

50/92

SUPREME COURT OF VICTORIA

RT EDGAR PTY LTD v COVENTRY

McDonald J

2, 4 November 1992

AGENCY – SALE OF PROPERTY – SALE NOTE SIGNED BY PURCHASERS – OFFER REJECTED BY VENDOR – SUBSEQUENT CHANGE OF MIND BY VENDOR – SALE NOTE AND AGENCY AGREEMENT SIGNED BY VENDOR – DEPOSIT PAID BY PURCHASERS – DATE OF CONTRACT – WHETHER UPON DATE OF ORIGINAL OFFER OR SUBSEQUENT OFFER – WHETHER PROPERTY SOLD DURING AUTHORITY PERIOD – WHETHER AGENT ENTITLED TO COMMISSION: ESTATE AGENTS ACT 1980, S50.

On 2 June, purchasers signed a contract note offering to buy C.'s property. This offer was rejected by C. on 3 June. However, C. reconsidered on 5 June and asked RTE P/L (Agent) to ascertain if the offer to purchase was still available. Also on that date, C. signed a contract note and a sole agency agreement. On 6 June, the purchasers paid a deposit on the property and the agent deducted from it an amount by way of commission and taxes. C. subsequently sued the agent for wrongfully retaining the commission. The Magistrate upheld the claim on the basis that the property was sold on 2 June before the agency agreement came into existence, thereby disentitling the agent to claim commission. Upon appeal by the agent—

HELD: Appeal allowed. Order set aside. Complaint dismissed.

1. Once C. rejected the offer made by the purchasers, the offer came to an end and it was no longer open to C. to conclude a contract by subsequently accepting that offer. Accordingly, the signing of the contract note on 5 June did not constitute acceptance of the offer so as to make a contract on 2 June.

2. Under the sole agency agreement, the property was not deemed to be sold on 2 June because the agreement had not been entered into nor did the agent have C.'s authority to sell. However, having regard to the events which occurred on 5 and 6 June, it was open to conclude that the agent did everything under the agreement entitling it to commission.

McDONALD J: [1] I propose to give my judgment in this matter. The proceedings before the Court are in the nature of an appeal brought pursuant to the provisions of section 109 of the *Magistrates' Court Act* 1989 against an order of the Magistrates' Court at Heidelberg made on 5th June 1991 in proceedings wherein the appellant was the defendant and the respondents were the complainants. The proceedings were commenced by a complaint filed 5th February 1991 by the respondents against the appellant. The respondents claimed against the appellant payment of the sum of \$16,885.30 which they claimed that the appellant had wrongfully retained and kept from them for agent's commission and Government taxes on the sale of the property situated at Portsea and which they claimed the appellant had wrongfully converted to its use.

By their particulars of claim endorsed on the complaint, the respondents alleged, which allegation was admitted, that at all material times the appellant carried on a real estate agency business in Victoria and the respondents were the owners of property situated at 55 Bass Road, Portsea (the property). The respondents alleged that on 2nd June 1990 by a contract note signed by two purchasers, those persons offered to buy the property from the respondents on the terms therein set out. They alleged that on 5th June 1990 and after the purchasers had signed the contract note, thereby offering to buy the property, they engaged the appellant to sell the property on the terms and conditions set out in the contract note pursuant to [2] the terms of an exclusive sole agency agreement. They alleged that by the terms of the agreement they agreed to pay the appellant commission if at any time during the authority period the property was sold by the appellant. They allege that by further terms of the agency agreement it was agreed that the property was deemed to be sold by the appellant obtaining the signature of any persons upon a contract note offering to buy the property.

The respondents allege that on or about 6th June 1990 the appellant received from the purchasers a deposit of \$81,000 which was accounted for to the respondents save for the sum of

\$16,885.30 which they retained as agent's commission and Government taxes and in respect of which they wrongfully refused to pay and account for to the respondents. The respondents alleged that the retention of such moneys was wrongful and contrary to the provisions of section 50(1) (b) and (c) of the *Estate Agents Act* 1980 as in the circumstances the deemed date of the sale of the property was the 2nd June 1990, being the date on which the purchasers offered to buy the property by the terms of the contract note, at which time no written engagement or appointment signed by them was held by the appellant.

