

06/75

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

GA TREES PTY LTD v CREIGHTON**Moffitt P, Samuels and Mahoney JJA****10 March 1975**

CONTRACT – EXCLUSIVE AGENCY AGREEMENT – MEANING OF "PURCHASER" – STATE AGENT/ PLAINTIFF ENTITLED TO COMMISSION IF PROPERTY SOLD TO A PURCHASER INTRODUCED WITHIN 90 DAYS – PERSON INTRODUCED PAID HOLDING DEPOSIT WITHIN THE 90-DAY PERIOD BUT DID NOT EFFECT SALE UNTIL MORE THAN 90 DAYS LATER – WHETHER AGENT ENTITLED TO COMMISSION.

The parties entered into an "exclusive agency agreement" as to sole selling rights for 90 days for a home unit. Commission was payable to the estate agent/plaintiff under certain special conditions, one of which was (d) — if the property were sold at any time to a purchaser introduced by the agent to the property or to the owner within the 90 days.

One, Napper, was introduced to the owner by the agent, and within the 90 days entered into negotiations and paid a holding deposit. Shortly after, the owner informed Napper that he had received a higher offer. Napper could not match this, and the owner informed him that he had sold to the higher bidder. After the 90-day period Napper made another offer which was accepted and the contract of sale was subsequently executed. The agent claimed his commission in that he had introduced Napper as a purchaser within the 90 days.

The Trial Judge held that "purchaser" in clause (d) meant a person who within the 90 days was ready willing and able to purchase: that during the 90 days Napper never answered this description as he was unable to find the ultimate purchase price during that time. Upon appeal—

HELD: Per Samuels and Mahoney JJA, Moffitt P dissenting: Appeal allowed. The estate agent/plaintiff was entitled to commission.

1. **Per Samuels JA: Clauses (a), (b) and (c) each predicated the right to commission upon a sale of the property within the period of ninety days. Clause (d) was designed to preserve the right to commission if the property was sold outside that period. It effected this purpose by stipulating that commission was payable in that event provided that the purchaser was 'introduced' to the property or the owner within the period. Once the object of the clause and the means adopted to achieve it were thus apparent, its construction presented no real problem.**

2. **Accordingly, the plaintiff's claim fell within the provisions of clause (d) and it was entitled to commission at the rate agreed upon the amount of the consideration at which the property was ultimately sold.**

3. **Per Mahoney JA: The language of Clause (d) provided merely that the property be 'sold to a purchaser introduced ... within the period of ninety (90) days ...'. The word 'purchaser' as there used, was a matter of ordinary grammar, merely indicating the person to whom the property had been sold. When the words referred to such 'purchaser' as 'introduced' they indicated merely that the person to whom the property was ultimately sold was introduced (whatever the word 'introduced' may signify) within the specified time. As a matter of ordinary grammar, the words used indicated nothing as to the character of the person at the time when he was introduced.**

SAMUELS JA: Clauses (a), (b) and (c) each predicates the right to commission upon a sale of the property within the period of ninety days. Clause (d) is designed to preserve the right to commission if the property is sold outside that period. It effects this purpose by stipulating that commission shall be payable in that event provided that the purchaser was 'introduced' to the property or the owner within the period. Once the object of the clause and the means adopted to achieve it are thus apparent, its construction, to my mind, presents no real problem.

The word 'purchaser' in my view bears its appropriate meaning of 'a person who purchases', as I have naturally used it a few lines above. It is difficult to see what other word or words than purchaser could be more aptly employed in this context. What follows 'purchaser' is intended to attribute to the person who purchases 'at any time' – and hence, beyond the period – a particular

character, namely, that of having been introduced to the property or to the owner at an earlier specific time, that is, within the period. The meaning which I think emerges is that which would be clear beyond doubt if the words 'who was' were inserted between 'purchaser' and 'introduced'. To read the clause as if they were there does not require any violence to be done to the language in fact adopted; the insertion of the words merely makes wholly manifest a meaning which is yielded even in their absence.

In my opinion, therefore, there is no warrant for concluding that 'purchaser' bears the expanded meaning of 'a person ready able and willing to purchase' which the cases have given it in quite different contexts. To adopt this gloss upon the word is unnecessary to give the provision a meaning which accords with the intention of the agreement demonstrated by the terms of the three preceding clauses. Moreover, such a reading raises at least two possible constructions, one of which is tautologous and the other impractical. The first requires the clause to be read in this way: '... sold at any time ... to a person ready able and willing to purchase introduced ...' This says nothing about the quality of the purchaser at the time he was introduced and is repetitious because *ex hypothesi* a person who purchases must have been ready able and willing to do so.

The alternative construction, to overcome the first of the objections I have just mentioned, requires the clause to be read thus:— '... sold at any time ... to a person ready able and willing to purchase when (or at the time when) he was introduced ...' But it is scarcely likely that a person newly introduced to the property or the owner would at that point have determined to buy on the owner's terms; at the least, there would be many who had not. To avoid this problem, it would then be necessary to re-shape the clause to provide that 'the purchaser should at some time after his introduction and before the expiration of the period have become ready able and willing to purchase. This possible construction, apart from the distortion of the existing language which it requires, has the further effect of depriving the plaintiff of the right to commission available to him under the general law; since the introduction of a purchaser to the agent's principal during the currency of the agency would ordinarily be the effective cause of the subsequent sale and would thus entitle the agent to commission notwithstanding that the purchaser was never ready or able or willing to buy until after the agency had determined.

