

36/00; [2000] VSC 497

**SUPREME COURT OF VICTORIA**

***TJ BOARD & SONS PTY LTD v B & G POLLARD PTY LTD***

**Smith J**

**10, 27 November 2000**

**CIVIL PROCEEDINGS – ESTATE AGENT – CLAIM FOR COMMISSION ON SALE OF PROPERTY – STATUTORY PROVISION REQUIRING AGENT TO INFORM VENDOR OF CERTAIN INFORMATION BEFORE OBTAINING VENDOR'S SIGNATURE – AUTHORITY SIGNED BY VENDOR ACKNOWLEDGING HAVING BEEN INFORMED THAT AGENT'S FEES ARE SUBJECT TO NEGOTIATION – CLAIM FOR COMMISSION – RULING BY MAGISTRATE THAT AGENT MUST EXPLICITLY INFORM VENDOR – CLAIM DISMISSED – WHETHER MAGISTRATE IN ERROR: *ESTATE AGENTS' ACT 1980*, SS49A, 50.**

Section 49A of the *Estate Agents Act 1980* ("Act") provides:

- (1) An estate agent must not obtain, or seek to obtain, any payment from a person in respect of work done by, or on behalf of, the agent or in respect of any outgoings incurred by the agent unless—
  - (a) the agent holds a written engagement or appointment that is signed by the person ... ; and
  - (b) before obtaining the person's signature to the engagement or appointment, the agent ... informed the person ... that the commission to be paid to the agent under the engagement or appointment and any money to be paid by the person in respect of the outgoings were subject to negotiation.

TJB was appointed as exclusive agent to sell a property owned by P. TJB faxed an exclusive sale authority to P. The authority contained the following sentence:

"The vendor acknowledges having been informed by the agent before signing this authority that the agent's fees and the marketing expenses are subject to negotiation."

P. signed the authority and faxed it back to TJB. Subsequently, TJB issued proceedings in the Magistrates' Court seeking an amount for commission on the sale of the property. In dismissing the claim, the magistrate ruled that the statute required the agent to explicitly inform the client in respect of each engagement as to fees before the agreement was signed. Upon appeal—

**HELD: Appeal allowed. Remitted for further hearing and determination.**

**The obligation imposed upon the agent is to inform the person before obtaining the person's signature to the engagement. Section 49A of the Act on its proper construction does not justify the interpretation placed upon it by the magistrate. It does not matter how or when the client is informed prior to the signing of the document.**

**SMITH J:**

**Appeal**

1. The Appellant, TJ Board & Sons Pty Ltd, (Board) appeals from an order made in the Magistrates' Court on 21 June 2000 dismissing its complaint with costs. Board had issued proceedings in the Magistrates' Court seeking the sum of \$34,500 for commission on the sale of the Central Hotel, 1 Old Princess Highway Beaconsfield. Board was the agent authorised to sell the property and the respondent, P B & G Pollard Pty Ltd (Pollard) was the owner. The complaint was dismissed following the learned magistrate's decision to uphold the no-case submission of Pollard.

**Evidence in the Magistrates' Court**

2. So far as is relevant to this appeal, the evidence given on behalf of Board before the learned Magistrate was that, on 23 October 1998, it had a discussion with Mr Graham Pollard, a director of the respondent, and that as a result of that discussion Pollard agreed to appoint Board its exclusive agent for the sale of the property for a period of 30 days. At the request of Pollard, Board faxed an exclusive sale authority to Michael Pollard on 23 October 1998. On the same day, Michael Pollard signed the authority on behalf of Pollard and faxed it to Board.

The authority contained the following sentence:

"The vendor acknowledges having been informed by the agent before signing this authority that the agent's fees and the marketing expenses are subject to negotiation."

### Relevant legislation

3. To understand the issues raised and the learned magistrate's reasons it is necessary to refer to the relevant provisions of the *Estate Agents Act* 1980. The provisions to be considered are ss49(A) (1) (a) (1) (b) and s50(1)(b).

#### **49A. Offence not to give certain information about commission**

(1) An estate agent must not obtain, or seek to obtain, any payment from a person in respect of work done by, or on behalf of, the agent or in respect of any outgoings incurred by the agent unless (a) the agent holds a written engagement or appointment that is signed by the person (or the person's representative); and

(b) before obtaining the person's signature to the engagement or appointment, the agent (or an agents' representative employed by the agent) informed the person (or the person's agent or representative) that the commission to be paid to the agent under the engagement or appointment and any money to be paid by the person in respect of outgoings were subject to negotiation;

#### **50. Commission**

(1) Subject to sub-section (2) an estate agent shall not be entitled to sue for or recover or retain any commission or money in respect of any outgoings for or in respect of any transaction unless—

(a) ...

(b) the agent has complied with section 49A(1) with respect to the engagement or appointment to undertake the transaction and is not in breach of section 49A(2) with respect to the engagement or appointment."

### The learned magistrate's decision

4. The learned magistrate gave detailed reasons. He referred to the Act and expressed the view that knowledge acquired by the vendor from past dealings would not discharge the agent from the statutory obligation to inform the vendor of the right to negotiate the commission. He said that the state of mind of the client is not the issue, the issue is the informing of the client. He said the evidence adduced for Board established that the required information was not conveyed in discussions between the parties at any time prior to the signing of the agreement.

