16/02; [2002] VSC 129

SUPREME COURT OF VICTORIA

INDUS REALTY PTY LTD v PHILLIPSON & ANOR

Gillard J

26 March, 24 April 2002

CIVIL PROCEEDINGS – CONTRACT OF SALE OF PROPERTY – ESTATE AGENT'S COMMISSION – AGREEMENT TO PAY COMMISSION ON "COMPLETON OF A SALE" – SUCH AGREEMENT INDICATED BY HANDWRITTEN INSERTION INTO CONTRACT – DEPOSIT PAID BY PURCHASER BUT SALE NOT COMPLETED – MEANING OF "COMPLETION OF A SALE" – CONSTRUCTION OF CONTRACT – PRINCIPLES TO BE APPLIED IN CONSTRUING WRITTEN CONTRACT – SPECIFIC PROVISION WHERE PURCHASER DOES NOT COMPLETE PURCHASE – VENDOR LIABLE FOR PROFESSIONAL FEES FROM DEPOSIT PAID – WHETHER WRITTEN TERM IN CONFLICT WITH PROVISION WHERE PURCHASER DOES NOT COMPLETE PURCHASE.

P. engaged IRP/L, a real estate agent to handle the sale of P's property. An Exclusive Sale Authority was signed by P which contained a handwritten term to the effect that the agent's fees were "3% of the selling price subject to completion of a sale." Another clause in the Authority provided that where the purchaser did not complete the purchase, the vendor was liable to pay IRP/L's professional fees from the deposit paid. IRP/L introduced a purchaser and a written contract of sale was executed by P. and the purchaser. The purchaser defaulted, the contract was rescinded and the deposit of $100,000 was later recovered from the purchaser. IRP/L claimed it was entitled to the sum of $30,000 for its full commission.

HELD: Order that P. pay the sum of $30,000 to IRP/L.
1. The question is what was the event upon which commission was to be paid to the Authority agreement? The answer to this question depends upon a proper construction of the contract entered into between P. and IRP/L. In determining the common intention of the parties the court is required to approach the test on an objective basis. The function of the court is to ascertain the intention from the words.

2. Where there is a special term inserted into a standard form contract, whether or not the term has a greater effect than another term within the same contract will depend on the circumstances. The rule is that superadded words are entitled to have a greater effect attributed to them than to the printed words; however, this rule only applies if there is any reasonable doubt about the sense and meaning of the whole, but just as importantly, is to be considered in context.
***Glynn v Margetson & Co* [1893] AC 351 at 358; [1892] 1 QB 337, applied.**

3. The written term relating to the agent's fees conflicted with the vendor's obligation to pay commission from the amount of the deposit received. The words "completion of a sale" should be given their ordinary and natural meaning and mean in this contract the completion of the sale by the payment of the total purchase price and the transfer of title. This had the effect of postponing the time when the agent would receive the commission. However, the other clause clearly established what the parties intended in the event that the purchaser did not complete the purchase. The handwritten term and the other clause were not in conflict nor inconsistent nor repugnant with each other. Both clauses had separate work to do depending upon the circumstances. They dealt with separate situations. The other clause applied to the circumstances which occurred namely, the purchaser defaulting and the vendor recovering the forfeited deposit. Accordingly, the agent was entitled to recover its professional fees from the sum of the deposit paid.

GILLARD J:

1. This is an appeal pursuant to s109 of the *Magistrates' Court Act* 1989, from orders made by a Magistrate. The Magistrate made orders in a proceeding instituted by two property owners against a real estate agent for recovery of moneys allegedly due to the property owners.

Parties

2. The appellant, Indus Realty Pty Ltd, ("Indus"), was at all relevant times a company carrying on the business of real estate agent at Wheeler's Hill. An employee of the company, Mr E. Diakomanolis, was the person handling the transaction on behalf of Indus.

3. Indus was the defendant in the proceeding in the Magistrates' Court. It filed a counterclaim.

4. The respondents, John Phillipson and Elizabeth Phillipson ("the plaintiffs"), are a married couple, who at all relevant times owned the property at 781 Waverley Road, Glen Waverley ("the property"). They were the plaintiffs in the proceeding below.

Magistrates' Court Proceeding

5. On 18 May 2001, the plaintiffs, through their solicitors, issued a complaint in the Magistrates' Court against Indus. According to the particulars of claim which are far from enlightening, the plaintiffs claimed the sum of $10,000 "for moneys due and owing pursuant to a contract dated 15th July 2000". In fact, the claim was for money had and received.

