

37/10; [2010] VSC 316

SUPREME COURT OF VICTORIA

ALIEVSKI v CROSS COUNTRY REALTY VICTORIA PTY LTD

Bell J

16, 22 July 2010

CONTRACTS – AGENCY AND AGENTS – COMMISSION PAYABLE – AGREEMENT FOR COMMISSION CALCULATED AS ‘ANY DOLLAR AMOUNT OVER’ A SPECIFIED SALE PRICE – WHETHER ENFORCEABLE – UNDUE INFLUENCE – UNCONSCIONABILITY – AGENT SUCCESSFULLY SUED FOR COMMISSION – FINDING BY MAGISTRATE THAT AGENT’S CONDUCT NOT UNCONSCIONABLE – ORDER FOR THE AMOUNT OF COMMISSION CLAIMED – WHETHER MAGISTRATE IN ERROR – APPEAL FROM SUMMARY DISMISSAL OF APPEAL BY ASSOCIATE JUSTICE – RE-HEARING DE NOVO – ‘IN ALL THE CIRCUMSTANCES, UNCONSCIONABLE’ AS COMPARED WITH ‘UNCONSCIONABLE WITHIN THE MEANING OF THE UNWRITTEN LAW’: TRADE PRACTICES ACT 1974 (CTH), SS51AA-AC; FAIR TRADING ACT 1999 (VIC), S8; MAGISTRATES’ COURT ACT 1989 (VIC), S109.

A. engaged CCRVP/L as his estate agent to sell his two properties. The commission he agreed in writing was ‘any dollar amount over \$180,000’ for each unit. When CCRV sold the units for \$199,500 each the commission amounted to \$39,500. When A. refused to pay this amount, CCRV sued A. for the commission due. At the hearing A. claimed that CCRV had exerted undue influence over him and behaved unconscionably towards him. The Magistrate rejected this defence, dismissed A.’s counterclaim and made an order on the claim. A. appealed to the Supreme Court of Victoria and an application by CCRV to summarily dismiss A.’s application was upheld. On appeal—

HELD: Appeal dismissed.

1. The central issue was the concept of unconscionability and whether it was correctly applied by the Magistrate. A. relied on s51AB of the *Trade Practices Act*, which is mirrored in s8 of the *Fair Trading Act*. Section 51AB(1) prohibits a corporation (such as CCRV) in trade or commerce from engaging in conduct which is ‘in all the circumstances, unconscionable’. Section 51AB(2) specifies a number of matters to which the court may have regard in deciding whether the prohibition in s51AB(1) has been contravened. Section 51AC(1) specifies the same prohibition in respect of the supply in trade or commerce of goods or services. Section 51AC(3) specifies the same and further relevant matters.

2. The concept of ‘unconscionable’ in s51AB and s51AC of the *Trade Practices Act* has an enlarged (somewhat more protective) content which takes its scope from the ordinary meaning of the word. The provisions of s51AB(2) and s51AC(3) assist in applying that enlarged concept. Those provisions also underscore that the concept in s51AB(1) and s51AC(1) is statutory and not limited to the unwritten law form. So interpreted, ‘unconscionable’ in s51AB(1) and s51AC(1) means unconscionable according to the accepted standards of human behaviour in the context of trade and commerce, reflecting the dictionary meaning of the word as understood in that context.

3. On the Magistrate’s findings, A. signed the agent’s authority at the office of his own solicitor and in his presence. It is to be inferred that A. signed the authority after taking advice from that solicitor. A. was not under any special disability, such as age or infirmity. Indeed, he was a businessman with some experience in buying and selling property. The commission clause was written in terms which reflected A.’s express wishes, and was actually inserted by the handwriting of his solicitor. While CCRV told him the value of the units was ‘\$180,000-\$200,000 approximately’, it also said it did not know what they would sell for.

4. On the basis of these findings, it is not surprising the Magistrate decided that CCRV had not behaved with undue influence or unconscionably towards A. Having considered the evidence on which the Magistrate relied in making these findings, the findings were not only open but demanded.

BELL J:

1. Dzezair Alievski engaged Cross Country Realty Victoria Pty Ltd as his estate agent to sell two residential units on his behalf. The commission he agreed in writing to pay was ‘any dollar amount over \$180,000’ for each unit. The amount of the commission (if any) therefore depended on the sale price of the units.

2. Cross Country sold the units for \$199,500 each, but Mr Alievski refused to pay the commission due of \$39,500. When Cross Country sued Mr Alievski for the commission in the Magistrates' Court of Victoria, he did not contend the commission clause was legally invalid. That would have been too much. It has been rightly held that an agency agreement can make the amount of the commission depend on the sale price achieved for the property.^[1] Rather, Mr Alievski alleged the company had exerted undue influence over and behaved unconscionably towards him. He relied on the applicable common law principles and the provisions of s51AB of the *Trade Practices Act 1974* (Cth), as well as the equivalent provisions of s8 of the *Fair Trading Act 1999* (Vic). He also issued a counterclaim.

