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## SUPREME COURT OF VICTORIA

***TROTTER v McSPADDEN and ANOR***

Gobbo J

19 June, 24 September 1985

**[1986] VicRp 32; [1986] VR 329; [1985] V Conv R 54-177; Noted 59 Law Inst Jo 1373**

**PRINCIPAL AND AGENT – ESTATE AGENT – COMMISSION – AGENT AUTHORIZED TO SELL – COMMISSION PAYABLE UPON LEGALLY BINDING CONTRACT BEING SIGNED – PURCHASER FOUND – CONTRACT SIGNED SUBJECT TO SPECIAL CONDITION – CONDITION NOT SATISFIED – WHETHER AGENT ENTITLED TO COMMISSION.**

McS. engaged T. Pty Ltd, estate agents, to sell their property, and agreed:

"... that the commission payable therefor ... shall be payable ... upon a person ... signing ... a document whereby that person legally binds himself to become the purchaser of the property."

T. Pty Ltd found a purchaser who signed a sale note containing a special condition that the sale was:

"Subject to and conditional upon the purchasers entering into an unconditional contract of sale for the sale of their property ...

When this special condition was not satisfied, McS. engaged another agent, and refused to pay T. Pty Ltd's claim for commission on the first "sale". At the subsequent hearing in the Magistrates' Court, T. Pty Ltd argued entitlement to their commission upon their securing a person who legally bound himself to become a purchaser. The magistrate held otherwise. Upon order nisi to review—

**HELD: Order nisi discharged.**

**(1) The terms of the engagement provided that commission would be payable upon a third person's purchasing the property.**

**(2) As that condition was not satisfied, a binding contract for the purposes of bringing about an entitlement to commission did not occur.**

***Scott v Willmore & Randell* [1949] VicLawRp 21; [1949] VLR 113; [1949] ALR 510, distinguished. *Gerlach v Pearson* [1950] VicLawRp 56; [1950] VLR 321; [1950] ALR 717; and *Reid v Bennett* [1955] VicLawRp 79; [1955] VLR 505, applied.**

**GOBBO J:** [1] This is the return of an order nisi to review the decision of the Stipendiary Magistrate at Frankston relating to a claim for commission by the applicant before me, William James Trotter. The basic facts, so far as they are relevant to the order to review, may be summarised as follows. The applicant estate agent had been duly engaged to sell the respondents' property at Ormington. The agent had secured a purchaser for the property and both the vendors and the purchaser had signed a sale note, which was drawn up in the prescribed form of the Real Estate and Stock Institute of Victoria. The sale note, which was signed on the 19th February 1983, contained a special condition that the sale was:

"Subject to and conditional upon the purchasers entering into an unconditional contract of sale for the sale of their property situated at and known as 729 Ferntree Gully Road, Glen Waverley on or before the 19th day of March 1983 such contract providing for settlement to be effected not later than the 19th day of May 1983."

[2] No unconditional contract within the meaning of the special condition had been entered into by the 19th March. It thereafter transpired that the respondents, who were the vendors, engaged another estate agent, who secured a purchaser of their property on terms that were different in some respects to those contained in the original sale note. The respondents refused to pay the applicant commission in respect of what might be described as the first sale. At the hearing of the claim for commission, the learned Stipendiary Magistrate made a number of findings in

favour of the respondents in relation to the transaction and held that, on the proper construction of the terms of the engagement, the applicant was not entitled to commission, having regard to the fact that the special condition had not been fulfilled.

There were a great many grounds contained in the order nisi and these were substantially repetitive. They fall into two categories. The first covers those grounds that turn on a number of issues that were contested before the Magistrates' Court, in particular whether there had been a waiver of the condition by the purchasers. All of these grounds involved demonstrating that the learned Stipendiary Magistrate should have made other findings. As was properly conceded before me, it was not open to the applicant in effect to seek to set aside the Magistrate's findings unless it could be said that on no reasonable view of the evidence could these findings have been arrived at. As is obvious, this could not be, and was not, contended in the present case, and accordingly the area of challenge represented by this first category of grounds cannot be sustained.

[3] The second category of grounds may be simply summarised as directed to the twofold proposition that, where there is a contract which is expressed to be conditional upon a certain event, in this case the entry into another contract, then an agent becomes entitled to commission once he has secured a person who legally binds himself to become the purchaser and that secondly, this purchaser had legally bound himself. I accept the submission that was put in this case that, a condition of the kind in question here or, for example, a condition as to availability of finance, is a condition subsequent and not a condition precedent to contract.

It may therefore be said that the contract represented by the sale note in the present case was a contract subject to a condition subsequent. It would also follow that, subject to the condition subsequent, it was a binding contract. The critical question is whether the purchasers here legally bound themselves to become the purchasers of the property and, if they did, did the entitlement to commission accrue immediately upon that act occurring, represented as it was by the vendors and the purchaser signing the contract embodied in the sale note?

