

16/78

SUPREME COURT OF VICTORIA

GLYNN, DEPUTY REGISTRAR of ESTATE AGENTS v BRIDLE

Murray J

22 February 1978

ESTATE AGENT – IN BREACH OF HIS FIDUCIARY DUTIES – TRUST MONEYS IMPROPERLY USED OVER A SUBSTANTIAL PERIOD OF TIME – AGENT WELL AWARE THAT HE WAS USING MONEYS THAT DID NOT BELONG TO HIM – CHARGED WITH OFFENCES UNDER ESTATE AGENTS ACT – CHARGES FOUND PROVED – FINDING THAT AGENT NOT A FIT AND PROPER PERSON TO HOLD AN ESTATE AGENTS LICENCE – LICENCE CANCELLED FOR 14 DAYS – WHETHER MAGISTRATE IN ERROR – WHETHER ORDER TO REVIEW PROCEDURE APPLICABLE TO MATTERS UNDER THE ESTATE AGENTS ACT: ESTATE AGENTS ACT 1958, S19.

At a hearing before a Magistrates' Court the Respondent was called upon to show cause why his licence as an estate agent should not be cancelled. Evidence was given that a substantive amount had been withdrawn from a trust account. An auditor deposed that from January 1974 until January 1977 the trust account was consistently in debit. Some moneys had been withdrawn by way of advance payments of anticipated commissions. There was no entitlement to withdraw and apply such moneys for that purpose.

The respondent deposed that due to the absence of his book-keeper he was uncertain of the precise amount of the deficiency, of which he was well aware. He called evidence of his good character, that none of his clients had suffered any loss, and that at all material times he had the resources to remedy any deficiency.

The Stipendiary Magistrate found that the respondent

1. Was not a fit and proper person to hold the licence; and
2. that he had been guilty of such conduct as an agent to render him unfit to hold a licence. The Stipendiary Magistrate cancelled his licence for fourteen days and indicated that, upon application for a new licence, he would be inclined to grant such a licence if no further evidence was adduced than had been adduced.

HELD: Order nisi absolute.

1. In relation to the submission that the order to Review procedure did not apply to decisions of the Magistrates' Court made under s19 of the *Estate Agents Act 1958*, it was necessary to examine closely the legislation giving rise to the procedure in question.

2. The question was not merely whether the function exercised by the Magistrate may for some purposes be categorised as ministerial or administrative but whether the procedure resulted in an order being made which fell within the wide terms of the definition of order in s3 of the *Magistrates' Court Act 1971*.

3. The order made by the Court was after a hearing and (apart from any appeal) and was a final order. It affected rights and obligations. It could not be equated with the function of Justices in deciding to commit or refuse to commit for trial — a function which was not exercised by Justices sitting as a Court. Even though the purposes of the section may have been protective or regulatory and even though the section did not involve offences as such the task of the Court it was of a judicial character.

4. The procedure by way of Order to Review did apply in relation to orders made by Magistrates' Courts pursuant to s19 of the *Estate Agents Act 1958*.

5. Having regard to the real nature of the function which the Magistrate was exercising, which had been described variously as supervisory regulatory or protective, and having regard to the evidence that showed that the respondent had been in breach of the provisions of the Act and of his common law fiduciary duties in relation to trust moneys over a substantial period of time and was well aware that he was using moneys which did not belong to him and that he held upon trust there seems to be good reason to hold that the Magistrate misdirected himself.

6. In the circumstances of this case it appeared that the appropriate course to follow was to exercise the powers conferred by s93 of the *Magistrates' Court Act* and vary the order of the

Magistrate by substituting an order that the licence of the respondent be cancelled and delivered up forthwith and that the respondent be disqualified from holding an Estate Agent's Licence for a period of twelve months. In the particular circumstances of the case no reason could be seen why the respondent should be disqualified from holding a Sub-Agent's Licence and he would therefore be entitled to apply for such a licence immediately.

MURRAY J: On the 28th July 1977 Master Barker granted the applicant an Order Nisi to Review this decision on the following ground —

1. In the circumstances of the case and having regard to the findings of the Magistrate the period of disqualification from holding a licence under the *Estate Agents Act* 1958 imposed by the Magistrate was

(a) manifestly inadequate;

(b) so short as to be unreasonable;

(c) so short as to show that the Magistrate had failed properly to exercise his discretion given him by the provisions of s19 of the said Act.