3. After hearing the evidence and considering the submissions of the parties, the magistrate did not accept Mr Alievski's defence. Her Honour found him to be legally liable for the commission and made orders in favour of Cross Country. She also dismissed Mr Alievski's counterclaim.

4. Mr Alievski appealed to the Supreme Court of Victoria against the magistrate's orders under s109 of the *Magistrates' Court Act 1989* (Vic). His amended grounds of appeal specify three alleged errors of law. The first is that the magistrate erred in law in her interpretation of the provisions of the applicable legislation. The second is that, in light of the entirety of the evidence, it was not reasonably open to the magistrate to find that Cross Country had not engaged in unconscionable conduct. The third is that the magistrate failed properly to consider Mr Alievski's amended defence and counterclaim.

5. Cross Country applied for summary dismissal of Mr Alievski's appeal pursuant to r58.10(8)(b) of the *Supreme Court (General Civil Procedure) Rules 2005* on the ground that Mr Alievski had no arguable case. An associate justice of the court upheld that application and dismissed Mr Alievski's appeal with costs. He now appeals to me as a judge of the court against those orders.

6. Under r77.06(7), the appeal before me is a rehearing *de novo* of the application by Cross Country to strike out Mr Alievski's appeal. Therefore my focus is not on whether the decision of the associate justice was erroneous but on whether, on the merits, Mr Alievski's appeal should be dismissed under r58.10(8)(b).

7. Cross Country submitted the substantive appeal should be dismissed because, on the facts found by the magistrate, which were fully open on the evidence, Mr Alievski had no arguable case. The company also submitted the magistrate had properly applied the relevant legislation.

8. Mr Alievski submitted the magistrate had misunderstood the concept of unconscionability on which he relied. He pointed to parts of the magistrate's reasons for decision where her Honour had, in his submission, treated as not to the point matters which were directly relevant to that subject. Mr Alievski also attacked certain fact findings of the magistrate for not being open on the evidence.

9. As the appeal has been argued before me, the central issue is the concept of unconscionability which was applied by the magistrate. Mr Alievski relied on s51AB of the *Trade Practices Act*, which is mirrored in s8 of the *Fair Trading Act*. Section 51AB(1) prohibits a corporation (such as Cross Country) in trade or commerce from engaging in conduct which is 'in all the circumstances, unconscionable'. Section 51AB(2) specifies a number of matters to which the court may have regard in deciding whether the prohibition in s51AB(1) has been contravened. I note that s51AC(1) specifies the same prohibition in respect of the supply in trade or commerce of goods or services. Section 51AC(3) specifies the same and further relevant matters.

10. In Mr Alievski's submission, rather than applying the provisions of s51AB(1) and (2), the magistrate applied the provisions of s51AA(1). Unlike s51AB(1) (and s51AC(1)), which prohibits conduct which is 'in all the circumstances, unconscionable', s51AA(1) prohibits conduct 'that is unconscionable within the meaning of the unwritten law'.

11. I think it would have been an error of law for the magistrate to apply s51AA(1) instead of s51AB(1). Section 51AA(1) does not apply to conduct which is prohibited by s51AB (or s51AC).^[2] Thus it is logically necessary to consider s51AB (and s51AC) first. If s51AB (or s51AC) is found to apply, s51AA does not. Further, as Hargrave J held in *First East Auction Holdings Pty Ltd v Ange*^[3]

(as regards s51AB and s51AC), and Sundberg J held in *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd*^[4] (as regards s51AC), 'unconscionable' in those provisions is not limited to cases of equitable or 'unwritten law' unconscionability, as it is in s51AA. The concept of 'unconscionable' in s51AB and s51AC has an enlarged (somewhat more protective) content which takes its scope from the ordinary meaning of the word. The provisions of s51AB(2) and s51AC(3) assist in applying that enlarged concept. Those provisions also underscore that the concept in s51AB(1) and s51AC(1) is statutory and not limited to the unwritten law form. So interpreted, 'unconscionable' in s51AB(1) and s51AC(1) means unconscionable according to the accepted standards of human behaviour in the context of trade and commerce, reflecting the dictionary meaning of the word as understood in that context. Consequently, decisions on the scope of unconscionability under the unwritten law in s51AA(1), such as *Australian Competition and Consumer Commission v Berbatis Holdings Pty Ltd*,^[5] do not actually govern the operation of ss51AB and 51AC, however much they might otherwise be generally helpful.

12. However, having considered Mr Alievski's submissions on the point, I do not accept the magistrate applied the wrong concept of unconscionability. This is evident from her Honour's specific mention^[6] of Mr Alievski's reliance on s51AB of the Trade Practices Act and s8 of the Fair Trading Act, of the decision of Sundberg J in *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd*^[7] and of the relevant circumstances specified in s51AC(3). The decision of Sundberg J was relevant because the terms of s51AC(3) of the *Trade Practices Act* are not materially different from the terms of s51AB(2). That the magistrate did not misapply the concept of unconscionability is also evident from her careful and thoughtful analysis of the circumstances of the case.

