18/04; [2004] VSCA 61

SUPREME COURT OF VICTORIA — COURT OF APPEAL

PHILLIPSON and ANOR v INDUS REALTY PTY LTD

Callaway, Chernov and Vincent JJ A

25 March, 21 April 2004 — (2004) 8 VR 446; [2004] ANZ Conv R 280

CIVIL PROCEEDINGS – CONTRACT OF SALE OF PROPERTY – ESTATE AGENT'S COMMISSION – AGREEMENT TO PAY COMMISSION ON "COMPLETION OF SALE" – SUCH AGREEMENT INDICATED BY HANDWRITTEN INSERTION INTO CONTRACT – DEPOSIT PAID BY PURCHASER BUT SALE NOT COMPLETED – CONSTRUCTION OF CONTRACT – WHETHER PROFESSIONAL FEES EARNED – "SUBJECT TO COMPLETION OF SALE" – MEANING OF – AS NO SALE COMPLETED NO AGENT'S FEES EARNED.

HELD: Callaway and Vincent JJ A, Chernov JA dissenting: The words "subject to completion of a sale" in an exclusive sale authority meant that the estate agent did not earn the 3% commission unless a sale was completed. As no sale was completed, a vendor was not liable to pay the agent's professional fees.

***Indus Realty Pty Ltd v Phillipson & Anor* [2002] VSC 129; MC16/2002, overruled.**

CALLAWAY JA:

1. In July 2000 the appellants engaged the respondent real estate agent to sell a property in Glen Waverley. The property was sold for $1,000,000 and eventually the appellants were paid a deposit in the sum of $100,000, but the sale was not completed and the appellants re-sold the property through a different agent. The respondent claimed to be entitled to commission in the sum of $30,000. The Magistrates' Court held that it was not so entitled but a different view was taken by a judge of the Supreme Court on appeal pursuant to s109 of the *Magistrates' Court Act* 1989. The present appeal is brought against his Honour's order made on 29 April 2002, setting aside the orders made by the Magistrates' Court and, among other things, ordering that the appellants pay the sum of $30,000 to the respondent together with damages in the nature of interest. Leave to appeal pursuant to s17A(3A)(b) of the *Supreme Court Act* 1986 was granted on 19th July 2002.

2. The "exclusive sale authority" entered into by the parties contained a section headed "AGENT'S PROFESSIONAL FEE STRUCTURE". It consisted of two parts, "AGENT'S FEES" and "MARKETING EXPENSES", but the latter part was struck out by a diagonal line. Opposite "AGENT'S FEES" there appeared an asterisk, which is not relevant, and a dollar sign followed by the handwritten expression "3% of the selling price subject to completion of a sale." The words "subject to completion of a sale" were in capital letters, but only because they were written by a different person. I shall call the handwritten expression "the agreed commission clause". The dollar amount of the commission was also shown, namely $30,000 upon a selling price of $1,000,000.

3. The learned judge held that the words "completion of a sale" meant, in this authority, the completion of a sale by the payment of the total purchase price and the transfer of title. As the sale was not completed, the agreed commission clause did not entitle the respondent to payment of the commission. His Honour decided the case in favour of the respondent on the basis of condition 4. The exclusive sale authority is a two-page document. Condition 4, which appears on the second page under the heading "Agreed Conditions", reads:

> "Where the Purchaser does not complete the purchase and the Vendor is entitled to a forfeited deposit the Vendor will take all reasonable steps to recover the unpaid deposit from the Purchaser and/or any other person who may be liable for payment of the deposit and to pay the Professional Fees from the sum of the deposit paid or recovered."

Condition 1.10 defines "Professional Fees" as "the total of the 'Agent's Fees' and the 'Marketing Expenses' (as duly authorised and expended)".

4. In this case the appellants had already been paid the deposit.[1] The judge held that condition 4 obliged the appellants to pay $30,000 to the respondent from the deposit. His Honour pointed

out that condition 4 remained part of the agreement and expressly addressed non-completion. There was, he said, no inconsistency between the agreed commission clause and condition 4, which gave the respondent an independent right to commission in the events that had happened. It was a less extensive right, because the commission was payable only from so much of the deposit as was actually paid or recovered.