Section 50(1)(b) and (c) and subsection 2 of the *Estate Agents Act* 1980 provides as follows:

"1. Subject to subsection (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—
(b) his agent or appointment to act as agent in respect of the [3] transaction is in writing signed by the person charged or to be charged with the payment of the commission and the money in respect of outgoings (if any) or his agent or representative;

(c) the written engagement or appointment is held by him before he has done everything required of him under the terms of his engagement or appointment to be entitled to commission and money in respect of outgoings (if any).

2. The provisions of subsections 1(b) and (c) shall not apply in respect of any transaction or classes of transactions prescribed by the rules."

There was no issue in these proceedings that the provisions of subsections 1(b) and (c) of section 50 of the Act did not apply. By its defence to the respondents' claim the appellant admitted that it received the deposit of \$81,000 on the sale of the property on or about 6th June 1990 on behalf of the respondents. It denied however that it was not entitled to retain the sum of \$16,885.30 as commission and taxes and that it wrongfully retained that sum against the respondents. The appellant alleged that the offer in writing made by the purchasers on 2nd June 1990 was rejected by the respondents and on instructions of the respondents it advised the purchasers that the offer was rejected. By its defence it admitted that on 5th June 1990 the exclusive sole agency agreement was entered into but it contended that the property was not deemed to be sold until 5th June 1990 after the first respondent had requested the appellant to communicate to the purchasers that the respondents would accept the original offer.

On the pleadings there was no issue as to whether [4] the sum of \$16,885.30 was the correct sum of agent's commission and taxes on the sale of the property. At the conclusion of the trial the Magistrate sitting at Heidelberg found for the respondents and ordered that the appellant pay to the respondents the sum of \$16,885.30 with costs of \$1,982.80. It is against that order that the appellant appeals.

Before the Magistrate the first respondent gave evidence that in early April 1990 he had discussions with one Barrett sales representative of the appellant as to whether the appellant would be interested in selling his property at Portsea. He said that the appellant was appointed as agents at that point although agent's commission was not directly discussed. The first respondent gave evidence that one Anderson of the appellant inspected the property in April. He said that no agency agreement was signed at this time. He said they discussed advertising the property and opening it for inspection. He said that the appellant wrote a letter valuing the property at between \$880,000 and \$900,000. The first respondent said that towards the end of May 1990 Anderson advised him that the persons who were the eventual purchasers had made an offer of \$800,000. The first respondent gave evidence that he was not interested in that offer. He said that in the last week in May Anderson told him that the best offer he could get from the "purchasers" was \$810,000. He said that at this time he had not been given an authority to sign. The first respondent said that he asked Anderson to tell him when he had a signature from the purchasers on a contract note and that he sighted a [5] contract note on 5th June 1990. He said that he was aware that he was not required to pay commission unless there was a signed authority.

In answer to a proposition put to him by counsel for the appellant in cross-examination the first respondent gave evidence that he had not rejected the offer of \$810,000. He said that he regarded it as open for the period of six days as stated on the contract note. He denied that he had told Anderson that he would not accept the offer of \$810,000, but conceded in cross-examination

that on 4th June 1990 Anderson had told him that he had contacted the purchasers and told them that their offer was rejected. In further cross-examination the first respondent conceded that on 5th June he had telephoned Anderson, asked him if the offer was still available and told him that he had reconsidered and would accept the offer and that Anderson was to find out from the purchasers if they would still purchase the property at that price.

The second respondent gave evidence before the Magistrate that on 5th June 1990 after her husband had telephoned her and told her that the agent was coming to her home to have her sign the contract, the agent had come to her home and that she signed first a contract and then the authority for the agent.