13. On the magistrate's findings, those circumstances were that Mr Alievski signed the agent's authority at the office of his own solicitor and in his presence. It is to be inferred that Mr Alievski signed the authority after taking advice from that solicitor. Mr Alievski was not under any special disability, such as age or infirmity. Indeed, he was a businessman with some experience in buying and selling property. The commission clause was written in terms which reflected Mr Alievski's express wishes, and was actually inserted by the handwriting of his solicitor. While Cross Country told him the value of the units was '\$180,000-\$200,000 approximately', it also said it did not know what they would sell for.

14. Further, her Honour found Mr Alievski had previously tried to sell the units through another agent with a reserve of \$189,500. That agent gave evidence of his unsuccessful attempts to do so. He said the price achieved by Cross Country was 'exceptional' and 'obviously a good price'. This evidence shows Cross Country could not have been sure of obtaining such a price when it accepted the engagement. The company took the commercial risk of selling the properties for at least \$180,000 in order to obtain the commission payable if the units were sold for more. If it did not do so, no commission at all would be payable.

15. On the basis of these findings, it is not surprising the magistrate decided that Cross Country had not behaved with undue influence or unconscionably towards Mr Alievski. Having considered the evidence on which the magistrate relied in making these findings, I think the findings were not only open but demanded.

16. Mr Alievski especially attacked the terms in which the magistrate expressed her concluding remarks. Her Honour said that, when Cross Country sold the units for \$199,500 each, the company achieved a 'windfall' under the commission arrangement. 'However', she said, 'this is not to the point'. Her Honour went on to say: 'Nor is it relevant, in the absence of unconscionable conduct, that the commission payable well exceeds standard rates of commission.'

17. These words, submits Mr Alievski, prove the magistrate misunderstood the concept of unconscionability. That a 'windfall' was obtained certainly is relevant to that concept in its enlarged scope under s51AB and s51AC. So also is the payment of a commission which well exceeds the standard rates.

18. Considered fairly in the context of the reasons as a whole, I do not accept these submissions. The magistrate was saying that, without unconscionable conduct, the agreement was legally enforceable even though, in the events which happened, the commission payable represented

a 'windfall' and was well above standard rates. Her Honour was not saying these matters were irrelevant to the issue of whether Cross Country had behaved unconscionably (in the enlarged sense) towards Mr Alievski. Indeed, her reasons go into this aspect of the case in some detail. Nor do the reasons in this respect suggest that the magistrate failed to apply the provisions of s51AB(1) of the Trade Practices Act and the equivalent provisions of s8(1) of the *Fair Trading Act*. As I have already said, the reasons show that these were the provisions which the magistrate applied. The reasons also reflect a consideration of the circumstances specified in s51AB(2) of the *Trade Practices Act*, as well as s8(2) of the *Fair Trading Act*.

19. Within the bounds marked out by the law, people are free to negotiate their own contracts. Where the circumstances fall within the established legal principles, including undue influence under the common law and the enlarged concept of unconscionability in s51AB and s51AC of the Trade Practices Act and its state equivalents, a court may intervene. But otherwise the courts will respect and give legal effect to the bargain of the parties. That one party may attain a 'windfall' gain or an unusually high return under the contract is relevant to the application of the established legal principles. But these possible indicia of undue influence and unconscionability neither constitute a principle of judicial intervention in themselves nor necessarily establish, in all such cases, that the established legal principles will be engaged. The magistrate did not err in her reasoning in this respect.

20. In conclusion, Mr Alievski has no arguable case that the magistrate committed an error of law in upholding Cross Country's claim for the commission and dismissing his amended defence and counterclaim. The associate justice was correct in so deciding.

21. I have considered whether I should simply dismiss the appeal against the orders of the associate justice, on the one hand, or remake the orders summarily dismissing the appeal from the orders of the magistrate, on the other. This is not dealt with in the Supreme Court Rules. Since I am conducting a rehearing *de novo*, it might be thought that I should remake the orders as a fresh exercise of the summary dismissal power. I think that would be an unnecessarily complex way of doing things. I will dismiss the appeal from the orders of the associate justice, which will leave them standing on their own feet.

[1] *Peacock v Tarleton* (1928) 28 SR (NSW) 561; 45 WN (NSW) 164.

[2] Section 51AA(2) of the *Trade Practices Act*.

[3] [2010] VSC 72, [206].

[4] [2000] FCA 1365, [31]; (2000) 104 FCR 253; 178 ALR 304; [2000] ATPR 41-790.

[5] [2003] HCA 18; (2003) 214 CLR 51; 197 ALR 153; 77 ALJR 926; (2003) 24 Leg Rep 2;.

[6] Reasons for decision dated 20 November 2008, [7] and [29].

[7] [2000] FCA 1365; (2000) 104 FCR 253; 178 ALR 304; [2000] ATPR 41-790.

APPEARANCES: For the appellant Alievski: John N Selimi, counsel. Starnet Legal Pty Ltd, solicitors. For the respondent Cross Country Realty Victoria Pty Ltd: James J Isles, counsel. Stephen Peter Byrne, solicitors.
