45/87

SUPREME COURT OF VICTORIA

ESCROW REALTY CORPORATION PTY LTD v SELMONT PTY LTD

Murray J

17 November 1987

AGENCY – REAL ESTATE AGENT – AGENT IN VICTORIA – TRANSACTION EFFECTED IN RESPECT OF PROPERTY IN QUEENSLAND – WHETHER AGENT ACTED AS AN ESTATE AGENT IN QUEENSLAND – AGENT NOT LICENSED IN QUEENSLAND – WHETHER AGENT ENTITLED TO COMMISSION: *AUCTIONEERS AND AGENTS ACT* 1971-1985 (QLD), SS5, 14, 70.

A Victorian company ERC P/L ('agent') was engaged by a Queensland company S P/L ('vendor') to effect a sale of property the vendor owned in Queensland. In due course, the agent introduced a potential purchaser (who was resident in Victoria at the time) who agreed to buy the property. During the transaction, no representative of the agent visited Queensland, and all communications with the vendor were by mail or telephone. The contract of sale was posted by the agent to Queensland for signature by the vendor. When the vendor failed to pay to the agent the balance of the commission owing, the agent sued in the Magistrates' Court at Melbourne. On the hearing, the Magistrate dismissed the claim on the ground that the agent had acted as an estate agent in Queensland and was not entitled to claim commission on the sale because the agent was not licensed pursuant to the provisions of Queensland *Auctioneers and Agents Act* 1971-1985 ('Act'). Upon order nisi to review—

HELD: Order absolute.
1. The provisions of the Act, so far as relevant to the transaction in question, only relate to a person acting as an agent in Queensland.
***Freehold Land Investments Ltd v Queensland Estates Pty Ltd* [1970] HCA 31; (1970) 123 CLR 418; (1970) 44 ALJR 329, discussed.**

2. Notwithstanding that the property and one of the parties to the contract were in Queensland, it did not follow that the agent acted as a real estate agent in Queensland.

3. Accordingly, from the terms of the agency agreement, the agent had fulfilled its function and became entitled to the commission upon obtaining the purchaser's signature to the binding contract of sale.

MURRAY J: [1] This is the return of two orders nisi to review decisions of the Stipendiary Magistrate sitting at Melbourne on 3rd April 1987. The proceedings before the Magistrate were two default summonses which were heard together. In one summons the applicant was the complainant and the respondent the defendant whilst in the other summons the positions were reversed. In the first summons the applicant claimed the sum of $6,661.80 alleged to be due to it as the balance of commission owed to it by the respondent. In the other summons, the respondent claimed the sum of $6,000 which it claimed had been received by the applicant as part of the deposit due on sale of a property in Queensland. After hearing the evidence and the submissions of the parties, the Magistrate dismissed the summons in which the applicant was the complainant and **[2]** found in favour of the respondent on the other summons ordering the applicant to pay the respondent $6,000 together with $224 interest and $2,100 costs. The applicant obtained orders nisi to review the Magistrate's decisions on both summonses upon the simple and single ground that in making the orders that he did make the Magistrate was wrong in law.

At the outset I may say that I have been greatly assisted in the consideration of the orders nisi by the fact that the Magistrate delivered his reason for his decisions in writing and these reasons have enabled me to understand the basis of his decisions. My task has also been made very much easier by reason of the fact that provisions in Queensland similar to the provisions which are under consideration at present have been considered and discussed by the High Court in *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* [1970] HCA 31; (1970) 123 CLR 418; 44 ALJR 329. For the sake of brevity I shall refer to this decision as "Freehold". The facts which the Magistrate found are set out in his written reasons as follows:

"Ms Warren of Selmont Pty Ltd met the owner of Maceval Pty Ltd, Mrs Smith, in March 1986 in

