10/03; [2002] VSC 575

SUPREME COURT OF VICTORIA

GARBETT v ROSEMEN INVESTMENTS PTY LTD

Smith J

9, 10, 19 December 2002

CIVIL PROCEEDINGS – ESTATE AGENT – PERSON ENGAGED IN A SINGLE TRANSACTION – MEANING OF "ESTATE AGENT" – WHETHER PERSON WHO ENGAGED IN A SINGLE TRANSACTION DEEMED TO BE AN ESTATE AGENT: *ESTATE AGENTS ACT* 1980, S4.

Where there was evidence to show that a person was engaged for the first time in a single transaction involving the purchase of a Cafe and Bar and who did not intend to engage in subsequent similar transactions, that person did not come within the definition of "estate agent" in s4 of the *Estate Agents Act* 1980 (Act). Accordingly, a magistrate was in error in dismissing a claim by such a person holding that the person was an estate agent and by virtue of s6 of the Act was not entitled to sue or recover commission.

***Mercer v Dalley* [1934] VicLawRp 3; [1934] VLR 14; [1934] ALR 8, followed.**

SMITH J:

The proceedings

1. This is an appeal from a decision of the Magistrates' Court made on 27 May 2002 dismissing the complaint of the appellant, Stephen Garbett, and ordering him to pay the costs of the respondent of $4525.00, such decision being stayed for one month.

2. In those proceedings, Mr Garbett had sued for the sum of $20,000 alleging an agreement with both respondents to act on behalf of the first respondent in respect of the purchase by the first respondent of a business trading as "The Hideout Video Cafe and Bar". So far as is relevant, the respondents raised the defence that Garbett was acting as an estate agent in carrying out the agreement and that, being unlicensed under the *Estate Agents Act* 1980, he was prevented from recovering any remuneration by the provisions of section 50 of that Act. The Magistrate upheld this argument.

The Relevant Provisions.

3. The terms "estate agent" and "agent" are defined in s4 of the Act as follows:

> "**"estate agent"** or **"agent"** means any person (whether or not he carries on any other business) who exercises or carries on or advertises or notifies or states that he exercises or carries on or that he is willing to exercise or carry on or in any way holds himself out to the public as ready to undertake the business of—
>
> (a) selling buying exchanging letting or taking on lease of or otherwise dealing with or disposing of;
>
> (b) negotiating for the sale purchase exchange letting or taking on lease of or any other dealing with or disposition of;
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> (c) collecting rents for; or
>
> (d) compiling information or preparing reports on the sale purchase exchange letting taking on lease of or otherwise dealing with or disposing of—
>
> any real estate or business on behalf of any other person;"

4. The provision relied upon by the respondents, s50, is as follows:

> **50. *Commission***
>
> (1) Subject to sub-section (2) an estate agent shall not be entitled to sue for or recover or retain any commission or money in respect of any outgoings for or in respect of any transaction unless—
>
> (a) at all material times in relation to the transaction he is the holder of an estate agent's licence; and
>
> (b) the agent has complied with section 49A(1) with respect to the engagement or appointment to undertake the transaction and is not in breach of section 49A(2) with respect to the engagement or appointment."

The issues in the appeal

The Master identified the following questions of law for determination:

> "(a) whether the Magistrate erred in dismissing the Appellant's complaint and should have held that section 50 of the Estate Agents Act 1980 did not apply, so as to disentitle the Appellant from recovering the subject of the Appellant's claim from the Respondents; (b) whether the Magistrate erred in holding that the Appellant was an estate agent or agent within the meaning of section 4 of the *Estate Agents Act* 1980."

5. It is common ground that the critical issue is the second question – whether the Magistrate erred in holding that the appellant was an estate agent as defined in section 4 of the Act . This question involves the construction of the definition of "estate agent".

Submissions

6. The appellant, Mr Garbett, submitted that on its proper construction, the definition in section 4, in referring to the exercising or carrying on of a "business", requires the person said to be an "agent" or "estate agent" to have engaged in

> (a) a series of commercial transactions conducted by the claimant in his own right, or
> (b) a single commercial transaction carried out with the intention to carry out more similar transactions in the future .