During the course of the respondents' case before the Magistrate the contract note referred to was produced and tendered as was the agent's authority. The contract note by its terms provided that the appellant as agent for the respondents the vendors had obtained from the identified purchasers the offer to purchase [6] the property of \$810,000. It was signed by the purchasers. It further stated:

"This offer is made by the purchasers on 2/6/1990 and will lapse at midnight on 6/6/1990."

Underneath that there also appears:

"This offer is accepted by the vendor on 5/6/1990."

Thereafter appears the two signatures of the vendors. The 'Exclusive Sole Agency Agreement, Residential Property', was in the form of such agreement of the Real Estate Institute of Victoria. By its terms the respondents retained the appellant for 60 days as exclusive sole agent and it authorised the appellant to sell for \$810,000 or at such lower price as the vendor may agree, with a deposit of 10 per cent and the residue being paid on 3 August 1990. I shall hereafter refer to clauses relevant to that agreement being specifically clauses 2 and 6 of same.

On behalf of the appellant Anderson, a director of the appellant, gave evidence that on or about 30th May 1990 the ultimate prospective purchasers talked about offering \$800,000 for the property. Anderson in his evidence before the Magistrate said that the first respondent advised him that he would take between \$860,000 on a 60-90 day contract or \$875,000 once the tennis court and fencing had been completed. He said that it was agreed that he would get the best possible offer in writing and that following that he obtained the purchaser's signatures to the contract note on 2nd June 1990. Anderson gave further evidence before the Magistrate that he telephoned the respondent and advised [7] him of this and that the first respondent rejected the offer and that on the next day, 3rd June 1990, he communicated with the purchasers and advised them that their offer to purchase had been rejected.

Anderson said in evidence that on 5th June 1990 the first respondent communicated with him and told him that he had changed his mind and he wanted to sign the contract note and that he, Anderson, attended at the first respondent's office and the first respondent signed the contract note. He gave evidence further that as a consequence of the respondents, on 5th June 1990 deciding that they would accept \$810,000 which was the amount of the previous offer, on that day a fresh offer was requested by him of the purchasers.

A further witness was called and gave evidence on behalf of the appellant before the Magistrate; namely, Barrett. He gave evidence that on the 5th June 1990 he attended at the home of the second respondent and that she signed the contract note and the sole agency agreement. There was evidence before the Magistrates' Court from which it could be concluded by the Magistrate that the persons who signed the contract note purchased the property and took possession of the same. It was not an issue in dispute that the appellant received the deposit of \$81,000 and accounted to and paid the same, other than the amount in dispute, to the respondents.

Other than the evidence of Anderson that in consequence of the respondents on 5th June 1990 deciding that they would accept \$810,000 for the purchase of the property, and that he requested the purchasers to make a fresh offer, there was no direct evidence as to whether [8] they made an offer which was accepted by the respondents or they accepted an offer made by the respondents by their agent.

The case of the respondents was that on 2nd June 1990 the purchasers made an offer to purchase the property by signing the contract note, that on 5th June 1990 the respondents engaged the appellant to sell the property, that the deposit was paid for the purchase on 6th June 1990, that pursuant to the agency agreement the purchase was deemed to have taken place on 2nd June, but as contended by them there was not then in existence an agency agreement in writing and, therefore, the appellant was not entitled to be paid or to retain the commission as retained by it by reason of the provisions of section 50 of the *Estate Agents Act*. The appellant's case was that the respondents had rejected the purchasers' written offer of 2nd June, that in consequence no contract arose as a result of that offer, but rather the sale and purchase arose in consequence of the respondents on 5th June 1990 being prepared to accept \$810,000 for the purchase of the property and a fresh offer being sought in that amount from the eventual purchasers and that as on 5th June 1990 the appellant was authorised in writing as the respondents' agent they were entitled to retain the commission from the deposit.

The Magistrate in finding for the respondents stated that he was not satisfied that the appellant had complied with the *Estate Agents Act* in that on 2nd June 1990 when the purchasers signed the contract note. He said that there was not then in existence a signed [9] agency agreement and that that was the time pursuant to the exclusive sole agency agreement that the property was "deemed" to be sold. On being specifically requested by counsel for the appellant, the Magistrate found that the offer of 2nd June 1990 was rejected by the respondents.