> Queensland where Mrs Smith was interested in purchasing the leasehold in a nursing home at Southport. Mrs Smith showed interest in buying the business. Mrs Warren told her that she was willing to sell the freehold. Mrs Smith expressed interest in buying the freehold. Mrs Smith inspected the premises on 16th March. She was informed that the purchase price was $600,000.
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> It appears that in about the third week in May Mr Hahn from Escrow telephoned Mrs Warren and asked if the freehold was still available for sale. I find that Mr Hahn probably did tell her that a company was interested and that there would not have to be an inspection because the purchaser had seen the property already. **[3]** I also believe that Mr Hahn told Mrs Warren that he had in fact two potential purchasers.
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> Mr Hahn asked Ms Warren if he could act as her agent in the sale for commission and was informed that the purchase price of $600,000. He then advised her that he would send her a part executed agency agreement to be signed by her as proprietor of Selmont Pty Ltd. On 27th May 1986 Mr Hahn wrote to Mrs Warren stating that he had a potential buyer and enclosing a non-exclusive agency agreement. On 30th May Selmont Pty Ltd signed the agreement and returned it to Escrow.
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> Mr Hahn gave evidence that he later contacted Mrs Smith because he knew she was interested in buying the freehold. Mrs Smith was resident in Victoria at the time. He gave evidence that he knew Mrs Smith was a potential purchaser before he rang Mrs Warren. The contract for the sale of the land was executed by the purchaser and vendor late in July 1986.
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> It appears to me that Mr Hahn found or introduced the potential buyer. Mrs Warren says she discussed the sale of the land in March 1986 with Mrs Smith who showed an interest in purchasing but nothing of any consequence (sic. happened) from then on until Mr Hahn's intervention in mid to late May. Mrs Warren's discussion with Mrs Smith never amounted to more than a mere expression of interest in purchasing by Mrs Smith. It seems clear that Mr Hahn approached Ms Smith explained the terms of the sale to her and arranged for the formalities of sale. There is no suggestion that Mrs Warren ever alerted Mr Hahn to Mrs Smith's existence. On the facts of the case I would say that Escrow was entitled to the payment of the commission."

The Magistrate added the last remark in order to give his view on a defence to the claim for commission advanced by the respondent that the applicant had not, in fact, introduced a purchaser. The Magistrate made these findings lest his decision on a matter of law be later held to be incorrect and to avoid the necessity of the summonses in that event being sent back for further hearing.

[4] The agency authority signed by the respondent provided for a payment of commission "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 ..." Upon the signing of the contract the purchaser paid the sum of $6,000 by way of preliminary deposit to the applicant and it is this sum which the respondent successfully claimed from the applicant. The applicant's claim for $6,681.80 was for the balance of the commission due to it in accordance with the provisions of the agency agreement together with the sum of $1.80 being financial institutions duty.

In short the Magistrate dismissed the applicant's claim on the ground that the applicant had acted as an estate agent in Queensland and by virtue of the provisions of the *Auctioneers and Agents Act* 1971-1985 of the State of Queensland it was not entitled to claim commission on the sale because it was not licensed under that Act. In finding for the respondent that the applicant had acted as a real estate agent in Queensland the Magistrate detailed the following reasons:

> "(i) The land and one of the parties were in Queensland;
> (ii) The agent earned his commission in Queensland when the contract was completed in Queensland.
> (iii) The contract for the sale of the land was partly executed in Queensland and partly in Victoria; and
> (iv) The contract of sale was based on the land practices and usages of Queensland."

[5] For the present purposes I shall assume, as appears to have been assumed throughout this case, that the proper law of both the contract of agency and the contract of sale of the land in question is the law of Queensland. Unless that assumption is correct it is difficult to understand how the provisions of a Queensland Act of Parliament have anything to do with the dispute. However, on the view which I have formed the question of the proper law of contract is not important because it appears to me that the provisions of Queensland legislation, so far as relevant, only relate to a person acting as an agent in Queensland and, in my opinion, the

evidence does not establish that the applicant did at any stage act as an agent in Queensland. It is common ground that no representative of the applicant stepped foot in Queensland in relation to any of the matters in dispute. Communications between the applicant and the respondent were by mail or by telephone, the applicant being in Victoria and the respondent in Queensland.