7. Relying on the case of *Mercer v Dalley* [1934] VicLawRp 3; [1934] VLR 14; [1934] ALR 8, the appellant submitted that where a person acts as an agent for the sale or purchase of land on a single occasion, that person is not an estate agent or agent for the purposes of the Act in the absence of any intent to continue to act as such estate agent or agent in future transactions. Counsel submitted that there was no evidence in the present case of an intention to continue to engage in similar transactions. I note that counsel for the respondent did not dispute that proposition. Counsel also submitted that on the evidence there was no series of commercial transactions conducted by Mr Garbett in his own right. There was evidence that he had for some seven years acted as an employee of an estate agent, Klemm's, in negotiations for the sale and purchase of real estate and businesses but on the occasion in question he was acting in his own right, his employment with Klemm's having ceased. These facts were also not in dispute. I note that it was not, and is not, alleged for the respondent that the appellant held himself out to be an agent.

8. In support of his argument, Mr Garbett relied on a number of authorities for the proposition that to carry on a business one must engage in continuous or repetitive activities for the purpose of profit[1]. Counsel for Mr Garbett also relied upon the statement of Lord Esher in *Re Griffin; ex parte Board of Trade*[2] as follows:

> "Whether one or two transactions make up a business depends on the circumstances of each case. I take the test to be this: if an isolated transaction, which if repeated would be a transaction in a business, is proved to have been undertaken with the intention that it should be the first of several transactions, that is with the intent of carrying on a business, then it is a first transaction in an existing business. The business exists from the time of the commencement of a transaction with intent that it should be one of a series ".

9. Counsel for the respondents submitted that the appellant's argument failed to give due effect to the word " exercise "in the definition of "estate agent "and "agent ". He submitted that meaning had to be given to the word "exercises" it being included as an alternative to "carries on". He submitted that it was intended to have the effect that the definition applied to a person who was at any time performing the business of negotiating as an agent in the purchase of a business.

10. Counsel for the respondents distinguished the case of *Mercer v Dalley* (above) on the basis that, on its facts, very little had been done in that case by the alleged agent whereas, in the present case. the agent had been extremely active and had proceeded with a degree of formality by having the terms of the agreement spelt out in a deed. In addition the transaction in *Mercer v Dalley* was completely isolated. Counsel submitted further that there is no authority that says that, if there is only one transaction, it cannot be a carrying on of a business or the exercise of a business.

Analysis

11. On its face, the word "exercise" is apparently intended to mean something different from "carries on" or, at least, to add something to the definition. A possible construction is that the drafter intended to use the word to include a single transaction.

12. A major difficulty facing that construction, however, lies in the legislative history[3] starting with the construction of the provisions of the 1928 Act in *Mercer v Dalley* (above). In that case, Lowe J construed somewhat similar language as excluding single transactions. The 1928 Act provided:

> "Real estate agent" means any person (whether or not such person carries on any other business) who exercises or carries on or advertises or notifies or states that he exercises or carries on or that he is willing to exercise or carry on in Victoria or in any way holds himself out to the public as ready to undertake for payment or other remuneration (whether monetary or otherwise) any of the following functions, namely—
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> (i) selling buying exchanging letting or taking on lease of or otherwise dealing with or disposing of: or
>
> (ii) negotiating for the sale purchase exchange letting or taking on lease of or for any other dealing with or disposition of
>
> land of any tenure or buildings or any estate or interest in land of any tenure or buildings on behalf of any other person or for or in consideration of any payment or other remuneration (whether monetary or otherwise)."

13. Lowe J in reaching his decision in *Mercer v Dalley* construed the provision as having no application "to the single act or isolated occurrence". He did so notwithstanding the fact that the provision required consideration of no more than whether a person exercised or carried on a "function", such as negotiating for the purchase of land.

14. Further, notwithstanding amendment to the Act since 1934, no attempt has been made to alter the effect of the decision in *Mercer v Dalley*. Rather, the drafter has substituted the concept of "business" for "function". In the debate before His Worship, counsel for the respondents argued that this broadened the definition. It does in the sense that "business" is broader than a specific "function". But it is easier to construe the 1928 definition to apply to a single or isolated transaction than it is the current definition. It has in fact narrowed the scope of the definition and affirmed Lowe J's interpretation.