Before me Mr Uren, who appeared to move the order absolute, based his submissions broadly on the grounds that the order of the Magistrate was so manifestly inadequate as to indicate that the exercise of his discretion had miscarried and that he had failed to appreciate the nature and purpose of the proceedings particularly having regard to the fact that he had found the allegations in the information established. Mr Uren submitted that it was manifestly inadequate for him merely to cancel the respondent's licence and to fix a period of two weeks as the period in which the applicant would be ineligible to apply for the re-issue of a licence.

Mr Kaye, who appeared for the respondent, based his submissions on three grounds. First that the procedure by way of Order to Review did not apply to decisions of the Magistrates' Court made under s19 of the *Estate Agents Act* 1958. Secondly that the Court was not empowered to review a decision upon the grounds set out in the Order Nisi and thirdly, that the grounds set out in the Order Nisi were not made out.

In relation to the first ground Mr Kaye submitted that proceedings under s19 are of a ministerial or administrative nature and are not subject to the procedure by way of Order to Review and also that the applicant is not a person aggrieved within the meaning of s88 of the *Magistrates' Court Act* 1971. In support of this ground Mr Kaye relied upon the well established principle that the action of Justices in committing or refusing to commit for trial a person charged with an indictable offence cannot be reviewed. See *Phelan v Allen* [1970] VicRp 28; (1970) VR 219 and the cases referred to in the judgment of Smith J.

Mr Kaye also relied upon *Tour Finance Ltd v Watt* [1972] VicRp 8; (1972) VR 58 in which Stephen J closely examined the nature of proceedings under s12 of the *Money Lenders Act* 1958 and held that the limitation provisions contained in s215 of the *Justices Act* 1958 did not apply to such proceedings. Mr Kaye also referred to an unreported decision of Gillard J (delivered 29/3/76) in *Sencek v Archibald* in which His Honour reached a similar conclusion in relation to an objection based on duplicity. It is however to be noted that in those cases, although their minds were directed to an examination of the nature of the proceedings, both Stephen J and Gillard J made the orders absolute.

Some of the expressions used in the decisions relating to whether the committal or refusal to commit a person charged with an indictable, offence for trial are wide enough to lend support to the view that any order made by Justices which can be categorised as ministerial or administrative as opposed to judicial is not susceptible of the procedure by way of Order to Review — *Phelan v Allen* (*supra*). Nevertheless in each case it is in my opinion necessary to examine closely the legislation giving rise to the procedure in question. And, as Mr Uren pointed out, the question is not merely whether the function exercised by the Magistrate may for some purposes be categorised as ministerial or administrative but whether the procedure results in an order being made which falls within the wide terms of the definition of order in s3 of the *Magistrates' Court Act* 1971.

In relation to the procedure in the present case it is in my opinion important to observe that the grant and cancellation of licences is a function not entrusted to a Stipendiary Magistrate as a *persona designata* but to the Magistrates' Court as such: cf. *Huish v Justices of Liverpool* (1914) 1 KB 109. The procedure is commenced by the laying of an information — see sections 14 *et seq.* The sections refer to the hearing and determination of applications, the Court is given power to adjourn the proceedings, to hear evidence and to make orders for costs. Applicants and objectors have the right to appear by solicitor or counsel. Section 17(6) refers to a person who feels aggrieved by any order of the Court under this section as does s19(5). The order made by the Court is after a hearing and (apart from any appeal) is a final order. It affects rights and obligations. It cannot be equated in my opinion with the function of Justices in deciding to commit or refuse to commit for trial — a function which is not exercised by Justices sitting as a Court. Even though the purposes of the section may be protective or regulatory and even though the section does not involve offences as such the task of the Court it is in my view of a judicial character.