5. The judge had earlier explained the effect of condition 4 in a case where commission was earned on sale. He said:

> "It provides for the situation where a purchaser does not complete the purchase. In my opinion, the clause is not inconsistent with the obligation to pay commission on the sale as defined. But it does relieve a vendor from the obligation to pay the commission in full if the deposit or the amount received is insufficient to provide full payment. Clause 4 obliges the vendor to take reasonable steps to recover the unpaid deposit, but in my opinion, evinces the common intention of the parties that if the vendor is unable to obtain sufficient deposit to cover the total commission, he is only obliged to pay what he can, from the sum of deposit forfeited and received. If this turns out to be less than the full commission, the agent is not entitled to any greater sum than the amount of the deposit forfeited."

6. Mr Boaden contested that construction. He submitted that condition 4 did not relieve a vendor of its obligation to pay commission that had been earned or reduce the quantum of that obligation where the deposit paid or recovered was less than the amount of the commission. The words "to pay the Professional Fees from the sum of the deposit paid or recovered" did no more than evince an intention that the commission should be a first charge upon the deposit. It is unnecessary for me to decide those points. The passage from his Honour's judgment quoted above may, however, derive support from condition 3, which expressly makes the vendor's agreement to pay the Agent's Fees subject to condition 4.

7. In my opinion, the reference to "Professional Fees" in condition 4, so far as it relates to Agent's Fees, is a reference only to the professional fees, if any, that the agent has earned in accordance with the authority. The critical question is whether, in the events that happened, any professional fees were earned.

8. Mr Gillies submitted that the sum of $30,000 had been earned on sale. Clause 2(c) on the first page of the authority provided that the vendor was obliged to pay the agent the Agent's Fees if the vendor sold the property during the currency of the agreement. The appellants did sell the property during the currency of the agreement. The effect of the agreed commission clause was, counsel submitted, simply to postpone the time for payment, including payment by deduction from the deposit as authorized by condition 7.

9. Mr Boaden submitted that the words "subject to completion of a sale" in the agreed commission clause affected the right to commission and not just the time for payment. Apart from the general sense of the words, he relied on the choice of "subject to" rather than "upon" and "a sale" rather than "the sale". I accept that submission. In my opinion, the natural meaning of the agreed commission clause is that the agent does not earn the 3% unless a sale is completed. The words "subject to completion of a sale" brought the agreement within the third class described by Viscount Simon LC in *Luxor (Eastbourne) Ltd v. Cooper*[2] and supplied the term that could not be implied in *Scott v Willmore and Randell*[3]. It follows that there were no Agent's Fees on which condition 4 could operate.

10. It is true that that means that condition 4 was unlikely to have any practical effect between these parties. Agent's Fees would not be earned if the purchaser did not complete the purchase and, as it happens, there were no marketing expenses and none was contemplated. The respondent had already found a purchaser. Condition 4 is, however, a standard clause. Like other standard clauses that were unlikely to have any practical effect, it was left in the agreement. It is more realistic to impute an intention to the parties that it should have its usual meaning, for better or for worse, than to impute an intention that it should have a special meaning to reflect the agreed commission clause.

11. The latter means that the agent does not earn commission unless a sale is completed and standard provisions like condition 4 are to be read subject to that overriding stipulation.

12. Mr Gillies, and to a lesser extent Mr Boaden, invited us to have regard to the evidence in the Magistrates' Court if we considered the meaning of the agreed commission clause to be doubtful. I do not consider that it is doubtful and most of the evidence is either equivocal or indicative only of the subjective intention of one or other of the parties. I have nevertheless assumed in favour of the respondent that the authority and the contract of sale were part and parcel of one transaction. That is why no marketing expenses were contemplated or authorized. It is unnecessary to resolve the conflict in the evidence as to the dates on which the documents were executed.

13. I would allow the appeal, set aside the order made on 29 April 2002 and, in lieu thereof, order that the appeal from the Magistrates' Court be dismissed.

CHERNOV JA (dissenting):

14. I have had the advantage of reading the draft reasons for judgment of Callaway JA and agree that, as his Honour explains, "Professional Fees" in condition 4 means, relevantly, the Agent's Fees, if any, that the agent has earned in accordance with the Authority and that the critical question is whether, in the events that have happened, any such fees were earned. Whether the agent became entitled to commission depends on whether the event, specified in the agreement, which was to give rise to such an entitlement, has happened.[4] The printed terms of the agreement that deal with the agent's rights to commission are clause (2)(c) and condition 3 of the Agreed Conditions, although the operation of the latter provision is subject to the operation of condition 4. If these were the only relevant terms, it seems clear enough that, in the circumstances that have occurred, the agent had not only earned its commission, but had become entitled to payment of it by the vendor. The parties, however, had agreed to insert into the agreement another condition, namely, that the commission, as quantified, was to be "subject to completion of a sale." Although these words were inserted in the portion of the agreement that is designed to deal with the quantification of the Agent's Fees, it is, nevertheless, clear enough that they were intended to qualify the agent's entitlement to commission. The question is, however, whether that qualification was intended to impose an additional event that had to occur before the agent earned the commission under the agreement, or whether the words were intended to relieve the vendor of the obligation to pay the fee earned, unless the sale was completed.