15. The substitution of "business" for "functions "appears to have occurred when the Parliament enacted the 1980 legislation . That legislation was the result of an extensive review of the previous legislation. A reading of Hansard does not reveal any detailed discussion of the reason for the change to the definition of "estate agent". In the second Reading speech of the Attorney General, however, the following appears[4];

> "The definition of "estate agent "has been changed in form rather than in substance and this change of form means that the word 'business' has had to be defined in the interpretation section of the Bill."

This statement supports the view that the Parliament did not intend to alter the effect of *Mercer v Dalley*.

16. The learned Magistrate approached *Mercer v Dalley* on the basis that it could be distinguished on its facts and that it did not construe the statutory definition. He took the view that *Mercer v Dalley* was a case where there was an isolated single act and for that reason the case did not come within the then definition. He noted that Mr Garbett on the other hand, had for a number of years been engaged professionally as an employee real estate agent and that that was a matter to be taken into account as evidence in determining whether, in the transaction in question, he was "exercising or carrying on the business of" the negotiations for purchase of the relevant business. His Worship concluded that having regard to the way he conducted himself, with commercial gain being very much present in his mind, he was exercising or carrying on the business referred to in the definition.

17. The learned Magistrate was careful in his reasons, however, not to use Mr Garbett's prior history as a licensed agent working for Klemms, as providing similar transactions that could be used with the transaction in question to establish a series of transactions and therefore a

business. He considered the conduct as a single transaction but evaluated that conduct in light of Mr Garbett's previous experience as an agent. Thus, he treated the statutory definition as being one capable of being applied to a single transaction, *Mercer v Dalley* not being an authority as to the construction of the definition.

18. I take a different view as to the ratio of *Mercer v Dalley*. It is true that Lowe J stated that on the "bare facts" before him, the definition did not apply. But he went on to say that

> "the single act or isolated occurrence does not come within the words to which I have made reference".[5]

In my view, Lowe J relied on that construction in reaching his decision.

19. Further, the issue of the legislative history does not appear to have been canvassed before his Worship in any detail. In light of that legislative history I have come to the conclusion that Lowe J's construction is applicable and the statutory definition is not intended to apply to a person engaged for the first time in a single transaction who does not intend to engage in subsequent similar transactions. In my view, Mr Garbett plainly on the evidence before his Worship did not come within the definition.

20. I suggest that such an interpretation accords with the structure and content of the Act. I refer for example to the requirements to be fulfilled before a licence can be obtained and requirements imposed upon licensed estate agents to maintain trust accounts and other requirements. The Act is directed to the regulation of people whose business it is to work as estate agents. It is true that this interpretation could provide a small and temporary loophole for an unscrupulous and dishonest person to attempt to avoid the regulation imposed by the Act, but, the moment such a person moved on to a second transaction, that person would be in danger of being charged with breach of the Act. That reality should be sufficient to protect the statutory scheme.

Conclusion

21. For the foregoing reasons, I am persuaded that the construction of the statutory definition of "estate agent" and "agent" adopted by the learned magistrate was incorrect and that, therefore, the alleged errors are made out. The issues that remain are the disposition of the matter and the orders that should be made. I will invite submission on those matters.

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[1] *Pioneer Concrete Services Ltd v Galli* [1985] VicRp 68; [1985] VR 675 at 705; (1985) 4 IPR 227; *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1; (1980) 29 ALR 577; (1980) 12 ATR 231; (1980) 54 ALJR 345; (1980) 41 LGRA 262; see also *McMillan v Commmonwealth* [1997] FCA 619; (1997) 77 FCR 337 [1997] 147 ALR 419 and *Hughes v Clubb* (1987) 10 NSWLR 320.
[2] (1890) 60 LJQB 235 at 237.
[3] Pearce & Geddes, *Statutory Interpretation in Australia*, para 3.25 and ff; Re *Alcan Australia Ltd* [1994] HCA 34; (1994) 181 CLR 96; (1994) 123 ALR 193, 200; (1994) 68 ALJR 626.
[4] *Hansard* Legislative Council, Vol 351, Session 1979-80, at 8974.
[5] at 16.

APPEARANCES: For the appellant Garbett: Mr J Isles, counsel. Slater & Gordon, solicitors. For the respondents Rosemen Investments: Mr D Carlile, counsel. Mahonys, solicitors.