In ordering that this appeal be referred to a judge and to be heard and determined pursuant to Rule 58.09 of the Rules of Court the Master of this Court by order stated a number of questions of law "to be considered" on the hearing of this appeal. Although in wide terms, the first two questions were the matters on which counsel for the appellant based his submissions, in contending that the Magistrate was wrong in law in reaching his decision in this case. Those stated questions were:

"(a) Was the learned Magistrate wrong in law in finding that the appellant was not entitled to recover or retain its commission pursuant to section 50 of the *Estate Agents Act* 1980.

(b) Was the learned Magistrate wrong in law in finding that the appellant was not entitled to retain its commission."

The starting point in considering this appeal is to consider the offer to purchase made by the purchasers on 2nd June 1990 and what occurred in relation to the same. The offer as contained in the contract note provided that it would lapse at midnight on 6th June 1990 and comprised an offer to purchase the property for \$810,000. There was a conflict on the evidence as to whether that offer was rejected by the respondents. It was the evidence of Anderson that on 3rd June 1990 the first respondent had rejected it and that that fact [10] had been communicated to the purchasers. The Magistrate found specifically that the respondents had rejected the offer.

In *Baker v Taylor* (1906) 6 SR (NSW) 500 Street J at 511 dealing with an offer relevant to his consideration in that case said:

"The plaintiff was bound either to accept or reject the offer so made, and having in fact rejected it the offer came to an end and it was not competent for the plaintiff to revive it by subsequent acceptance."

Although the offer made by the purchasers on 2nd June by one of its terms provided that it would lapse at midnight on 6th June and it was not initially necessary for the respondents to accept or reject it, on the findings of the Magistrate that the offer had been rejected. The offer came to an end by the respondents rejecting it, which rejection was communicated to the purchasers. It was no longer open to the respondents to conclude a contract with the purchasers for them to purchase the property by later accepting that offer – see also Greig & Davis, *Law of Contract*, page 333; Lindgren Carter and Harland, *Contract Law in Australia*, paragraph 521.

Accordingly, on the evidence and on the findings of the Magistrate no contract came into existence on 2nd or 3rd June 1990 nor could it come into existence at a later time by the respondents purporting to accept at a later time the offer made on 2nd June 1990 by the purchasers. It follows that the signing of the contract note on 5th June 1990 by the respondents was not able to constitute the acceptance of the purchasers' offer and by the act it did not

constitute the making of the [11] contract. Consequently the contract to purchase the property by the purchasers, which was not a fact in dispute in this case and pursuant to which the deposit of \$81,000 was paid must have been constituted by an offer which was accepted by that fact being communicated to the offeree on 5th or 6th June 1990 or thereabouts for it was on or about the latter date that the deposit was paid pursuant to the same. Further it is not to the point in considering the provisions of section 50 of the *Estate Agents Act* whether the agency agreement was signed before or after the respondents signed the sale note, because as stated the signing of the sale note by the respondents did not conclude a contract with the purchasers.

Next it is necessary to have regard to the exclusive sole agency agreement signed by the respondents on 5th June 1990. By its terms the vendors retained and authorised the appellant who accepted the retainer and authority to act as the exclusive sole agent for a period of 60 days commencing on 5th June 1990, which period was called the "authority period", for the sale of the property for not less than \$810,000 (or such lower price as the respondents may thereafter approve) and on the terms stated.

The agreement to pay the appellant's commission on the sale of the property and its entitlement to the same was provided by clauses 2(a), (b) and (c) of the agreement which provided:

The agent undertakes to endeavour to sell the property in consideration for which the [12] vendor agrees (subject to condition 5 below) to pay the agent's commission as set out in condition 3 below—

- (a) If at any time during the authority period the property is sold by the agent or by any other agent or by any other person for the said price and upon the said terms: or
- (b) If within 120 days after the expiration of the authority period the property is sold for the said price and on the said terms to a person introduced to the property within the authority period (whether such introduction was by the agent or any other agent or by any other person) or to a person introduced to the other person by the property prior to the signing hereof; or
- (c) The property is sold subsequently to the expiration of 120 days, after the expiration of the authority period to a person introduced to the property within the authority period, whether such introduction was by the agent, by any other agent or by any other person and to whom as a result of such introduction the property is sold."

