36/80

SUPREME COURT OF VICTORIA

FINN & KEMPE PTY LTD v HAM

Murray J

14 December 1979

CIVIL PROCEEDINGS – SALE OF LAND – AGREEMENT THAT PURCHASER WOULD PAY 5% DEPOSIT ON SIGNING OF CONTRACT – SUCH AMOUNT PAID TO VENDOR'S AGENT – VENDOR REQUIRED ANOTHER 5% DEPOSIT – PURCHASER AGREED TO PAY SUCH AMOUNT – AMOUNT NOT COLLECTED BY AGENT – AMOUNT NOT PAID – ACTION TAKEN TO ENFORCE CLAIM – FINDING BY MAGISTRATE THAT AGENT USUALLY RECEIVES 10% DEPOSIT – FINDING THAT AGENT WAS BOUND TO COLLECT ADDITIONAL DEPOSIT – ORDER MADE AGAINST AGENT FOR THE UNPAID 5% DEPOSIT – WHETHER MAGISTRATE IN ERROR.

H. was the owner of a block of land and appointed F&K as his agent to sell the land. A sub-agent of F&K introduced a purchaser to H. and an agreement was effected whereby the purchaser would pay 5% deposit. Whilst H. agreed to this amount, later he contacted the agent and the purchaser and obtained consent for the purchaser to pay another 5% deposit. The agent did not collect the remaining 5% from the purchaser and later, when the sale did not proceed, H. sued the agent for the deposit uncollected. During the hearing an estate agent was called to state that where an agent obtains the signature of a purchaser to a sale note or contract of sale, it is the practice that the usual deposit of 10% would be collected by the agent. The Magistrate made an order against the agent for the unpaid 5% deposit. Upon appeal—

HELD: Order nisi absolute. Magistrate's order set aside and complaint dismissed with costs.
In finding for H. against the agent for breach of contract the magistrate must have based his decision upon the hypothesis that the evidence disclosed a contractual undertaking by the agent to collect the deposit payable under the amended sale note. There was no evidence of any express undertaking by the agent that the additional 5% would be collected by the agent. Even if there had been evidence that the agent had said that she would collect or receive the additional 5% deposit it is difficult to see any consideration which would have turned that undertaking into a binding contract. When this position was reached the duty of the agent had been completely fulfilled and that any subsequent agreement between the vendor and the purchaser could not have the effect of imposing any further contractual obligations upon the agent. Quite apart from this there is a big distinction between the authority of an agent to receive the deposit on the one hand and duty imposed upon him/her actively to enforce payment of it on the other. There is a very considerable distinction between a custom that an agent ordinarily receives the deposit on the one hand and an implication into the agent's contract of employment that he will enforce the payment of deposit on the other. Accordingly, the Magistrate was in error in holding the applicant liable for breach of contract.

MURRAY J: This is the return of an order nisi to review the decision of the Stipendiary Magistrate sitting at Bendigo on 6 June 1979. The affidavits filed in support of the order nisi and in opposition to it contain no material differences in their account of the proceedings which were a claim for $447.50 damages for breach of contract.

When the matter came on for hearing the solicitor who appeared for the applicant, which was the defendant in the proceedings, asked for an adjournment on the ground that, due to a misunderstanding, his client had thought that the proceedings were to come on for hearing on the following day and consequently he had no witnesses available. The Magistrate refused an adjournment. In the result no evidence was called on behalf of the applicant.

The respondent gave evidence to the effect that he was the owner of a block of land in Belgrave and that he had appointed the applicant as his agent to sell the land. A copy of the agency agreement was tendered in evidence which was an authority for the applicant to act as agent for the sale of the property on terms. The sale price set out on the authority was $10,500 and some time later the respondent wrote a letter to the applicant in which he set out the terms which he would agree to. The respondent said that in June 1978, he received a telephone call from one Isabel Ralph whom he believed to be a sub-agent of the applicant and who said that she

had a prospective purchaser for the land. In a later conversation the respondent told Miss Ralph that he would sell the land for $8950 cash. Miss Ralph told him that the purchaser's name was Rimmer and that she and Mr Rimmer would proceed to Bendigo on the 22nd June and would bring with them a contract of sale for execution by him.

The respondent said that at about 1 pm on the 22nd June, Mr Rimmer and Miss Ralph arrived at his office and a sale note which had already been prepared was produced. This note, a copy of which was put into evidence, provided for a price of $8,950 payable by a deposit of $447.50 (being 5 per cent of the purchase price) and the balance within 30 days of the exchange of contracts. The respondent said that he queried the fact that the deposit was only 5 per cent but that Mr Rimmer had said that it was usual in Melbourne for only 5 per cent deposit to be paid in the case of 30 day contracts. The respondent apparently accepted this and duly signed the sale note as vendor. Mr Rimmer said that he would arrange for his solicitor to prepare the contract of sale. Mr Rimmer and Miss Ralph then left the Office, saying that they intended to visit Bendigo Pottery before returning to Melbourne.

The respondent said that after they had left his office he became concerned that the sale note only provided for 5 per cent deposit and in due course he decided to go to Bendigo Pottery to see if he could find Mr Rimmer or Miss Ralph. He said that he told Mr Rimmer that he required the sale note to be amended to provide for a deposit of 10 per cent and that after initial protests Mr Rimmer eventually agreed and the sale note held by Mr Rimmer was altered and initialled by Mr Rimmer and him in the presence of Miss Ralph.

The respondent said that it was his belief that the estate agent would collect the deposit due. When he was cross-examined he said that no payment was made at the Bendigo Pottery and that he did not ask about payment of the deposit at that time. He said he assumed that 5 per cent deposit had been paid. When asked if Miss Ralph had agreed to collect the extra 5 per cent deposit he said that as Miss Ralph was present at the conversation at the Bendigo Pottery he expected that the extra 5 per cent would be paid to her.

