

26/11; [2011] VSC 414

SUPREME COURT OF VICTORIA

RODIN v VOYLER PTY LTD

Emerton J

15 June, 29 August 2011

CIVIL PROCEEDINGS – CONTRACT – CLAIM BY ESTATE AGENT FOR COMMISSION – CONSTRUCTION OF TERM IN REAL ESTATE AGENT’S CONTRACT – EXCLUSIVE SALE AUTHORITY – COMMENCEMENT OF EXCLUSIVE AUTHORITY PERIOD – WORDS INSERTED IN AUTHORITY THAT PERIOD COMMENCED “60 DAYS FROM DATE OF CERTIFICATE OF OCCUPANCY GRANTED” – CONSIDERATION OF PURPOSE AND OBJECT OF THE INSTRUMENT – CONSIDERATION OF SURROUNDING CIRCUMSTANCES – CONSTRUCTION PREFERRED THAT IS CONSISTENT WITH BUSINESS COMMON SENSE – APPLICATION OF THE *CONTRA PROFERENTEM* RULE – FINDING BY MAGISTRATE THAT THE WORDS INSERTED MEANT THAT THE AUTHORITY WAS TO COMMENCE ON THE DATE THE AUTHORITY WAS SIGNED – WHETHER MAGISTRATE IN ERROR: *ESTATE AGENTS ACT 1980, S47A*.

VP/L, a real estate agent, entered into Exclusive Sale Authorities to sell units for R. in return for commission. Words inserted in the Authorities in relation to the period were "60 days from the date of the Certificate of Occupancy granted". When the units were all sold, R. failed to pay the amounts of commission sought by VP/L. Accordingly, VP/L claimed monies owing under the contracts. The dispute for the Magistrate was whether the words inserted by the parties meant that the Exclusive Authority Period was intended to commence 60 days after the grant of the Certificates of Occupancy or whether it was to commence on the date the Authorities were signed and to continue to a day 60 days after the date that the certificates of occupancy were issued for the units. The Magistrate decided that the relevant date was the date when the Authorities were signed and made an order on the claim. Upon appeal—

HELD: Appeal dismissed.

1. The Court was presented with competing constructions of the Authority and, in particular, the words inserted by the parties for the Exclusive Authority Period. One construction accorded with common commercial sense; the other, more literal meaning, did not make commercial sense. In such circumstances, the Court may interpret the agreement to accord with commercial common sense. The way in which this could be done in the present case was to interpret the Exclusive Authority Period to commence on the day the Authority was signed and to continue until “60 days from the date of the Certificate of Occupancy granted”.

2. It is very unlikely that a professional real estate agent would have accepted the uncertain and protracted arrangement for which R. contended. Such an arrangement would flout business common sense. The argument put on behalf of R. that it was open to VP/L to sell the units before the Exclusive Authority Period commenced and that the agent would have been entitled to some kind of recompense for the work he performed in selling the units – albeit not commission – does not cause any change of view. There is no reason why the agent would enter into an agreement that required him to seek recompense for his work on such an ill-defined basis.

3. Accordingly, it was necessary to interpret the words describing the Exclusive Authority Period so that the period commenced on the day that the Authority was signed. To reach such a conclusion was not to interpret the Authority so as to turn a poor bargain into a reasonable one. Rather, it was to give the words a meaning which accorded with business common sense and was consistent with the surrounding circumstances as found. The alternative, albeit more literal, meaning would result in an arrangement that flouted business common sense.

4. Having regard to what reasonable persons in the position of the parties would have understood the words to mean by reference to the text of the Authority, the surrounding circumstances known to the parties and the purpose or object of the agreement between them based on the evidence accepted by the learned Magistrate (but excluding post-contractual conduct), the proper construction of the Authority and the Exclusive Authority Period was as contended for by VP/L.

5. There was, therefore, no error in the conclusion reached by the learned Magistrate that the Exclusive Authority Period commenced upon the signing of the Authorities and that VP/L was entitled to be paid commission pursuant to the terms of the Authorities for any sale effected during the period commencing on that date and concluding 60 days after the issuing of the certificate of occupancy for the unit.