The applicant contended before me that this was a binding contract because a whole range of rights and obligations flowed from the signatures being appended to the sale note. It was submitted that it could not be said that this was not a legally binding contract and that, therefore, the purchasers had legally bound themselves to purchase. It was submitted that the case was covered by the decision of the Full Court in *Scott v Willmore & Randell* [1949] VicLawRp 21; [1949] VLR 113; [1949] ALR 510. There, the agent's entitlement to commission turned upon his selling the property. The agent had procured a person to [4] sign a contract of sale but the purchasers had failed to pay the balance.

The trial Judge had disallowed commission on the basis that the purchasers would not be able to complete the contract. On appeal, it was held that the agent was entitled to commission on the execution by the vendor and purchaser of the contract of sale. The distinction was clearly drawn between entering into a binding contract and completion of such contract, including the ability of the purchaser to perform his contract. It was held that the agent's commission was not contingent upon completion.

In my view, the decision of the Full Court in *Scott v Willmore & Randell* does not assist the applicant in the present case. This is not a case of a purchaser who either fails to complete or is unable to complete. Strictly speaking, it is not a case of completion of the contract at all. I here use the term 'completion of the contract' in contrast to 'formation of the contract' or 'resolution of the contract' as a result of the operation of conditions not related to performance of obligations under the contract. The present case falls to be decided upon the terms of the engagement. These were extremely cryptic and read as follows:

"The terms of this engagement are that the commission payable therefor shall be as prescribed under the *Estate Agents Act* and that such commission shall be payable by me/us to you upon a person found or introduced by you signing (either by himself or by his agent) a document whereby that person legally binds himself to become the purchaser of the property."

In my view, a contract, though in some or most respects legally binding, which was conditional upon a particular event occurring that was not related to obligations resting on either of the parties to the contract, was not a binding contract for the purposes of the engagement. I

reach this view [5] for a number of reasons. An agent does not become entitled to commission until the condition upon which the binding force of the contract depends is satisfied. It may be true that for certain purposes there is a legally binding contract, but it is not, in my view, a binding contract for the purposes of bringing about an entitlement to commission.

Even if this were not so as a matter of principle, this is true here as a matter of construction. The contract of sale is really a statement by the purchaser that there is only a legally binding contract if or only to the extent that a certain event occurs. It is not an event that relates to performance of the contract. It is an event that contemplates that an extraneous event unconnected with performance is necessary to make the contract binding. Moreover, the engagement and entitlement to commission is subject to a possible implication that the commission is not payable in the event of the condition not being fulfilled. This last approach can be put in another way that seems to me to accord with principle and also reflects what would be the normal expectation of the parties in this situation. It can properly be said that the agent is entitled to commission but that entitlement is subject to defeasance if the condition is not satisfied.

The above view not only does not conflict with the decision of the Full Court in *Scott v Willmore & Randell* but is more consistent with *dicta* in two other cases, namely, *Gerlach v Pearson* [1950] VicLawRp 56; [1950] VLR 321; [1950] ALR 717 and *Reid v Bennett* [1955] VicLawRp 79; [1955] VLR 505; [1956] ALR 148. In the first case Dean J expressed the view that, where there had been a sale subject to finance, there was no binding agreement. Accordingly, the agent was not entitled to commission. His Honour at p325 said as follows:

[6] "In the present case, it becomes important to determine what is the precise event upon which commission has been promised. If it be upon securing a person who makes a binding agreement, and so becomes a purchaser, that event has not occurred. The document signed is not a binding and enforceable contract for two reasons. In the first place, it is subject to a condition and is not to become binding unless that condition is fulfilled – *McCallum v Hicks* [1950] WN 190; *Comley v Wellman* [1948] 65 WN (NSW) 268; *Marks v Board* [1930] 46 TLR 424; *Henry v Buxton* [1904] 4 SR (NSW) 264; 21 WN (NSW) 92. In the second place, the document lacks certainty. Some day, in some manner, the purchaser has to pay the balance of the purchase money with interest at some rate in the meantime. The document is silent as to these matters. The clause written in the margin of the contract is vague and obscure in other ways which it is unnecessary to discuss. The document, therefore, was not a sale, and Davey did not become a 'purchaser' in the relevant sense by signing it."

In *Reid v Bennett*, Sholl J spoke in terms of indefeasible entitlement when discussing agent's commission. A conditional contract would not bring about such entitlement. The conclusion that I have come to not only accords with such authorities as exist, but does not involve the possible anomalies of the opposite view. If the applicant's contention were accepted, it would mean that a vendor would be compelled to pay commission in circumstances where it was clear at the outset that the whole sale was entirely conditional upon some subsequent event. It is, of course, always open to parties to contract even upon a basis that might be thought to be unduly onerous, but it would seem to me somewhat anomalous that commission became payable when, at the outset, it was found that the contract was totally conditional upon some outside event not dependent on any act or default of either party. This is all the more so when it is the agent who [7] actually drew up the contract containing the crucial condition in question that is making the claim for commission.

Accordingly, I find that the challenge to the decision of the learned Stipendiary Magistrate fails and the Order Nisi will be discharged with an order that the applicant pay the respondent's taxed costs.

Solicitors for the applicant: DIB Welsh, Major and Co.

Solicitors for the respondents: McCullough Kollias and Co.