37/69

SUPREME COURT OF VICTORIA

OVERTON v LOUKIDES

McInerney J

13-14, 17, 19 November 1969; 6 February 1970 — [1970] VicRp 61; [1970] VR 462

CIVIL PROCEEDINGS – ESTATE AGENT – EMPLOYEE OF ESTATE AGENT SOLD PROPERTY BELONGING TO THE ESTATE AGENT WITHOUT FIRST OBTAINING THE WRITTEN CONSENT OF THE AGENT – CHARGE LAID AGAINST EMPLOYEE AND FOUND PROVED BY MAGISTRATE – MAGISTRATE FAILED TO MAKE AN ORDER THAT THE DEFENDANT ACCOUNT FOR AND PAY OVER TO THE OWNER ALL PROFITS RESULTING FROM THE PURCHASE – WHETHER MAGISTRATE IN ERROR: *ESTATE AGENTS ACT* 1958, S37(2)(a).

HELD: Order nisi absolute.

1. On the evidence it was open to the magistrate to come to the conclusion that the defendant was interested or concerned in the purchase of the property by his wife. Where an estate agent employed to bring about a sale effects a sale to his own wife, that circumstance will ordinarily give rise to grounds of suspicion as to the propriety of the estate agent's action.

2. On that evidence it was open to the Magistrate to convict and fine the defendant.

3. In relation to the power of the Court to order the defendant to account for and pay over the profits, in the circumstances the reasons given by the magistrate were unsustainable and he ought not to have dismissed the application made under s37(2)(b).

4. The inquiry and relief under paragraph (b) are to be undertaken and ordered subsequently to the hearing of the information under paragraph (a) and as a separate proceeding, although by the same tribunal and it is for that Court to prescribe the procedures as are appropriate in the particular circumstances of the case and having regard to the duty to give all parties affected an opportunity of being heard.

McINERNEY J: This was the return of an order nisi to review granted on 29 April 1969 by Master Bergere to review a decision of the Court of Petty Sessions at Prahran on 25 March 1969 upon the hearing of an information by the above-named Arthur Lewis Overton against the defendant, Michael Loukides.

The information (as amended at the hearing) charged that the defendant between 6 January 1967 and 22 February 1967 at Prahran, being an employee of an estate agent, to wit, Eastern Suburbs Real Estate Pty Ltd, was contrary to s37(2)(a) of the *Estate Agents Act* 1958 concerned in the purchase of certain real estate situated at and known as 7 Scotia Grove, South Yarra, which his employer, the said Eastern Suburbs Real Estate Pty Ltd, was by Ruby Norman, the owner thereof, commissioned to sell, without having previously obtained the consent in writing of such owner to such purchase.

Section 37(2) of the *Estate Agents Act* 1958 provides as follows:–

> "(a) No employé of an estate agent shall whether directly or indirectly purchase or be in any way interested or concerned in the purchase of any real estate or business which his employer is by any owner thereof commissioned to sell without having previously obtained the consent in writing of such owner to such purchase.
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> "(b) Any person who is convicted of an offence against this sub-section shall in addition to any penalty imposed by the court be ordered by the court to account for and pay over to his employer's principal all profits resulting or which in the opinion of the court may result from the purchase and any subsequent dealing with any such real estate or business."

The information came on for hearing before a Stipendiary Magistrate sitting alone on 25 March 1969 when Mr Loewenstein of counsel appeared for the informant and Mr Martin of counsel appeared for the defendant. The affidavit of the informant, on which the order nisi was granted, states that Mr Martin entered a plea of "not guilty" on behalf of the defendant. How this came about does not appear; certainly the defendant himself at a later stage of the hearing gave sworn evidence on his own behalf.

At the conclusion of the evidence called, the Stipendiary Magistrate announced that he found the offence proved. He convicted the defendant and fined him $100 and ordered him to pay costs of $79, with a stay of one month for payment. Mr Loewenstein then applied for an order pursuant to s37(2)(b) of the *Estate Agents Act* 1958, namely, that the defendant pay over to Mrs Norman, the vendor, all profits resulting from the purchase and subsequent dealing with the house at 7 Scotia Grove, South Yarra.