6. This construction reflects the parties' intentions that the words "60 days from the date of the certificate of occupancy granted" meant "until 60 days from the date the certificate of occupancy is granted". It was not necessary to rectify the Authority to achieve this purpose, because the Court can supply words where, as a matter of construction, in the surrounding circumstances, it is clear that a mistake has been made.

EMERTON J:

Introduction

1. This is an appeal from a decision of the Magistrates' Court of Victoria in respect of a claim brought by a real estate agent, Voyler Pty Ltd ('Voyler') (the respondent to this appeal), against a property developer, Ms Amaliya Rodin (the appellant in this appeal). Voyler's claim in the Magistrates' Court was for monies owing to it under a set of seven contracts entitled 'Exclusive Sale Authority' pursuant to which it was engaged by Ms Rodin to sell seven units on her behalf in return for commission. The total commission sought by Voyler pursuant to the seven Exclusive Sale Authorities was \$93,049.

2. One of the critical questions for determination was when the 'Exclusive Authority Period' in the Exclusive Sale Authorities commenced to run, for Voyler was only entitled to claim commission for sales made during the Exclusive Authority Period.

3. On 26 October 2010, the learned Magistrate held that the Exclusive Authority Period had commenced to run when the Exclusive Sale Authorities were signed, and ordered Ms Rodin to pay Voyler's claim plus interest, along with Voyler's costs.^[1]

4. The dispute in this case is whether the words inserted in the Authorities for the Exclusive Authority Period, "60 days from the date of the Certificate of Occupancy granted", mean that the Exclusive Authority Period was intended to commence 60 days after the grant of certificates of occupancy or whether it was to commence on the date the Authorities were signed (19 January 2009) and continue to a day 60 days after the date that certificates of occupancy were issued for the units.

5. Ms Rodin contends that pursuant to the Authorities, Voyler had an exclusive authority to sell as agent from the date upon which the certificates of occupancy were granted, which in fact was some 13 months after the Authorities were executed, until 60 days thereafter. By contrast, Voyler contends said that it had an exclusive authority to sell as agent from the date on which the Authorities were signed (19 January 2009) for what turned out to be a 15 month period, terminating 60 days from the date on which the certificates of occupancy were granted.

Grounds of Appeal

6. Ms Rodin appeals the Magistrate's orders on the following grounds:

(a) The learned Magistrate erred in law in his construction of the Exclusive Authority Period by finding that it commenced on the date of signing, rather than on the date of grant of Certificate of Occupancy;

(b) The learned Magistrate erred in law in finding that such Exclusive Authority Period commenced on the date on which the Exclusive Sale Authorities were signed, namely 19 January 2009;

(c) The learned Magistrate erred in finding that the expression 'Exclusive Authority Period' in the Exclusive Sale Authorities was ambiguous;

(d) The learned Magistrate erred in law in failing to apply the rule *contra proferentem* in the event that the learned Magistrate was correct in finding that the expression 'Exclusive Authority Period' was ambiguous.

7. Ms Rodin does not challenge any of the findings of fact made by the Magistrate. The Magistrate did not accept her evidence about her arrangement with Voyler and accepted instead the evidence of Mr Balbir, one of the principals of Voyler. That evidence, insofar as it might be relevant to the circumstances of the Exclusive Sale Authorities, is as follows:

(a) In about mid-2008, Ms Rodin approached Mr Balbir and told him she was undertaking a development consisting of seven units. They knew each other before that occasion both professionally and socially. Ms Rodin told Mr Balbir that the units would be under construction in early 2009 and

that construction was anticipated to be completed at the end of 2009 or the start of 2010.

(b) Ms Rodin asked Mr Balbir if he was prepared to help her sell some of the units. They discussed issues involved in selling such properties. Ms Rodin asked Mr Balbir for his opinion about an appropriate price for the units. She told him she had a finance broker and a group of investors interested in purchasing some of the units. Mr Balbir showed interest in assisting Ms Rodin in relation to the sale of the units.