In my opinion, there is no substance in the defendant's argument about the meaning of the word 'purchaser'.

The defendant also suggested a further difficulty in the construction of clause (d). It was said that in terms it operates whatever the circumstances in which the ultimate purchaser was introduced and whatever his identity. Hence, to borrow the analogy chosen by the learned Judge, the plaintiff would be entitled to commission if the local milkman were introduced as such to the owner within the period and subsequently, by reason of affection for the property generated by his daily visits, became the purchaser. Such a consequence would be unduly oppressive, it was said, and the clause should not be construed so as to produce it. The learned Judge endeavoured to avoid this result — which I agree would seem somewhat bizarre — by putting a gloss on the meaning of 'purchaser'. But the answer is, I think, to be found in the kind of introduction which the clause contemplates.

In order to give the provision business efficacy, it is necessary to imply a term that the introduction must of a person interested in purchasing the property or, at least, interested in inspecting the property or meeting the owner with a view to possible purchase. The introduction which the clause requires therefore one which must have some commercial nexus with the offer the property for sale. Such an implication is justified by the principle enunciated by Jordan CJ in *Heimann v Commonwealth* [1938] NSWStRp 47; (1938) 38 SR (NSW) 691 at pp694-6; 55 WN (NSW) 235; and the circumstances in which Mr Napper was introduced satisfy the condition to be implied. I should add one thing more. Mr Stewart for the defendant based much of his argument upon the proposition that clause (d) is ambiguous and must therefore be construed *contra proferentem*, that is, against the plaintiff whose document the agreement is. If it were ambiguous, then the next step would undoubtedly follow. But the supposed ambiguity has its source in nothing more than some difficulty in the construction of the provision; and difficulty in construction does not of itself suggest ambiguity or uncertainty: *The Council of the Upper Hunter County District v Australian Chilling & Freezing Company Ltd* [1968] HCA 8; (1968) 118 CLR 429; 41 ALJR 348 and *American Airlines Inc v Hope* (1973) Lloyd's Rep 233 at p250.

In my opinion, the plaintiff's claim falls within the provisions of clause (d) and it is entitled to commission at the rate agreed upon the amount of the consideration at which the property was ultimately sold.

MAHONEY JA: The language of Clause (d) does not, according to its ordinary meaning, require that that character should be so acquired. It provides merely that the property be 'sold to a purchaser introduced ... within the period of ninety (90) days ...'. The word 'purchaser' as there used, as a matter of ordinary grammar, merely indicates the person to whom the property has been sold. When the words refer to such 'purchaser' as 'introduced' they indicate merely that the person to whom the property was ultimately sold was introduced (whatever the word 'introduced' may signify) within the specified time. As a matter of ordinary grammar, the words used indicate nothing as to the character of the person at the time when he is introduced.

However, Mr Stewart has argued (in my opinion correctly) that there must be some implication read into the relevant words of clause (d). Thus, he argues, if the words 'sold ... to a purchaser introduced ...' were given their ordinary meaning without qualification then Clause (d) would apply where the person who ultimately purchased the property had been introduced to the owner in a way or in a context of related at all to the sale of the property; His Honour took by way of example, the introduction of that person as a likely milkman. Mr Stewart has therefore, in substance, argued that it must be implied that the person in question has, at the relevant time, some character or characteristic which appropriately relates him to the ultimate transaction of sale.

Whether one determines the matter by reference to what is 'clearly necessary ... in order to make the contract operative cording to the intentions of the parties as indicated by the express terms': *Scanlan's New Neon Limited v Tooheys Limited* ([1943] HCA 43; (1943) 67 CLR 169 at p195) per Latham CJ; or by reference to the testy bystander of Mackinnon LJ: *Shirlaw v Southern Foundries (1926) Limited* [1940] AC 701; [1939] 2 KB 206 at p227; [1940] 2 All ER 445 it is clear that it is necessary imply some qualification upon the generality of the words of the clause.

However, once it be accepted that the qualification to be implied is one which arises merely in order, e.g., to make the contract operative in the sense referred to, then the strength of Mr Stewart's argument goes: the qualification is to be determined, not, as he submitted, merely by giving a meaning to the word 'purchaser', but by formulating what in all the circumstances is the qualification necessary to make the contract so operative.

Mr Stewart submitted, with some force, that the term 'purchaser' in its ordinary meaning signifies merely a person who has acquired a thing for money or other consideration and that, even in an extended signification, it does not correctly apply unless the person has at least signed a contract for purchase or, perhaps, has offered to purchase, being ready willing and able to do so. Mr and Mrs Napper did not, within the ninety day period, satisfy any of these descriptions.

However, the principles by reference to which implications are to be made do not, in my opinion, warrant the implication that, at the relevant time, the person in question should have any such character. The point of time which is adopted by Clause (d) for characterising the person is the point of time when he is 'introduced to the property or the owner'; the clause says nothing as to his character at any other time. The term 'introduced' denotes a time at the commencement of the relationship between that person and the property or owner. It is not necessary to determine the precise point at which such person may be held to have been 'introduced', it is sufficient that it is a time at or about his first acquaintance through the agent with the property or the owner.

This being so, I do not think that it is to be implied that he must at that time have taken on any of the characters to which Mr Stewart has referred. In general terms, the person contemplated would be introduced for the purpose for which the agency agreement was entered into, namely, with a view to his being persuaded to buy the property. It would not be contemplated that at that time he was already necessarily ready willing and able to purchase or a person who had signed a contract.