6. Initially, Indus acted for itself and filed a notice of defence which was equally unenlightening. It subsequently engaged a solicitor and filed a notice of counterclaim which clearly set out the issues.

7. The counterclaim alleged that there was a written agreement made between the plaintiffs and Indus dated 15 July 2001, whereby the plaintiffs engaged Indus to sell the plaintiffs' property. It was alleged that it was a term of the agreement that on the sale of the property, Indus was entitled to 3% commission.

8. Indus introduced a purchaser, and a written contract of sale was executed by the plaintiffs and the purchaser, October Properties Pty Ltd ("the purchaser"), on or about 20 July 2000, for a price of $1M.

9. Indus received the sum of $10,000, being a part-payment of the deposit which was $100,000.

10. The evidence revealed that problems arose in the course of the journey to completion of the contract. First of all, the purchaser failed to pay the balance of the deposit, a notice of rescission was served, a dispute arose between the plaintiffs and the purchaser, ultimately resolved by the purchaser paying the balance of the deposit moneys to the plaintiffs' solicitors, Stewart Morgan and Associates.

11. Subsequently, a date was fixed for settlement in March-April 2001, the purchaser defaulted and was unable to settle, the contract was rescinded and the deposit was forfeited by the plaintiffs.

12. None of the above facts were in dispute. The dispute concerned the entitlement of Indus to commission in respect of the sale.

13. Indus claimed its full commission of $30,000 and refused to give the $10,000 to the plaintiffs; hence, the complaint by the plaintiffs.

14. Indus counterclaimed the sum of $30,000, together with interest, pursuant to the agreement.

15. The complaint and counterclaim came on for hearing before Ms W Wilmoth M on 13 November 2001. The proceeding was completed on the following day. On 15 November 2001, the Magistrate gave her reasons and held that the plaintiffs were entitled to recover the sum of $10,000. She ordered that Indus pay the sum of $10,000, together with interest in the sum of $575 and costs of $7,710.30. The counterclaim was dismissed.

16. It will be necessary to set out in some detail the terms of the Exclusive Sale Authority signed by the plaintiffs. It contained a term to the effect that the agent's fees were — "$3% of the selling price subject to completion of a sale".

17. Those words were handwritten on the printed document.

18. The Magistrate held that the special term meant that the agent Indus was not entitled to its commission until a sale was completed, and because the sale was not completed, because the

contract was rescinded, by reason of the purchaser's default, the estate agent, Indus, was not entitled to its commission.

Appeal

19. On 14 December 2001, in accordance with the Rules, Master Wheeler, having been satisfied that there was an arguable case for appeal, made an order stating the following questions of law to be determined—

> "(a) In the circumstances where the appellant's exclusive sale authority (Exhibit 'RAM-58') included a condition 4 which provided:–
>
> '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 — but had endorsed on the front of it after agent's fees '3% of the selling price subject to completion of the sale'—
>
> did the Magistrate err in holding that the agent was not entitled to its commission when the contract of sale did not result in settlement and the purchaser forfeited the deposit of $90,000 to the respondents by failing to complete the contract of sale after it had become unconditional?
>
> (b) Did the Magistrate err in holding that the appellant was not entitled to its commission?"

20. In fact, the original order contained errors and I have corrected those errors in stating the questions of law for determination.

Magistrate in Error

21. The agreement dated 15 July 2000 was a printed form called an "Exclusive Sale Authority" and was a document prepared by the Real Estate Institute of Victoria Ltd. The Magistrate's reasons focused on a special term which was a handwritten insertion into the printed form, and which was as follows —

> "AGENT'S PROFESSIONAL FEE STRUCTURE
> AGENT'S FEES $3% of the selling price subject to completion of a sale".

22. It was agreed to and inserted into the agreement at the time of its execution.

23. In her reasons, the Magistrate held that the words "subject to completion of a sale" should be given their normal and natural meaning and meant that the estate agent was not entitled to its commission until the sale was completed. She held that the sale had not been completed by payment of the full purchase price and the transfer of the title to the purchaser and hence, Indus was not entitled to its commission.