What happened then is described in the informant's affidavit:

> "The Stipendiary Magistrate stated that he would need more evidence in respect of the amounts of the profits. He then immediately refused the application. He stated the principal was no longer in existence. He stated that it was his opinion that the word 'principal' in s37(2)(b) in this case referred to the Eastern Suburbs Real Estate Pty Ltd. He stated that the evidence suggested that this company was no longer in existence."

The order nisi to review this decision was granted on the following grounds:–

> 1. That the Stipendiary Magistrate was wrong in law in holding that as applied to the facts proved before him the word "principal" in s37(2)(b) of the *Estate Agents Act* 1958 referred to Eastern Suburbs Real Estate Pty Ltd, and not to Mrs Ruby Norman, and
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> 2. That the Stipendiary Magistrate was wrong in law in failing to order, in accordance with the provisions of the said s37(2)(b), that the defendant account for and pay over to Mrs Ruby Norman all profits resulting from the purchase and subsequent sale by his wife of the property at No. 7 Scotia Grove, Prahran.

The order nisi wrongfully states that the order of Court of Petty Sessions on 25 March 1969 was one whereby the magistrate dismissed the information. In fact, the magistrate did not dismiss the information. On the contrary, he convicted and fined the defendant. The real complaint is that he did not make the order sought under s37(2)(b).

On the return of the order nisi there was no appearance for the defendant to show cause.

In the result, I have heard no argument that it was not open to the magistrate to find that the defendant was interested or concerned in the purchase of 7 Scotia Grove, Prahran, by his wife. It appeared to me, however, that on the evidence it was open to the magistrate to come to the conclusion that the defendant was interested or concerned in the purchase of the property by his wife. Where an estate agent employed to bring about a sale effects a sale to his own wife, that circumstance will ordinarily give rise to grounds of suspicion as to the propriety of the estate agent's action: cf *Tanti v Carlson* [1948] VicLawRp 70; [1948] VLR 401; [1948] 2 ALR 547; and see *Burrell v Burrell* [1915] SC 333; Robertson v Robertson [1924] NZLR 552, at p555, per Salmond J and *Re Douglas* (1928) 29 SR (NSW) 48, at pp50, 51; 45 WN (NSW) 195, as to the purchase of trust property by the wife of a trustee. In the present case, in my opinion, having regard to the statements made by the defendant in answer to the questions put to him by the informant, as recorded in the record of interview, it was open to the magistrate to find that the defendant was interested in or concerned in the purchase of the real estate by his wife. It was, therefore, open to the magistrate to convict and fine the defendant. The question then arises whether the magistrate was justified in the course he took in relation to the application under s37(2)(b) for an order that the defendant account for and pay over to the employer's principal all profits resulting or which, in the opinion of the court, might result from the purchase and any subsequent dealing with the real estate.

The reasons given by the magistrate for refusing to order such an account are unsustainable. The magistrate appears to have proceeded on the basis that the words "employer's principal" in

s37(2)(b) referred to Eastern Suburbs Real Estate Pty Ltd. This is plainly wrong; those words, in the circumstances of this case, apply and refer to Mrs Norman. Consequently the conclusion by the learned magistrate that the company was no longer in existence or that there was no evidence that the company was still in existence was irrelevant. Furthermore, it was wrong in law. The evidence did not disclose whether the company went into liquidation pursuant to an order of the court or pursuant to a voluntary liquidation. Where a company is being wound up by the court, dissolution of the company takes place upon the making of an order for dissolution under s239 of the *Companies Act* 1961 (see s240 of that Act). In the case of a voluntary winding up, dissolution takes place only after the expiration of three months after the lodging of a return with the Registrar of the holding of the final meeting and a copy of the account (see s272(1), s272(3), s272(5)), unless the court defers the date of dissolution under s272(6). In the circumstances the reasons given by the magistrate are unsustainable and he ought not to have dismissed the application under s37(2)(b).

So far no difficulties arise. The only difficulty to which this order nisi gives rise is the question of machinery, namely, in what way is the power of the Court to order the defendant to account for and pay over the profits of the impugned transaction to be called into play?