(c) In December 2008, Ms Rodin advised Mr Balbir that her broker had arranged for the sale of the four units. An arrangement was made for Mr Balbir to meet with the broker. Mr Balbir was given details of the purchasers and a contract drafted by Ms Rodin's solicitors. He was required to insert the purchasers' names and he was given details regarding the conveyances and monies to be paid.

(d) Mr Balbir brought Ms Rodin real estate agent authorities for her to sign. She said she would not sign the authorities as Mr Balbir had not been involved in the sales. He protested, to which Ms Rodin responded that she had plenty of other agents and if he did not act for her in the way she was suggesting, she would engage other agents in relation to the sale of the three remaining units. Ms Rodin told him that the purchasers of the four units were friends of hers who were prepared to substitute their contracts for other units or have their contracts cancelled in the event she was able to obtain a better price.

(e) Mr Balbir then put the deposits from the four sold units into his firm's trust account and issued receipts.

(f) On 19 January 2009, Mr Balbir met with Ms Rodin and placed before her seven Exclusive Sale Authority forms for the seven units. Each was partly completed with the details of Voyler and Ms Rodin (referred to in the forms as 'Agent' and 'Vendor'), agent's commission and marketing expenses of \$1,500. The forms were completed with handwritten details of the vendor's asking price, the words "on completion" after the vendor's asking price, the agent's estimate of selling price and the dollar amount of estimated commission. Certain parts of the pro forma documents were redacted.

(g) Following this meeting, Mr Balbir set about marketing the units, including placing on site a large advertising board (which cost \$1,500), preparing sales brochures and placing the project on the Voyler's internet site.

(h) In or about July 2009, Ms Rodin sent correspondence to Mr Balbir directing him to seek higher prices for the units. He would not agree to this, as he believed he had a binding agreement with Ms Rodin. In August 2009, Mr Balbir received offers for units 1 to 7. Ms Rodin rejected these offers.

(i) Certificates of Occupancy for the units were issued on 1 March 2010.

(j) Mr Balbir secured binding offers from purchasers to purchase the seven lots at the prices stated in the Exclusive Sale Authorities.

Submissions of the parties

8. Although the proceeding below involved a number of issues of contested fact and law, the appeal is limited to a question of construction of the Exclusive Sale Authorities, in particular the commencement and duration of Voyler's authority to act exclusively as Ms Rodin's agent for the sale of the units, which is defined as the Exclusive Authority Period.

9. 'Exclusive Authority Period' is defined in clause 1.7 of the General Conditions as follows: 'Exclusive Authority Period' means the stated number of days listed as the Exclusive Authority Period in the Particulars of Appointment.

10. The Exclusive Authority Period is thus a 'stated number of days'.

11. The Authorities are based on a printed form, requiring completion of details including names and addresses of the vendor and agent, agent's asking price, the agent's estimate of selling price and estimated commission. On the forms in question, the details to be inserted were typed in part and hand-written in part. For the Exclusive Authority Period, details have been inserted in a box. The number "60" has been hand-written, followed by the words, "days from the date OF THE CERTIFICATE OF OCCUPANCY GRANTED", which are typed. The words in capital letters have been substituted for other words that have been crossed out.

12. It is Ms Rodin's principal contention that the Exclusive Authority Period 'means exactly

what it says', and that the relevant words unambiguously refer to the period of 60 days from the date or dates on which the certificates of occupancy were granted. Sixty days is the 'stated number of days' for the purposes of Clause 1.7 of the General Conditions. She submits that the Court should not depart from the words in the Authorities unless there is a compelling reason to do so, such as an ambiguity, but submits that there is nothing ambiguous about the words in question. According to Ms Rodin, the commencement date for the Exclusive Authority Period could not be clearer: it is "from the date of the Certificate of Occupancy granted".

13. Ms Rodin denies that the Authorities make no commercial sense unless the Exclusive Authority Period is construed to commence on the day the Authorities were executed. She says that there was nothing to prevent Mr Balbir selling the units 'off the plan' or prior to the issuing of certificates of occupancy, but there was no exclusive authority for that period and no provision for the payment of commission. Although Voyler would be entitled to recompense by way of quantum meruit for selling the units before the commencement of the Exclusive Authority Period, Voyler had made no such claim. Its claim was only for the payment of commission in accordance with the terms of the Authorities. Moreover, Voyler made no claim for rectification of the Authority.