24. In reaching that conclusion, the Magistrate considered evidence given by the contracting parties as to their views and thoughts at the time and referred to some of the subsequent conduct of the parties in an endeavour to construe the agreement. What effect the evidence and the submissions had on the end result is not entirely clear. The Magistrate did say that she interpreted the commission "clause in its narrow legal meaning, because reference to the surrounding circumstances and background does not convince me that the words really had another meaning."

25. What each of the contracting parties thought or expected at the time of contracting are irrelevant. In order to determine the common intention of the parties, the test is an objective one and the Court considers the words and conduct of the parties at the time when the contract was executed. This is not to determine what each party had in their or its mind but what objectively could be inferred was their common intention. See *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 347 *et seq*, especially at p352; (1982) 41 ALR 367; (1982) 56 ALJR 459. The Court cannot consider conduct subsequent to the contract in order to construe it — see *L Schuler AG v Wickham Machine Tools Sales Ltd* [1973] UKHL 2; [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683; [1973] 2 Lloyds Rep 53.

26. It is important to bear in mind that it is the final document which records the consensus of the parties. Parties, in negotiating a contract, pursue their hopes and expectations with different emphasis and hope to achieve their goal in a certain way. Often, words which are used by one party mean something different to the other party and yet in the end result, the parties use a

formula to effect their agreement. The Court is concerned with ascertaining the common intention of the parties, and where parties, as in this case, record their consensus in a written document, then the primary source of their common intention is the words used in the document. Full effect must be given to the words used.

27. An agreement is to be construed to give effect to all of its provisions and a court is not, as a general rule, at liberty to disregard any part of it.

28. But the error the Magistrate made was that she failed to give any consideration to clause 4 of the agreement. The clause was dealing with the very thing that occurred, namely, the position where a deposit was forfeited because of the failure of a purchaser to complete the sale. This clause was clearly relevant to the construction of the contract and the rights and obligations of the parties and yet, no reference was made to it in her reasons. The issue was clearly raised by the notice of counterclaim.

29. It follows that the Magistrate made an error of law in that she failed to consider a relevant matter in construing the contract to determine the rights and obligations of the parties.

30. The question of the construction of the agreement is one of law. This Court is in as good a position as the Magistrate to construe the contract and Counsel for both parties informed the Court that the Court should carry out the task. Taking into account the costs to date, this was obviously a sensible course to follow.

31. In any event, as Mr Boaden of Counsel pointed out, he is entitled to seek to uphold the decision of the Magistrate on any ground and he submitted in any event that although the Magistrate failed to consider the clause, nevertheless her decision was correct in that the estate agent, Indus, was only entitled to recover commission on the completion of the sale and clause 4 is irrelevant in those circumstances.

Construction of the Authority

32. The Exclusive Sale Authority is a standard form document prepared by the Real Estate Institute of Victoria Ltd. It had in the right corner "EXCLUSIVE SALE 002".

33. The Authority contained blanks which were filled in by hand.

34. The parties are described as Indus Realty Pty Ltd, as agent of a specified address, and the vendors were described as "John Burton David Phillipson and Elizabeth Phillipson" and an address was given.

35. The property was described as — "781 Waverley Road, Glen Waverley 3150".

36. The Authority period was 60 days from the date of the agreement. The price was $1M, payable 60 days from the date of sale.

37. Then appeared the following —

> "AGENT'S PROFESSIONAL FEE STRUCTURE
> AGENT'S FEES $3% of the selling price subject to completion of a sale".

38. As I have already stated, the words after the dollar sign were handwritten and have been initialled by the representative of Indus, Mr E. Diakomonalis.

39. The Authority provided what the amount of the commission would be, namely, $30,000, upon a selling price of $1M.

40. The Authority then set out a number of conditions. The relevant ones were —

> "(1) The vendor acknowledges —
> (a) ...
> (b) That the level of service to be provided by the agent has been negotiated and is as follows —
> INTRODUCE PURCHASER AND CONDUCT NEGOTIATIONS."

41. The latter words were handwritten.

42. It went on to provide —

> "(2) The vendor is obliged to pay the agent —
> (a) ... (b) ...
> (c) The agent's fees if the vendor sells the property during the currency of this agreement. (Note particularly the meaning of 'sells' as defined in agreed condition 1.14 over page).
> (3) ... (4) ... (5) ... (6) ... "

(Emphasis added).