No specific procedure being prescribed by the *Estate Agents Act* 1958 or by the *Justices Act* 1958 for the taking of an account of the profits referred to in s37(2)(b) of the *Estate Agents Act* 1958 or for the payment of the profits ascertained upon the taking of any such accounts, the matter must be resolved in accordance with the principle stated in *Ex parte Toohey's Ltd; Re Butler* (1934) 34 SR (NSW) 277; 51 WN (NSW) 101; 8 ALJ 100, namely, that where a statute directs a specific proceeding in any court the proceeding must be according to the practice of that court, but where there is no practice specially applicable it is competent for the tribunal to deal with the matter as justice and common sense alike call for. Indeed, in *Edgar v Greenwood* [1910] VicLawRp 27; [1910] VLR 137, at pp144, 145; 16 ALR 6, at p10, it was said by Madden CJ that where a function is prescribed for a public officer, judicial or quasi-judicial and jurisdiction is given to him to deal with certain matters, and no machinery is provided for dealing with those matters, he must do the best he can with the means he has available. See also *Australian Tramway and Motor Omnibus Employees Association v Commissioner for Road Transport and Tramways* (NSW [1935] HCA 77; (1936) 54 CLR 470, at pp502, 503; [1936] ALR 105, at p114, per Dixon J; *Electric Light and Power Supply Corporation Ltd v Electricity Commission of New South Wales* [1956] HCA 22; (1956) 94 CLR 554, at pp559, 560; [1956] ALR 614, at pp616, 617; (1956) 30 ALJR 166; (1956) 1 LGRA 206, and *Ex parte Suttor; Re Bedsor* (1943) 43 SR (NSW) 308; 60 WN (NSW) 192, decisions which establish also the proposition that if additional jurisdiction is conferred upon an already existing court, it is deemed to be exercisable according to the procedure of that court with all its limitations as to jurisdiction and subject to any right appeal to which the jurisdiction of the court may be subject, unless a contrary intention appears.

But even if it be assumed that the liability created by s37(2)(b) is one to be enforced in accordance with the ordinary procedures of a Court of Petty Sessions, certain questions immediately arise.

Is the order to account to be made by the court which convicts the defendant and at the same time as the conviction is recorded? Is it the duty of the court then simply to direct that the defendant so convicted "account for and pay over to his employer his employer's principal or profits resulting or which in the opinion of the court may result from the purchase and any subsequent dealing with any such real estate or business" leaving the informant to initiate fresh proceedings for the taking of the accounts? If the words were merely "all profits resulting...from the purchase or any subsequent dealing...", there would seem to be no difficulty about making an order simply that the defendant/employee do so account at some subsequent time. But the reference to the "profits...which in the opinion of the court may result from the purchase or any subsequent dealing" suggests that the opinion which is there material is that of the court which convicted the defendant.

But that court will seldom be in a position to make a determination of this character immediately after convicting the defendant. For the question whether there has been any subsequent dealing with the real estate or business referred to in s37(2)(a) is, strictly speaking, irrelevant to the question whether there has been a contravention of the prohibition contained in

that paragraph. Consequently it is no part of the informant's function, at that stage, to adduce evidence to show that there has been some subsequent dealing from which the defendant has derived a profit or that profit will or may accrue to the defendant from any subsequent dealing with the real estate or business. Furthermore, the defendant will ordinarily be concerned to traverse the fact that he has purchased or been in some way interested or concerned in the purchase of the real estate or business in question and he will not be at all anxious to disclose the existence of any subsequent dealing with that real estate or business. It might then be unfair, if his primary case is a denial that he has either purchased or been in any way interested or concerned in a purchase of the real estate or business (as the case may be), to put him in the position whereby a failure on his part to lead or an abstention, for tactical reasons, from leading evidence directed to show that no profit (or a smaller profit than that suggested by the informant's case) had resulted or might result from a subsequent dealing with that estate or business led to the tribunal finding, for the purposes of s37(2)(b), a profit greater than had in fact resulted or might reasonably be expected to result.