14. Ms Rodin further submits that the learned Magistrate fell into error when he failed to apply the doctrine of contra proferentem and described it as applying only to limitation or exclusion clauses. Insofar as there was any ambiguity, he ought to have applied the doctrine to resolve the doubt in her favour, because the Authority was Voyler's standard form document. Voyler drafted the Authorities and submitted them to Ms Rodin for her signature.

15. For its part, Voyler submits that the purpose of the bargain embodied in the Authorities was to enable Mr Balbir to effect sales of the units for and on behalf of Ms Rodin for a fixed period from the date of appointment. All of the units were to be sold by Mr Balbir or Ms Rodin, and it was Ms Rodin's desire to sell the properties as quickly as possible for a commercially realistic price. In fact, all of the units were sold prior to the issuing of the certificates of occupancy.

16. Voyler submits that the Authorities are ambiguous or uncertain and that where contracts are ambiguous or uncertain, the courts have been 'proactive' in ensuring they are not unenforceable. In this case, there is an estate agent and a developer, a contract that provides for the sale of units at an agreed price, and a commission that has been agreed, along with advertising expenses. As a result, so Voyler says, the Court can and should find that the signing of the Authorities, without a deferral of appointment, without there being an indication that the Authorities would commence some time later following the grant of certificates of occupancy, makes it 'overwhelming' that the Authorities were contracts that were intended to commence from the date of signing. Otherwise, there would have been no point in Voyler executing the Authorities when it did.

17. In this context, Voyler points out that the Authorities comply with the statutory requirement in s47A of the *Estate Agents Act* 1980 (Vic) by providing for a selling figure of between \$550,000 and \$600,000 for the units. This shows that it was the intention of the parties that the Authorities relate to a sales period commencing at that time because the market might well change in over a period of 12 or 13 months. There was simply no explanation for why the parties would enter into the Authorities when they did unless the Authorities were to take effect from the date they were entered into.

18. As to the application of the contra proferentem rule, Voyler submits that it does not automatically apply and ought not to be applied in this case. The Courts should endeavour to find the meaning of ambiguous expressions from the language and logic of the document, rather than by resort to maxims and other rules of thumb.^[2]

Analysis

19. In *Australian Style Pty Ltd v .au Domain Administration Ltd*,^[3] Hargrave J helpfully set out the principles of contractual interpretation that apply to a case such as this. They require the Court to consider what reasonable persons in the position of the parties would have understood the words to mean by reference to the text of the agreement, the surrounding circumstances known to the parties and the purpose or object of the transaction.^[4] It is not necessary to first conclude that the words used are ambiguous before having regard to the surrounding circumstances and the purpose or object of the transaction.^[5]

20. The Court should have regard to all of the words used in the agreement “so as to render them all harmonious”^[6] and to ensure a congruent operation to the various components of the instrument as a whole.^[7]

21. Importantly, in interpreting the words and resolving any ambiguity, the Court should proceed in a common sense and non-technical way and give the agreement a commercially sensible construction.^[8] Where the words in a commercial contract, read literally, lead to a conclusion which “flouts business common sense”,^[9] the Court should endeavour to give the words a meaning which accords with business common sense. This is especially so where, as here, the contract was made informally by businesspeople and was not drafted by or with the assistance of lawyers.

22. I do not accept that the submission made on behalf of Ms Rodin that the Exclusive Authority Period is ‘means exactly what it says’ and that the commencement date for the Exclusive Authority Period ‘could not be clearer’. In my view, the words that have been inserted are susceptible to different interpretations: the words used, after all, do not form a complete sentence and do not obey the laws of grammar. They are a ‘short-hand’ expression of the parties’ intentions. I do accept, however, that the construction advanced by Ms Rodin involves ‘a stated number of days’, whereas the construction advanced by Voyler does not.