It becomes necessary to consider the relevant sections of Queensland *Auctioneers and Estate Agents Act.* Section 5 defines a real estate agent as:

> "Any person who, as an agent for others, and whether on commission or for or in expectation of any fee, gain or reward ... exercises or carries on or advertises or notifies or states that he exercises or carries on ... the business of buying, selling, exchanging, or letting houses, land or estates, or negotiating for such buying, selling, exchanging, or letting, ...

Section 14(4) provides that no person shall act as a real estate agent unless he is the holder of a real estate agents licence. Section 70 provides that no person **[6]** shall be entitled to sue for or recover or retain any fee, commission, reward or other remuneration for or in respect of any transaction as an auctioneer or real estate agent unless at the time of transaction he was the holder of a licence as an auctioneer or real estate agent ... under the Act.

In *Freehold* the High Court considered a case in relation to the provisions of the *Auctioneers, Real Estate Agents, Debt Collectors and Motor Dealers Acts* 1922-1961. The facts were significantly different from the facts in the present case. The Act was the forerunner of the present *Auctioneers and Estate Agents Act* 1971-1985 and it is not suggested that the relevant provisions, to which I have referred, in the present Act differ from those in its predecessor which were considered by the various members of the High Court. In *Freehold* the estate agent was a company incorporated in Hong Kong and the agency agreement between the respondent, a company incorporated in Queensland and the estate agent related to the possible sale of land in Queensland owned by the respondent. At some stage in the course of negotiations for a contract for the sale of the land by the respondent a representative of the appellant agent travelled to Queensland and, in Queensland conducted negotiations with the respondent vendor which related mainly to the terms on which the appellant agent should be entitled to commission on the sale of the land in question.

The majority of the Court, Barwick CJ, McTiernan and Walsh JJ held that the agent was not entitled to commission by virtue of the fact that it had, contrary to Queensland law, acted as an agent in Queensland. The **[7]** minority, Menzies and Owen JJ dissented on the ground that in negotiating with its principal the agent was not, within the terms of the definition in the Act, acting as "agent for others" because in carrying out the negotiations the agent was acting on its own behalf as the subject matter was the terms of its employment by the vendor. All the Court, however, agreed that the provisions of Queensland legislation were directed only at persons acting as an agent within the State of Queensland. Walsh J pointed out that the Act did not address itself to land in Queensland. He said (p440):

> "The Parliament of Queensland could have legislated validly for the control of agents who engaged, either in Queensland or elsewhere, in selling or buying or otherwise dealing with land or other property situated within the State of Queensland. It might have selected the locality of the property rather than the localities of the activities of the agents as providing a sufficient territorial connexion between the legislation and the State of Queensland. However the Act does not contain any express statement by which its general words are confined by some territorial limitation. The enactment in section 2(2) that the provisions of the Act relating to real estate agents and to certain other persons therein mentioned 'shall be in force throughout Queensland' is not of assistance in deciding the manner in which the provisions of the Act should be so construed as to accord with the presumption that they were not intended to have an extra-territorial operation. However I am of the opinion that it is right to suppose that the relevant provisions of the Act ... should be construed so as to apply only to persons who in Queensland act as real estate agents or carry on the business of a real estate agent."

(my emphasis)

The other members of the Court were of a similar opinion. It follows that, on the authority of the decision in Freehold, the question which must determine this case is whether the applicant acted as an agent in Queensland. **[8]** With all respect to the Magistrate it appears to me that the four aspects to which he referred do not answer this question. The fact that the land and one of the parties to the contract of agency and of sale were in Queensland does not answer the question whether the agent acted as an agent in Queensland. Nor is it correct to say that the agent earned

his commission in Queensland when the contract was completed in Queensland. Both from the terms of the engagement of the applicant as an agent and from ordinary principles the agent had fulfilled its function and had become entitled to commission upon obtaining the signature of the purchaser to a binding contract of sale: See *Luxor (Eastbourne) Ltd v Cooper* (1941) AC 108; [1941] 1 All ER 33; Storey & Goldberg, *Real Estate Agency in Victoria,* 2nd Ed, Chapter 4. It might be said that it was incumbent upon the applicant as part of its function as an agent to send the signed contract to the vendor in Queensland. But I am not able to comprehend how it can be said that the posting of the contract in Victoria by the agent constituted acting as an agent in Queensland merely because when the vendor received it in Queensland, it executed it and the contract was thereby concluded.