These considerations suggest that the inquiry and relief under paragraph (b) are to be undertaken and ordered subsequently to the hearing of the information under paragraph (a) and as a separate proceeding, although by the same tribunal.

Support for this view is, I consider, to be found in the decision of the Full Court of Queensland in *Kehoe v Porter; Ex parte Porter* [1957] St R Qd 480; 52 QJPR 13. In that case the Court had under consideration s19 of the *Auctioneers and Commission Agents Acts* 1922 to 1953 (Qld.) which so far as relevant provides:

> "It shall not be lawful for: (a) any commission agent, whether directly or indirectly or by himself or any partner or sub-agent, to purchase or be in any way concerned or interested in the purchase of any property other than perishable farm produce placed in his hands for sale on commission by any principal without having previously obtained the consent in writing of such principal to such purchase; Every commission agent who commits a breach of this provision or any partner, sub-agent or other person knowingly concerned in such breach, shall be liable to a penalty not exceeding fifty pounds, and, in addition, such commission agent shall be ordered by the adjudicating court to account for and pay over to his principal all profits resulting from the purchase in respect of which such breach was committed...".

On a complaint which alleged that being a commission agent Porter purchased property placed in his hands for sale by Jean Love without having previously obtained the consent in writing of Jean Love to such purchase, Porter was convicted by a Stipendiary Magistrate and fined. Porter had in fact resold the property at a price of £275 in excess of the price at which he had purchased the property from Jean Love. The magistrate, in addition to convicting and fining Porter, ordered him to account for and pay over to Jean Love the sum of £275 being the profit resulting from the purchase of the property, and in default of payment was ordered to be imprisoned for three months.

On an order to review the Full Court held, *inter alia*, that the magistrate had no jurisdiction to order the payment of the fixed sum which he assessed as profit.

Discussing the terms of s19, Stanley J at pp486, 487, said:

> "In my opinion 'account for' means nothing more than to demonstrate with exactitude (as to a person entitled to be truly informed) the amount of the profits resulting from the purchase. The principal is entitled to examine and check the alleged profits and to call for and receive such information as he may reasonably require from the agent in that behalf.
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> "By s33, nothing in the Act shall affect any civil remedy that any person may have against a commission agent in respect of any matter." (Note: s53 of the Victorian Act is substantially to the same effect.) "Unless the magistrate's order in terms of s19(a) creates in a principal a new right in law or equity it seems to be irrelevant to any civil remedy in such principal. If it does not create any such new rights can the order 'to account for and pay over to the principal' be enforced?
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> "Can the magistrate take the account? The words are not apt to create this power in him. If he has it he must exercise it judicially and give the agent, as well as the principal, ample time and opportunity to be heard on its details. He must not make the order merely on the evidence extracted on the

contested hearing of the complaint for an offence, when such agent is denying the breach of the section and is not concerned to be heard as to the details of his profits."

Townley J agreed with the reasons for judgment of Stanley J. The third member of the Court, Hanger J at pp490-2, said:

"The latter part of the order, excluding the default penalty, is sought to be justified by the provision in s19 which I have already set out, which requires the court to order a defendant to account for and pay over to his principal all profit resulting from the purchase in respect of which the breach of the Act was committed. The magistrate, apparently conscious of the difficulty in enforcing an order to account for profits, assessed the profits himself. The expediency of doing so, if it could be legally justified, is clear, for so far as this court has been informed, there is no method of enforcing an order to account for profits. The magistrate has deducted the price which the appellant paid for the property from the price he received for it, and fixed the difference as profit. He has made no allowance for expenses and in fact there was before him no evidence on which he could arrive at any figure for expenses.

"The first meaning of the words 'account for' which occurs to me in reference to a sum of money, is 'give an account of what has been done with the money'. An agent who has received money to expend for his principal will account for that money by showing that so much has been spent and that he retains or has paid over the balance to his principal. In a broader sense, he might be said to have literally accounted for the money by showing what he had spent it on though quite unlawfully. But the present context makes it clear that Parliament was not concerned with what has been done with the profit; it was concerned with its amount and with getting it from the agent to the principal.