23. The Court is presented with competing constructions of the Authority and, in particular, the words inserted by the parties for the Exclusive Authority Period. In my view, one construction accords with common commercial sense; the other, more literal meaning, does not make commercial sense. In such circumstances, the Court may interpret the agreement to accord with commercial common sense. The way in which this can be done in the present case is to interpret the Exclusive Authority Period to commence on the day the Authority was signed and to continue until “60 days from the date of the Certificate of Occupancy granted”.

24. In this case, reference to each Authority as a whole supports the conclusion that the Exclusive Authority Period commenced when the Authority was signed. In particular, the estimates of selling price must refer to the state of the housing market at the time the relevant Authority was signed, and not to the state of the housing market at an unspecified date in the distant future. Item 3 provides that the estimated selling price is to be given in the amount that the agent – Mr Balbir – believes, on the basis of his experience, skills and knowledge, that a willing but not anxious buyer would pay for the unit in question. As Counsel for Voyler pointed out in submissions, it would make no sense for Mr Balbir to give estimated selling prices months and possibly years before he was in a position to sell the properties. Such estimates would be inaccurate, and it is important that estimates be accurate, because, as the Authorities themselves record, penalties apply for the making of false representations as to the estimate of the selling price.

25. Furthermore, the surrounding circumstances indicate that the purpose of the arrangement between the parties was to provide for the sale of the units ‘off the plan’ and as quickly as possible. At the time the parties entered into the Authorities, it was anticipated that the units would not be completed for a year or more, and the issuing of certificates of occupancy would necessarily take even longer.

26. The relevant circumstances include Ms Rodin telling Mr Balbir she was embarking on a development with an anticipated completion a year ahead; Ms Rodin asking Mr Balbir for his opinion regarding an appropriate price for the units and asking him if he was prepared to help her sell some of the units; Mr Balbir expressing interest in helping Ms Rodin sell the units; Ms Rodin herself proceeding to sell some of the units, albeit on a contingent basis; Mr Balbir taking the deposits and preparing the Authorities for signing.

27. Although there was evidence of Mr Balbir subsequently advertising and taking other steps to sell the units, the authorities make it clear that post-contractual conduct is inadmissible in the interpretation of a written contract.^[10] Nonetheless, the pre-contractual conduct referred to establishes, in my view, that it was the intention of the parties that Mr Balbir be engaged in selling the units ‘off the plan’, that is, well prior to the completion of the units, which was not anticipated to occur before the end of 2009 or the beginning of 2010.

28. I find it very unlikely that Mr Balbir, a professional real estate agent, would have accepted

the uncertain and protracted arrangement for which Ms Rodin contends. I also find it unlikely that Ms Rodin would have thought that such an arrangement would be acceptable to him. In my view, such an arrangement would flout business common sense. The argument put on behalf of Ms Rodin that it was open to Voyler to sell the units before the Exclusive Authority Period commenced and that Mr Balbir would have been entitled to some kind of recompense for the work he performed in selling the units – albeit not commission – does not cause me to change my view. I see no reason why Mr Balbir would enter into an agreement that required him to seek recompense for his work on such an ill-defined basis.

29. Accordingly, I have concluded it is necessary to interpret the words describing the Exclusive Authority Period so that the period commences on the day that the Authority was signed. To reach such a conclusion is not to interpret the Authority so as to turn a poor bargain into a reasonable one. Rather, it is to give the words a meaning which accords with business common sense and is consistent with the surrounding circumstances as found. The alternative, albeit more literal, meaning would result, as I have said, in an arrangement that flouts business common sense.

30. Having regard to what reasonable persons in the position of the parties would have understood the words to mean by reference to the text of the Authority, the surrounding circumstances known to the parties and the purpose or object of the agreement between them based on the evidence accepted by the learned Magistrate (but excluding post-contractual conduct), the proper construction of the Authority and the Exclusive Authority Period is as contended for by Voyler.

31. There was, therefore, no error in the conclusion reached by the learned Magistrate that the Exclusive Authority Period commenced upon the signing of the Authorities and that Voyler was entitled to be paid commission pursuant to the terms of the Authorities for any sale effected during the period commencing on that date and concluding 60 days after the issuing of certificate of occupancy for the unit.