The principles of offer and acceptance do not appear to me to have any relevance to the question whether the applicant acted in Queensland. Notwithstanding this I notice that if one treats the sending of the contract signed by the purchaser to the vendor as an acceptance then an acceptance of a contract by post is deemed to have been made when the acceptance was posted: See *Entores Ltd v Miles Far East Corporation* [1955] EWCA Civ 3; [1955] 2 QB 327; [1955] 2 All ER 493; [1955] 3 WLR 48; [1955] 1 Lloyds Rep 511; 99 Sol Jo 384. The final two matters referred to by **[9]** the Magistrate do not appear to me to have any bearing on the question whether the applicant acted as an agent in Queensland.

The Magistrate referred to the judgment of Walsh J in *Freehold* at p444 where His Honour said:

> "If, therefore, no obstacle had stood in the way of an immediate completion of the sale by means of the signing and sealing by the respondent as vendor of the document so produced and if it had been so completed, the result would have been in my opinion that the appellant would have acted, partly outside Queensland and partly in Queensland, as a real estate agent in relation to that transaction of sale. It would have so acted, partly in Queensland, because its production of the contract for the purpose of signing by the vendor would have taken place in Queensland and that would have been one of the essential parts of the appellant's function of negotiating for the selling of the land."

In my view, with respect to the Magistrate, that passage does not bear out his decision. I say this for two reasons. First of all, the representative of the agent in Freehold travelled to Queensland and it appears to me that Walsh J was assuming that the production of the contract for signature by the vendor was by such representative in Queensland. Furthermore, the terms of the engagement of the agent and the terms upon which the agent would be paid commission depended upon the vendor executing the contract. As I have pointed out, the agent in the present case became entitled to its commission upon obtaining the signature of the purchaser to a binding contract. The facts in Freehold were significantly different.

The Magistrate went on to express the view that the purpose of Queensland Act was to control the qualifications and activities of agents and that the provisions of the Act are designed to protect purchasers and vendors of land in Queensland from **[10]** incompetent or ill-trained agents. His Worship said that the scope of the legislation should, therefore, be read as widely as possible to include agents who are involved in the sale of land in Queensland but who do not physically enter that State. One could apply that reasoning to a case in which the owner of land in Queensland comes to Melbourne and engages an agent in Melbourne to find a purchaser for land which he owns in Queensland.

If the agent immediately finds a purchaser and the contract is concluded in Melbourne, it could not possibly be said, in my opinion, that the provisions of Queensland Act would apply. Even though Walsh J expressed the view that the Parliament of Queensland could, if it chose to do so, direct its legislation to the sale of land in Queensland, the fact remains that it has not chosen to do so. Its provisions relating to the activities of estate agents must be given an interpretation relating to those activities in Queensland and the presumption against extra-territorial legislation will apply.

It follows that while I must express my appreciation of the careful reasoning which the Magistrate applied to his decision in this case, I am nevertheless constrained to say that he was in error. It follows that the orders must be absolute in each case. Unless the parties are able to agree on the questions of interest and costs, it appears to me that I have no alternative but to

order that each of the summonses be remitted to the Magistrate to make orders in accordance with this judgment. I therefore order that the orders nisi be made absolute in each case and that the summonses be remitted to the **[11]** Magistrate to make the appropriate orders including orders in respect of interest and costs. I order that the respondent pay the applicant's costs of these proceedings.