43. The agreement was dated 15 July 2000.

44. On the back of the Authority were the "Agreed Conditions".

45. The following conditions are relevant to the present issues –

> "(1) Meaning of Expressions — unless inconsistent, with the context, the following definitions apply to this Appointment which includes any attachments.
> 1.1 ... .
> 1.14 'Sale' is the result of obtaining a Binding Offer and 'sell' and 'sold' have corresponding meanings in the same situations.
> (2) ...
> (3) The agent will endeavour to sell the Property in consideration for which the Vendor agrees (subject to conditions 4 and 9 below) to pay the agent's fees if the property is sold,
> 3.1 during the authority period by the agent or by another person (including the vendor) for the price and upon the above conditions
> or
> 3.2 ... 3.3 ...
> (4) 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."

46. In my view, the real issue in the case, is the effect of the handwritten part of the Authority concerning the agent's fees and whether it renders agreed condition 4 irrelevant and inapplicable. The Magistrate did not consider that issue.

47. In the famous case of *Scott v Willmore and Randell* [1949] VicLawRp 21; [1949] VLR 113; [1949] ALR 510, the Full Court was concerned with a commission contract between a vendor and an estate agent. In that case, the contract provided that the estate agent was to "sell" the vendor's property and the vendor agreed to pay the ordinary estate agent's commission on the sale. The estate agent procured a person to sign the contract of sale and the plaintiff executed it. It was held that the estate agent was entitled to commission on the execution by the vendor and purchaser of the contract of sale.

48. Herring CJ and Gavin Duffy J referred to some well known statements by judges concerning the construction of agent's contracts. They referred to what was said by Simon LC in *Luxor (Eastbourne) Ltd v Cooper* (1941) AC 108 at 119; [1941] 1 All ER 33, where his Lordship said –

> "There is considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication of other terms." (Emphasis added).

49. In the same case, Lord Russell of Killowen said, at AC p124 –

> "(1) Commission contracts are subject to no particular rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency.
> (2) No general rule can be laid down by which the rights of an agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question and upon the true construction of those terms."
> (Emphasis added).

50. Lord Wright, in the same case, stressed the necessity of focussing on the real question, which was — "What did the parties agree on?"

51. As their Honours went on to say,

> "So considering it (the contract) we think it sufficiently plain that where an owner requests a professional agent to sell his property for him, if there is nothing more, the agent becomes entitled to his commission when he sells the property or the property is sold through his intervention, but "sell" and "sold" are ambiguous words and may refer either to the execution of the contract of sale or to the completion of the sale by payment and conveyance." (Emphasis added).

52. That case represented the law in this State and it is a fair inference that those responsible for the standard form in this case were well aware of the principles stated in that case and the result.

53. There are examples in the cases where parties had expressly agreed as to the point when commission was to be paid.

54. For example, in *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* [1977] HCA 13; (1977) 138 CLR 52; (1976-1977) 13 ALR 161; (1977) 51 ALJR 413, the agreement provided for the payment of the commission "upon the sale of the property under a contract entered into by a purchaser whom the estate agent had introduced to the property or to the owner as an intending purchaser".

55. Hence, the issue is what was the event upon which commission was to be paid pursuant to the Authority agreement?

56. The answer to this question depends upon the proper construction of the contract entered into between Indus and the plaintiffs. The relevant date is 15 July 2000.

57. In the case of *Howtrac Rentals Pty Ltd v Theiss Contractors (NZ) Limited* [2000] VSC 415, I considered the principles to apply in construing an agreement – see pp25 *et seq*. It is unnecessary for me to repeat those principles and I refer to the case as a helpful summary. However, I must mention some basic principles.

58. First, the Court's object in interpreting a contract is to determine the common intention of the parties. This is to be determined at the date of the contract. In the present case, this is 15 July 2000.

59. The primary source of the common intention is the words of the contract and the words are to be considered in context after taking into account the whole document. The words are to be given their normal everyday meaning, unless the words bear a special meaning by reason of some particular matter. There was no suggestion in the present case that the words in the Authority should be given any special meaning.

60. If the language used is clear and definite, there is no necessity to resort to any aids to interpret the agreement. However, if the language is obscure, uncertain, ambiguous or susceptible to more than one meaning, the Court, in determining what the parties intended, may resort to admissible evidence and aids to construction.

61. Business common sense is not to be overlooked in the exercise, and the Court avoids a result which is unreasonable and absurd when viewed in a commercial setting.

62. It is a trite proposition that parties are bound by their contract whether they read it or not and whether they appreciated the significance of its terms.