"Another meaning of the words, a more general one, would be "to explain how a fact came to be;' a man would 'account' for a discrepancy in his accounts by showing that money had been stolen. But this meaning is not appropriate here because the Statute is concerned with the 'profits resulting from the purchase', and if they in fact result from the purchase, an explanation as to how they came into existence does not seem to me to matter.

"I note also the following results: if the words 'account for' had been omitted, the defendant would only have 'to pay over' the profit resulting; but, to arrive at the profit would call for some accounting; the defendant would have to show what the profit was, and therefore would inevitably have to show how it was arrived at, how it came to be profit, how it came into existence.

"Again, suppose the words 'pay over' were omitted. The defendant then has to account for the profit-resulting to his principal. Would he not, 'account for' the profit resulting only by showing that he had paid over the profit to his principal or that he was then holding the profit in trust for or on behalf of his principal?

"But the best approach to the question of what the words mean in their context, may perhaps be to consider the situation as it exists when the time comes for the order to be made. A complaint has been heard that the defendant, being a commission agent, has bought property from his principal without his written consent. That is the issue that has been tried, and that is the substantial finding made. Whether any profit has resulted or could result from this circumstance has been neither in issue nor determined. But the issue of the purchase without consent having been decided against the defendant the Statute requires an order to be made that the defendant account for and pay over to the principal all profits resulting from the purchase. Before the profits can be paid over, they must be ascertained; they have presumably not been ascertained in the proceedings which have brought about the conviction; that therefore remains to be done. The intention shown in the Statute is clear that whatever the profits are, they are to be paid over to the principal. The statute provides clearly for that. What remains then but to provide for the ascertainment of the amount of the profits? And is this not what the Legislature aimed to do when it required the court to order that the agent 'account for' the profits resulting. Though the words are not really apt to effect this purpose, is it not quite clear from the context what the intention of the Legislature was? I think it is; that it is beyond the field of speculation that when the Legislature so provided, it meant that the defendant was to be required to give a true account showing what profits had in fact resulted to him from the purchase. I hold accordingly.

"If this view is correct, then the magistrate was wrong in ordering the defendant to account for and pay over as profits an amount he himself assessed without requiring an account from the defendant of what the profits were. The words 'account for' in the order must receive the same meaning as they have in the section which authorises the order. If, as I hold, the defendant is by the section to be directed to give a true account showing what the profits are, then the magistrate could not order the payment over of a fixed sum which he himself assessed as profit. The order is defective in

> this respect, no matter how expedient it may have been to make the order in that form. The issue of the amount of profits was not before the court: there may have been expenses of sale which the defendant did not mention and which in fact would not have been relevant to any issue before the court; the Legislature contemplated the determination of the profits at some time other than when the issue of the purchase without consent was determined."

It appears to me the observations quoted are equally applicable in the construction of s37(2) of the *Estate Agents Act* 1958.

In my view, it is open to a Court of Petty Sessions after conviction for an offence against s37(2)(a) to order that the defendant do before the Court of Petty Sessions at a time to be then and there fixed by the court account to his employer's principal for the profits which have resulted or which may in the opinion of the court result from the purchase by his wife of the real estate there in question and subsequent dealings therewith. The court may, in that context, call in aid the provisions of s129(1)(a) of the *Justices Act* 1958.

That section—first enacted in Victoria by s2 of the *Justices (Enforcement of Orders) Act* 1937 (Act No. 4472)—appears to have been based, as the sidenote to that section suggests, on the provisions of s34 of the *Summary Jurisdiction Act* 1879 (Eng.) (42 and 43 Vict. c.49). Subs(1) of that section operates wherever by some Act a power is given to a Court of Petty Sessions:–

> (a) of requiring any person to do or abstain from doing any act or thing other than the payment of money; or
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> (b) of requiring any act or thing other than the payment of money to be done or left undone—
> and no mode of enforcing such requisition is prescribed by or under any Act.