I find it impossible to believe that Stephen J and Gillard J after a close consideration of the nature of the functions of the Magistrates' Court in exercising the power to grant or refuse or cancel licences overlooked the question of whether the conclusions they reached resulted in the proceedings before them not being appropriate. Nor did Stephen J categorise the proceedings as ministerial or administrative. I am therefore of the view that the procedure by way of Order to Review does apply in relation to orders made by Magistrates' Courts pursuant to s19 of the *Estate Agents Act* 1958. See also *Simons v Chief Commissioner of Police* [1939] VicLawRp 35; (1939) VLR 232; [1939] ALR (CN) 499; *Francis v Carmichael* [1976] VicRp 20; (1976) VR 259; *Maxwell & Anor v Dixon* (1965) WAR 167.

Turning to the other aspect of Mr Kaye's first submission, namely that the applicant is not a person aggrieved within the meaning of s88 it appears to me that once it is established that the order of the Magistrates' Court may be reviewed under s88 it follows that the applicant, as a person specifically authorised by the statute to lay an information under s19 and to appear to prosecute it, it follows that he is a person aggrieved in the relevant sense. See *Day v Hunter* [1964] VicRp 109; (1964) VR 845 and the cases referred to therein; *Mill v Scott* [1955] St RQd 210; 49 QJPR 69; *Ex Parte Sidebotham* [1874-80] All ER 588; (1879) 14 Ch D 458; In *Re Lamb* (1894) 2 QB 805. For these reasons I reject Mr Kaye's first submission.

Mr Kaye's second submission amounted in effect to the proposition that s88 requires that a *prima facie* case of error or mistake on the part of the Stipendiary Magistrate must be shown before the Court will intervene and that none has been shown to have existed in the present case, the whole matter being one of the exercise of the discretion of the Magistrate. While the Court will normally be slow to interfere with the exercise of a discretion in the Court below the authorities clearly establish in my opinion that in some cases the decision called into question may be shown to be, in cases of penalty or punishment, so manifestly excessive or manifestly inadequate that a miscarriage in the exercise of discretion may be inferred — see *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504; 9 ABC 117; (1936) 10 ALJR 202; *Cranssen v R* [1936] HCA 42; (1936) 55 CLR 509 at 519; (1936) 10 ALJR 199; *Burns v Knowles* (1956) Tas LR 105; *O'Neill v Graham* [1952] St RQd 79; *Delmenico v Marusich* [1931] VicLawRp 28; [1931] VLR 158; 37 ALR 93. The present case does not concern a penalty or punishment strictly so called. If it did it could be argued that the Magistrate had a considerable body of evidence before him to justify him taking a very merciful course. But having regard to the real nature of the function which the Magistrate was exercising, which has been described variously as supervisory regulatory or protective, and having regard to the evidence that showed that the respondent had been in breach of the provisions of the Act and of his common law fiduciary duties in relation to trust moneys over a substantial period of time and was well aware that he was using moneys which did not belong to him and that he held upon trust there seems to me to be good reason to hold that the Magistrate misdirected himself. There is good reason to infer in my opinion that the Magistrate was led by the evidence adduced on behalf of the respondent and by the address made by way of a plea by his counsel into the error of viewing the order which he was about to make as an order of the same character as a penalty or punishment. It must not be forgotten that the Magistrate found as facts that the respondent was not a fit and proper person to hold a licence and that he had been guilty of such conduct as an agent as rendered him unfit to hold the licence. In these circumstances it is clear in my view that from the point of view of the protection of the public a period of cancellation of

the respondent's licence of two weeks was a period that was on its face manifestly inadequate in the circumstances and is indicative of a miscarriage of the exercise of the Magistrate's discretion.

In relation to the third submission put by Mr Kaye it need only be said the Magistrate had before him evidence of a knowing misuse of trust moneys extending over a period of years. It could not therefore in my opinion be denied that there was ample evidence to justify his findings. It follows that both the second and third bases of Mr Kaye's submissions fail. In the circumstances of this case it appears to me that the appropriate course for me to follow is to exercise the powers conferred upon me by s93 of the *Magistrates' Court Act* and vary the order of the Magistrate by substituting an order that the licence of the respondent be cancelled and delivered up forthwith and that the respondent be disqualified from holding an Estate Agent's Licence for a period of twelve months. In the particular circumstances of the case I can see no reason why the respondent should be disqualified from holding a Sub-Agent's Licence and he will therefore be entitled to apply for such a licence immediately. The Order Nisi will be made absolute.