63. It is equally a trite but important proposition, that the courts no longer construe a contract in a vacuum, and where there is ambiguity, then it is open to the Court to consider the surrounding circumstances to assist in the interpretation of the contract. But as Mason J said in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 352; (1982) 41 ALR 367; (1982) 56 ALJR 459:

> "But it is not admissible to contradict the language of the contract when it has a plain meaning."

64. Another important matter is to emphasise that the quest of the Court is to determine the common intention of the parties and this requires the Court to approach the test on an objective basis. The function of the Court is to ascertain the intention from the words. The Court is not concerned with what a party actually intended or expected. The Court does not decide what was probably intended or what ought to have been intended, or what the parties would have thought about the matter if they had given further consideration to the topic or had been properly advised.

65. The Court interprets the document and has no authority to rewrite it.

66. As I said in the *Howtrac Rentals Pty Ltd* case, *supra,* at p30 —

> "It is important to always bear in mind that it is the final document which records the consensus of the parties. The parties, in negotiating a contract, pursue their hopes and expectations with different emphasis and hope to achieve their goal in a certain way. Often words which are used by one party mean something different to the other party and yet, in the end result, the parties use a formula to effect their agreement."

67. Where parties have recorded their agreement in writing, the starting point must be the words of the contract, read as a whole and in context. If they are plain and definite, then the words should be given their normal and natural meaning as the presumed intention of the parties.

68. Turning to this Authority contract, it was reduced into writing by the parties on 15 July 2000 and signed by them. It embodies their contract and the task is to determine their common intention.

69. Whoever was responsible for drafting this contract no doubt had in mind the case of *Scott v Willmore and Randell*, *supra*, and no doubt was determined to define what was meant by the word "sells" to avoid any argument.

70. Putting to one side the special term concerning the 3% commission, the scheme of the printed contract is for the agent to introduce a purchaser and conduct negotiations and for the vendor to pay commission if the agent sells the property. The word "sells" is defined, namely, sells the property if "the result (is) ... obtaining a binding offer and" the words "'sell' and 'sold' have corresponding meanings in the same situations."

71. Clause 4 is part of the contractual scheme and is to be considered with the other clauses and conditions of the Authority. It cannot be ignored. It is a term of the contract.

72. 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. In other words, it is clear that it was the common intention of the parties that where the purchaser did not complete, new contractual obligations and rights arose between the parties to the Authority.

73. This brings me to the effect of the special term.

74. Where there is a special term inserted into a standard form contract, then in some circumstances, that term may have greater effect than another term within the same contract. Whether or not it has that effect will depend upon the circumstances.

75. The use to which written clauses may be used in the construction of a contract, was stated by Lord Halsbury LC in *Glynn v Margetson & Co* [1893] AC 351 at 358; [1892] 1 QB 337;. The rule applicable to such cases was laid down by Lord Ellenborough CJ in *Robertson v French* [1803] EngR 639; 4 East 130 at 136; 102 ER 779 at 781. Lord Halsbury quoted what his Lordship said with approval in *Glynn's* case. The learned Chief Justice said —

> " ... the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, in as much as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formality adapted equally to their case and that of all other contracting parties upon similar occasions and subjects." (Emphases added).

Quoted with approval by the High Court in *Ryan v Fergerson* [1909] HCA 47; (1909) 8 CLR 731 at 735; 16 ALR 41.

76. It is noted that the rule only applies if there is any reasonable doubt about the sense and meaning of the whole, but just as importantly, is to be considered in context.

77. The application of the rule was discussed by the High Court in *Hume Steel v Attorney-General* [1927] HCA 24; (1927) 39 CLR 455.

78. In that case, there was an argument put that there was an inconsistency between a printed clause and a written clause. At p465, Higgins J discussed how one resolved this apparent inconsistency. His Honour said –

> "Now, there are certain rules, more or less artificial, which are treated as applicable where one part of an instrument contradicts another part. One is that, if an earlier clause in a deed be followed by a later inconsistent clause, the earlier clause prevails. ... Another is that the words of an instrument shall be taken most strongly against the party employing them except in the case of the Crown; ... Another is that where part of the instrument is printed and part written, greater effect is to be given to the written words. ... But such rules are only to be applied as a matter of last resort, when the words used cannot be fairly reconciled; and it is our duty to find whether the words are not capable of reconciliation, so as to give to each set of words full and equal weight, and yet give a consistent effect to the instrument as a whole." (Emphases added).