The section appears to be applicable to a case such as the present, where the court is empowered by the Act (i.e. s37(2)(b) of the *Estate Agents Act* 1958) to order that the convicted person account for all profits resulting or which may result from the purchase and subsequent dealing with the real estate. The additional power conferred by subs(1) of that section to order the defendant to pay over such profits is not accompanied by any provision as to the mode of enforcing the payment of the said profits and the provisions of s113 of the *Justices Act* 1958 would, therefore, appear to be applicable and to authorize the issue of a warrant of distress.

Furthermore, s129(1) empowers the court to impose conditions on the defendant—and it may be that one of the conditions which it could impose, in appropriate circumstances, is that the defendant do, at the time fixed for the taking of the accounts, produce to the court all documents in his possession or power.

In addition, s129 empowers the Court of Petty Sessions to make such arrangements as the court thinks fit for carrying into effect the powers conferred by the legislation in question--in this instance, s37(2)(b) [of the *Estate Agents Act*]. This provision, as well as the common law principle referred to in the authorities previously cited, could be called in aid by the Court of Petty Sessions in giving directions as to the mode of taking the accounts, e.g. as to who should have the carriage of the proceedings for the taking of accounts, as to whether the defendant should deliver an account to the informant, and, if so, within what time, whether the account produced by the defendant should be *prima facie* evidence, whether the informant or the employee's principal or both should have the right to surcharge or falsify, and if so within what time, whether the informant or the employee's principal or the defendant should go first in adducing evidence to show what profit has resulted or may result, whether the informant or the employee's principal or the defendant should have the general onus or burden of proof.

I do not think that it is advisable for this Court to prescribe in advance and necessarily in the abstract, the procedure to be followed by a Court of Petty Sessions taking an amount under s37(2)(b): it is better to leave that court to prescribe such procedures as are appropriate in the particular circumstances of the case and having regard to the duty to give all parties affected an opportunity of being heard: *Dentry v Stott* [1947] VicLawRp 69; [1947] VLR 462, at p465; [1947] ALR 587, at p588, per Fullagar J.

It may be that the employer's principal—Mrs Norman—will not desire to appear in these

proceedings, but in any event, it will be a matter for the Court of Petty Sessions to consider whether she should have or be served with notice of the application by the informant to have the account taken or with a copy of the order directing the taking of the account, and to determine what directions, if any, require to be given in order to ensure that the employer's principal have the opportunity (if so advised) of intervening in the proceedings and taking such part therein as to the court may seem proper. Whether the employer's principal should be allowed to take over the conduct of the proceedings for an account, and if so whether a complaint should then be issued at the instance of the employer's principal against the defendant seeking an order for accounts and for payment of the relevant profit found due is a matter which may fall to be determined by the Court of Petty Sessions. Since the matter may be one upon which the Court of Petty Sessions may have come to a decision it is obviously undesirable that this Court should express an opinion with respect thereto.

I reserved my decision principally to consider questions relating to the procedure which should be followed by a Court of Petty Sessions in making an order for accounts under s37(2)(b) of the *Estate Agents Act*. I have discussed that procedure and indicated certain views in the course of my reasons for judgment. In the result, therefore, I think that both grounds of the order nisi are made out.

The order of the Court is as follows:–

Order nisi dated 29 April 1969 made absolute. Set aside so much of the order of the Court of Petty Sessions at Prahran as relates to the refusal by that court to order that the defendant account for and pay over to his employer's principal, Mrs Ruby Norman, all profits resulting from or which in the opinion of the court may result from the purchase by the defendant's wife of the real estate situate at and known as 7 Scotia Grove, South Yarra, and any subsequent dealings therewith. Order that the proceedings be remitted to the Court of Petty Sessions at Prahran with a direction to hear and determine according to law an application by the informant for an order that the defendant account for and pay over to his employer's principal the profits which have resulted or which may in the opinion of the court result from the purchase by the defendant's wife of the real estate situate at and known as 7 Scotia Grove, South Yarra, and any subsequent dealings therewith. Order that the informant's costs of and incidental to this order nisi including any reserved costs, be taxed and when so taxed be paid to an amount not exceeding $120 by the defendant.

Solicitor for the informant: Thomas F Mornane, Crown Solicitor.