32. The construction which I find reflects the parties' intentions is that the words "60 days from the date of the certificate of occupancy granted" mean "until 60 days from the date the certificate of occupancy is granted". It is not necessary to rectify the Authority to achieve this purpose, because the Court can supply words where, as a matter of construction, in the surrounding circumstances, it is clear that a mistake has been made.^[11] In my view, this is such a case.

33. As to the application of the *contra proferentum* rule, courts now generally regard it as a rule of last resort, because it is widely accepted that it is preferable that judges should struggle with the words actually used as applied to the unique circumstances of the case and reach their own conclusions by reference to the logic of the matter, rather than by using mechanical formulae.^[12] In this case, the rule had no application, as the proper construction of the Authority could be ascertained by other means, and the learned Magistrate did not err in declining to apply it.

Conclusion

34. The learned Magistrate was correct to hold that the Exclusive Authority Period commenced on the date of signing, namely 19 January 2009, rather than on the date of the grant of Certificates of Occupancy.

35. Accordingly, the orders made by the learned Magistrate are correct and must stand.

36. The appeal is dismissed.

[1] To be assessed in default of agreement on Scale D of the County Court Scale.

[2] *Johnson v American Home Assurance Company* [1998] HCA 14; (1998) 192 CLR 266, 274; (1998) 152 ALR 162; (1998) 72 ALJR 610; (1998) 10 ANZ Insurance Cases 61-386; [1998] 5 Leg Rep 2.

[3] [2009] VSC 422 [88].

[4] *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451, 162 [22]; (2004) 208 ALR 213; 78 ALJR 1045; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, 179 [40]; (2004) 211 ALR 342; (2004) 79 ALJR 129; 1 BFRA 280; [2005] Aust Contract Reports 90-204.

[5] *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 [11]-[13], referring to *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384, 408; [1997] HCA 2; [1997] HCATrans 242; (1997) 141 ALR 618; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 [69]; (1998) 194

CLR 355, 381 [69]; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41; and *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14 [10]-[11]; (2004) 218 CLR 273, 280-281; (2004) 205 ALR 1; (2004) 78 ALJR 585; 59 IPR 1; [2004] AIPC 91-973.

[6] *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99, 109; 47 ALJR 526.

[7] *Wilke v Gordian Runoff Ltd* [2005] HCA 17; (2005) 21 CLR 522, 529 [16].

[8] *Hillas & Co Ltd v Arcos Ltd* [1932] UKHL 2; [1932] All ER 494, 499, 503-4; (1932) 147 LT 503; (1932) 38 Com Cas 23; (1932) 43 Lloyd's Rep 359; *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* [1968] HCA 8 [9]; (1968) 118 CLR 429, 437; 41 ALJR 348; ; *Di Dio Nominees Pty Ltd, v Brian Mark Real Estate Pty Ltd* [1992] VicRp 99; [1992] 2 VR 732, 740; [1993] ANZ Conv R 86; [1992] V Conv R 54-445; *MLW Technology Pty Ltd v May* [2005] VSCA 29 [76]-[81].

[9] *Antaios Compania Naviera S A v Salen Rederierna A B* [1985] AC 191, 201; [1984] 3 All ER 229; [1984] 2 Lloyd's Rep 235; [1984] 3 WLR 592; *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VicRp 74; [1990] VR 834, 840.

[10] *FAI Traders Insurance Co Ltd v Savoy Plaza Pty Ltd* [1993] VicRp 76; [1993] 2 VR 343, 347-51; [1993] ANZ Conv R 469; [1993] Aust Contract Reports 90-025; [1993] V Conv R 54-.

[11] *Fitzgerald v Masters* [1956] HCA 53; (1956) 95 CLR 420.

[12] *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, 602; (2000) 176 ALR 711; (2001) 11 ANZ Insurance Cases 61-479; (2000) 75 ALJR 325; (2000) 21 Leg Rep 24.

APPEARANCES: For the appellant Rodin: Mr IW Upjohn, counsel. Lewenberg & Lewenberg, solicitors. For the respondent Voyler Pty Ltd: Mr MR Simon, counsel. McDonald, Slater & Lay, solicitors.