5. Referring to the parties' submissions he said that Board argued that the making of the acknowledgment on the face of the agreement, even if not amounting to either an admission or an estoppel, itself effected compliance with the statute when the pro-forma agreement is signed subsequently by the person concerned. He said that in other words, Board was saying that the acknowledgment had the same effect as if it had said "I hereby inform you that my fees are negotiable". He said that Board argued that no person reading the acknowledgment and then signing the agreement could be said to be uninformed as to the situation with respect to the agent's fees. He noted that Board further argued that in forwarding the agreement containing the acknowledgment, it was the agent who was informing the client of the necessary matters.

6. He then summarised Pollard's argument to the effect that there was a clear distinction to be drawn between a positive act required by law and an acknowledgment that such an act had occurred. The learned magistrate then said

"if the forwarding of the pro-forma by the agent does not amount to informing, then in my opinion the defendant is plainly correct. The issue is whether such informing must be independent of words couched as an acknowledgment in a pro-forma which proves the engagement between the parties, and creates a liability to pay the fees."

His Worship then went on

"While this is a short point it is not a particularly easy point to resolve ... The point at issue is a somewhat technical point perhaps, and my conclusion is that the statute requires an agent to explicitly inform a client in respect of each engagement as to his fees, in circumstances where the client or person has been properly informed of these matters before turning to the face of and proceeding to sign the agreement in question, whatever acknowledgments this particular agreement may itself contain."

On this basis he upheld the no-case submission.

**Questions of law raised by the appeal**

7. The questions of law raised in the appeal identified by the Master are as follows:

(a) Whether the expression "the person's signature" in s49A(1)(b) of the *Estate Agents Act* 1980 ("the Act") can apply to a company?

(b) Did the faxing of an exclusive sale authority dated 23 October 1998 (being exhibit "DG9" to the said affidavit of Dennis Galimberti) to the Respondents representative constitute compliance with s49A(1)(b) of the *Estate Agents' Act* 1980.

(c) Whether the finding by the learned magistrate at the close of the case for the appellant that the respondent had no case to answer was one which upon the evidence a reasonable magistrate could make.

**Issues argued on appeal**

8. The appellant, Board, does not press the issue raised in the first question of law noted above but presses the remaining matters. The question of law raised in question (c) is to be resolved, however, on the basis of whether the appellant is successful on the issue raised in question (b). There were no other matters sought to be relied upon to argue that the learned magistrate erred in finding no case to answer.

9. Before me, arguments presented below for Board were re-canvassed in challenging the learned magistrate's analysis. In addition, however, counsel for Board submitted that there was nothing in the section which justified the learned magistrate's conclusion and that, in fact, the learned magistrate had added further requirements not spelt out in the legislation. He submitted that the intent of parliament was to ensure that vendors were informed that commissions and outgoings were subject to negotiation before signing an agency agreement. The Act however did not prescribe the way in which the information was to be given and he submitted that plainly it might be given orally or in writing or by both means. He submitted that there was nothing to be found in the provision to warrant a requirement that the vendor be given the prescribed information "before turning to the face of, and proceeding to sign the agreement in question". He said that what the learned magistrate was saying in those remarks was that the client had to be informed before reading the document to be signed.

10. The respondent, Pollard, did not dispute the analysis of the learned magistrate's reasons but submitted that the reasons were correct and that the sentence in the statement did not constitute an informing of the client and could not do so and that the informing had to occur before the perusal of the document.

**Analysis and Conclusion**

11. The purpose of the provisions is, presumably, to inform and so empower potential clients of estate agents to negotiate commission and expense arrangements. In those aims, it might be said to recognise an imbalance in bargaining position between estate agents and their prospective clients. If such be the purpose, one might question whether the spirit of the provision is being honoured where an estate agent does not inform the client of the right to negotiate prior to entering into an oral agreement with the client and merely conveys that information on the authority document in very fine print which may well be overlooked by the client.

12. The learned magistrate's construction would better achieve the purpose than that argued for by the respondent. It is a construction I would favour but for the fact that I do not think there is sufficient support in the language of the section. The obligation imposed upon the agent is to inform the person "before obtaining the person's signature to the engagement or appointment". Read on its own it might be argued that the phrase "obtaining the person's signature" covered a period of time which included the period during which that signature was sought — in other words it was referring to the process of obtaining the person's signature. But the words at the commencement of s49A(1) draw a distinction between obtaining and seeking to obtain and one should proceed on the basis that the words were being used in a similar way in both parts of the section. It seems to me that the section, on its proper construction, does not justify the interpretation placed upon it by the learned magistrate. It does not matter how or when the client is informed provided that the client is informed prior to signing of the document. If a different result was intended by the Parliament, amendment of the legislation is required.

13. The issue that then arises for determination is whether, on the evidence, the representative of the respondent read the relevant portion of the document and so was informed; for the obligation to inform is not complete until the information is received. As the no case submission focused solely on the point whether the informing must occur outside the authority document, this issue was not dealt with below. In those circumstances, error of law having been established, the proper course is to refer the matter back to the Magistrates' Court in Melbourne for hearing and determination according to law. I will hear further submissions on the precise form of the order to be made.

**APPEARANCES:** For the appellant Board: Mr T Messer, counsel. Maurice Blackburn Cashman, solicitors. For the respondent: Mr D Christie, counsel. Williams Winter & Higgs, solicitors.

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