15. Although the position on this question is not free from doubt, I consider that the better view is that the additional words did no more than relieve the vendor of its obligation to pay the commission until the sale was finalised. I say this in light of the following circumstances. It seems that the Authority was completed at the agent's office and was presented to the vendor for his approval and signature in a form that included the deletions and the written words other than the additional words, which were then added by the agent at the request of the vendor. Absent the additional words, the hand written formula by which the commission was to be calculated and the remainder of the agreement, particularly clauses (1)(b) and (2)(c) and condition 3, make it plain that the parties agreed that the agent would be engaged to find a purchaser and negotiate a contract of sale and that, upon a binding agreement being executed by the vendor and purchaser, the vendor would pay the agent a commission of 3% of the selling price. The additional words do not require that the agent do any more in order to earn its fee. Rather, on their ordinary meaning, they operate to qualify the vendor's obligation to pay the agent 3% of the selling price once a binding contract of sale is executed. They effectively provide, I think, that the vendor's obligation to pay that fee is postponed until the completion of sale.

16. I acknowledge that there is considerable force in the opposite view taken by Callaway JA. Similarly, there is merit in Mr Boaden's argument that the choice of "subject to" rather than "upon" and "a sale" rather than "the sale" support a construction that the additional words affected the agent's right to commission and not merely the time for its payment. In my view, however, Mr Boaden's submission would carry more weight if the additional words were selected by a lawyer, particularly one experienced in conveyancing. But here the words were chosen by a layman, and I doubt that much thought was given by the parties to the sort of matters to which counsel understandably referred. As I have said, I consider that, on balance, the better view is that the additional words were intended merely to relieve the vendor of the obligation to pay the agent's fees, once they have been earned, until the completion of the contract of sale, if that ever occurred. In my view, those words do not affect the operation of clause (2)(c) and condition 3 which prescribe the event, upon the happening of which, the agent was to earn its fee. By the time a binding contract of sale has come into existence the agent completed what it was engaged

to do, namely, as is made apparent by clause (1)(b) of the agreement, to introduce a purchaser and negotiate the contract of sale, thereby earning its fee.

17. Thus, I consider that the respondent has earned the fees relevant to condition 4 notwithstanding the non-completion of the contract of sale and consequently, it became entitled to have them paid out of the forfeited deposit pursuant to condition 4. It follows that I would dismiss the appeal.

VINCENT JA:

18. As Callaway JA and Chernov JA have pointed out in their respective judgments, the point in issue in this matter is whether, through the insertion of the words "subject to the completion of a sale", the parties agreed to defer the right to payment of commission to which the agent would become entitled upon the entry of a purchaser into a contract of sale, or intended that no right to commission would arise at all until a sale had been completed. Each of my brothers has demonstrated that the matter is not without difficulty and that a quite respectable case can be presented in support of either of these constructions. There is no need to canvass the factors militating in favour of the adoption of the respective approaches adopted by them as they are set out in their judgments and nothing save length will be gained by repetition. In my opinion and for the reasons that he has advanced, I have concluded that the construction adopted by Callaway JA is to be preferred and the expression "subject to completion" should be accorded its normal meaning, so that no commission was payable unless and until a contract of sale was completed.

19. Accordingly, I would also allow the appeal, set aside the order made on 29 April 2002 and order that the appeal from the Magistrates' Court be dismissed.

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[1] See [1] above. The sum of $10,000 had been retained by the respondent in partial satisfaction of its claim for commission. The proceeding in the Magistrates' Court consisted of a claim by the appellants for the $10,000 and a counterclaim by the respondent for the commission.
[2] [1941] AC 108 at 120; [1941] 1 All ER 33.
[3] [1949] VicLawRp 21; [1949] VLR 113 at 116; [1949] ALR 510.
[4] See *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 120; [1941] 1 All ER 33 per Viscount Simon LC.

APPEARANCES: For the appellants Phillipson: Mr RR Boaden, counsel. Stuart Morgan & Associates, solicitors. For the respondent Indus Realty Pty Ltd: Mr WF Gillies, counsel. Raelene A Murley, solicitors.