As provided by that clause the event that entitles the agent, the appellant, to commission was the sale of the property "at any time during the authority period", the sale of the property in the circumstances provided by subclause 2(b) within 120 days after the expiration of the authority period, or the sale of the property in the circumstances provided by subclause 2(c) subsequent to the expiration of 120 days after the expiration of the authority period.

For the purpose of the agreement the concept of what constituted a sale of the property, thereby entitling the appellant to commission was extended, by the provisions of clause 6 of the same. It provided:

"For the purpose of this agreement and authority:-

(a) The property shall be deemed to have been 'sold' [13]

- (i) By the agent immediately upon the agent obtaining the signature of any person either by himself or by his agent, upon or to a document which constitutes or evidences an offer in writing by that person to purchase the property which if accepted or agreed to be the vendor would result in a legally binding contract or sale of the property enforceable against the person for the purchase of the property by him.
- (ii) By any other agent or by the vendor or by any other person immediately upon any person (either by himself or by his agent) signing a document in which or whereby he enters into a legally binding contract of sale with the vendor enforceable against him for the purchase of the property by him.

And the word 'sell' shall have corresponding meanings in the same situations."

The provisions of clause 6(a)(i) whereby the property is deemed to be sold by the agent immediately upon the agent obtaining a purchaser's signature to a document which is evidence of or is an offer to purchase the property relate to the property being sold during one of the periods

provided by clause 2 of the agreement. That which is relevant to the circumstances of this case is the fact that the property was sold during the "authority period". On 2nd June 1990 not only did the appellant not have the respondents' authority to sell the property or \$810,000 but the Exclusive Sole Agency Agreement had not been, at that time, entered into between the respondents and the appellant. Accordingly, under the terms of the agreement, the obtaining of the purchasers' signature to the contract note could not have immediately caused the [14] property to be "deemed" to be sold under the provisions of the agreement entered into on 5th June 1990.

The Magistrate was accordingly in error in holding that the property was sold by the appellant on 2nd June 1990 by virtue of the provisions of the sole agency agreement. The provisions of the agreement as contained in clause 6(a)(i) are provided to be for "the purpose of [the] agreement and authority". The event of the appellant obtaining the purchaser's signature to the contract note on 2nd June in the circumstances of this case did not entitle the appellant to be paid commission. It follows further that the Magistrate was in error in holding that the appellant was not entitled to retain its commission from the deposit by reason of the provisions of section 50 of the *Estate Agents Act* in so far as at 2nd June 1990 the appellant did not hold a written engagement. It was the respondents' case that the deposit paid on or about 6th June 1990 was on the purchase of the property. This fact was not in dispute.

The only inference open to the Magistrate in my view on the evidence was that the contract for the sale of the property was concluded on 5th or 6th June 1990 or thereabouts in consequence of Anderson requesting the purchasers to make a fresh offer. It was for the respondents on their case as pleaded to establish that the agency agreement in writing was not held by the appellant before it did everything under the agreement entitling it to commission. In the circumstances of this case to be entitled to commission it required the property to be "sold" by the appellant during the [15] "authority period".

There was no evidence on which the Magistrate could find that it had been established that the written agency agreement was not held by the appellant before the property was sold in consequence of an offer made by the respondents or purchasers being accepted by the other on 5th or on or about 6th June 1990.

For these reasons in my view the Magistrate was in error in finding for the respondents on their claim and making the orders appealed against. Accordingly it will be ordered by this Court that the order made in these proceedings in the Magistrates' Court at Heidelberg on 5th June 1991 be set aside and in lieu thereof it be ordered that the complaint of the respondents be dismissed.