79. His Honour went on to hold that the words were reconcilable on their face.

80. Isaacs J, at p463, emphasised the importance of attempting to reconcile the clauses in question.

81. Turning to the Authority, in my opinion, the written term relating to the agent's fees conflicts with the obligation on the vendor to pay commission pursuant to clause 2(c) and the definition of "sale" found in agreed condition 1.14. I am satisfied that the parties intended to vary the obligation to the payment of the fee on the completion of a sale. In my view, the words "completion of a sale" should be given their ordinary and natural meaning, and mean, in this contract, the completion of the sale by the payment of the total purchase price and the transfer of the title. Hence, the agent would be entitled to its commission upon the completion of the sale. This had the effect of postponing the time when Indus would receive the commission. Normally, it would be on the sale, but the parties agreed it would not be paid until a later point in time.

82. This finding accords with the finding made by the Magistrate.

83. The sale was not completed.

84. However, clause 4 provides for the situation where the sale fails by reason of the conduct or omissions of the purchaser. Clause 4, in my opinion, clearly establishes that the parties intended that if the purchaser did not complete the purchase, then a different set of obligations and rights would apply if the vendor was entitled to forfeit the deposit.

85. The clause was not deleted or excluded. It remains in the contract as a term and the general rule is that effect must be given to it, unless it is established that the parties intended it should be ignored. There is no evidence suggesting that the parties discussed the issue.

86. In my opinion, the written term concerning agent's fees and clause 4 do not conflict, and are not inconsistent or repugnant with each other. Clause 4 only applies where the purchaser does not complete and the vendor is entitled to a forfeited deposit. The obligation is placed upon

the vendor to take reasonable steps to recover the unpaid deposit and on the assumption that he does take reasonable steps, is only obliged to pay professional fees within the meaning of the contract from the amounts actually paid or recovered.

87. "Professional Fees" is defined by agreed condition 1.10 as —

> "Are the total of the agent's fees and the marketing expenses (as duly authorised and expended)."

88. The "agent's fees" are the commission.

89. Both the handwritten clause concerning the Agent's Fees and Agreed Condition 4 have separate work to do, depending upon the circumstances. They do not conflict. They are dealing with separate situations.

90. I do not accept that there is any doubt which is reasonable about the sense and meaning of the whole of the contract; the construction put on the written term does not in any way conflict with what the parties agreed in the event that the purchaser did not complete the purchase; and in my opinion, clause 4 entitled the agent, Indus, to recover its professional fees from the sum of the deposit paid.

91. The plaintiffs received the total sum of $100,000 and accordingly, clause 4 applies and they are obliged to pay the $30,000.

Conclusion

92. In my opinion, the Magistrate was wrong in failing to consider the provisions of clause 4 of the agreement. The parties agreed to clause 4. It applies in the circumstances which occurred, namely, the purchaser defaulting and the vendor recovering a forfeited deposit which equalled or was in excess of the amount of professional fees which they were obliged to pay. The question of construction is a question of law.

93. Subject to any submission by Counsel, I propose to make orders in accordance with the following —

> (i) That the appeal against the orders made by Ms W Wilmoth on 15 November 2001 in the proceeding between John David Burton Phillipson and Elizabeth Phillipson v Indus Realty Pty Ltd (ACN 089 421 358) is allowed.
>
> (ii) That the orders made on 15 November 2001 in the said proceeding be set aside.
>
> (iii) In lieu of the orders made, order -
> (a) that the complaint brought by John David Burton Phillipson and Elizabeth Phillipson against Indus Realty Pty Ltd be dismissed with costs;
>
> (b) that John David Burton Phillipson and Elizabeth Phillipson pay to Indus Realty Pty Ltd the sum of $30,000 together with damages in the nature of interest to be determined;
>
> (c) that the said John David Burton Phillipson and Elizabeth Phillipson pay the costs of the counterclaim by Indus Realty Pty Ltd to be fixed in accordance with the appropriate scale.
>
> (iv) That the respondents to the appeal pay the appellant's costs including any reserved costs.

APPEARANCES: For the appellant Indus Realty Pty Ltd: Mr W Gillies, counsel. Raelene Ann Murley, solicitors. For the respondents: Mr R Boaden, counsel. Stuart Morgan & Associates, solicitors.