The respondent said that Mr Rimmer's solicitor subsequently prepared a contract of sale which he had signed but that Mr Rimmer refused to sign the contract and proceed with the sale. He said that it was not until September that he was aware that the applicant had only received 5 per cent deposit. In due course, apparently in October 1978, he instructed his solicitor to rescind the contract. In December the applicant accounted to him for the 5 per cent deposit received by it after deducting its commission.

The next witness called on behalf of the respondent was Mr Stephen John Carter an estate agent and had been carrying on business on his own account for some five years. Mr Carter deposed that where an agent obtains the signature of a purchaser to a sale note or contract of' sale it is the practice that the agent should receive the deposit. He stated that the usual deposit was 10 per cent but whatever the deposit was it was customary for it to be collected by the agent. Under cross-examination Mr Carter said that he had never been in a position when the cheque given by way of deposit had ''bounced" and gave no evidence of what the custom was in such a case.

The applicant's solicitor was not in a position to call evidence and the two solicitors then made their submissions to the magistrate who in due course stated that he was satisfied that the original agreed deposit was 5 per cent but this had been amended at the Bendigo Pottery to 10 per cent by the parties and that he was satisfied that it was customary practice for estate agents to collect the full deposit stipulated. The agent should have collected the full 10 per cent and the respondent was therefore entitled to an order for $447.50 by way of damages for breach of contract, that amount being the additional 5 per cent deposit. He ordered the applicant to pay $246 costs.

The applicant obtained an order nisi to review this decision upon eight (8) grounds one of which was, that the Stipendiary Magistrate was wrong in law in giving local effect to the terms of the agency contract between the parties by reason of customary practice of real estate agents. It will be seen that in finding for the respondent against the applicant for breach of contract the magistrate must have based his decision upon the hypothesis that the evidence disclosed a

contractual undertaking by the applicant to collect the deposit payable under the amended sale note. There was no evidence of any express undertaking by Miss Ralph that the additional 5 per cent would be collected by her or by the applicant. It may well be that after Mr Rimmer had agreed to the amendment of the sale note the respondent assumed that the additional deposit would be paid to the agent. By the same token, as in the ordinary course of events both the applicant and the respondent would forward their copies of the sale note to their solicitors, Miss Ralph may well have assumed that the additional deposit would be paid to the vendor's solicitor by the purchaser's solicitor. But whatever they assumed it seems clear that there was no express agreement entered into at the Bendigo Pottery between the respondent and Miss Ralph in relation to the additional 5 per cent deposit and even if there had been evidence that Miss Ralph had said that she would collect or receive the additional 5 per cent deposit it is difficult to see any consideration which would have turned that undertaking into a binding contract.

An analysis of the magistrate's decision reveals that he treated the evidence of Mr Carter as proving not only that an estate agent customarily receives the deposit payable on the signing of the sale note but that the agent by his contract with the vendor contractually binds himself not only to receive the deposit but also to collect it in a positive sense, namely, to enforce its payment. For myself I would have thought that the evidence of Mr Carter did not go so far as to prove any such contractual obligation. Be this as it may however, the evidence of Mr Carter simply did not touch upon the position in the present case, namely when the vendor and purchaser, after the sale note had been signed and the deposit paid, agreed to amend their agreement by increasing the amount of the deposit. In the present case it appears to me that the agent had introduced the purchaser who had signed a binding contract specifying a deposit of 5 per cent which deposit the agent had received, and the vendor accepted that contract and executed it.

When this position was reached it appears to me that the duty of the agent had been completely fulfilled and that any subsequent agreement between the vendor and the purchaser could not have the effect of imposing any further contractual obligations upon the agent. Quite apart from this there is a big distinction between the authority of an agent to receive the deposit on the one hand and duty imposed upon him actively to enforce payment of it on the other. In *Luxor (Eastbourne) Ltd v Cooper* (1941) AC 108; [1941] 1 All ER 33 Lord Russell of Killowen said (AC p124)

> "... contracts by which owners of property desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event which involves the rendering of some service by the agent. There is no real analogy between such contracts and contracts of employment by which one party binds himself to do certain work and the other binds himself to pay remuneration for the doing of it."

In the present case there are no relevant specific provisions in the agency agreement nor is there any evidence of express agreement and indeed it is clear that the Magistrate based his decision upon the custom deposed to by Mr Carter and not upon any express term of the engagement of the agent.

Mr Lally who appeared for the applicant, very properly referred me to a passage in the judgment of Barwick CJ in *Brien v Dwyer* [1978] HCA 50; (1978) 141 CLR 378; 53 ALJR 123 at p125; 53 ALJR 123 where the learned Chief Justice said:

> "It seems to me that, not only must the purchaser so pay to the estate agents the stipulated deposit which until the vendor becomes bound will be held for the purchaser ... but that it is part of the estate agent's duty, if he is to earn his commission, to obtain payment of the deposit by the purchaser at the time he signs the form of contract for transmission or presentation. Such an obligation on the part of the estate agent is scarcely burdensome: self interest if nothing else should insure its performance."

The circumstances of the case in question were entirely different from the present case and I do not think that the learned Chief Justice was intending to lay down any principle in relation to the obligation of an estate agent, the breach of which will render him liable for breach of contract. It is to be noticed that the Chief Justice's comment is in relation to the question of whether or not an agent is entitled to his commission, not whether he is liable to an action for breach of contract.

In the present case it was conceded that the agent had earned its commission. In *Brien v Dwyer* (*supra*) the situation of an estate agent was considered by Gibbs J. His Honour said (p129):

> "The expression 'agent' when used in relation to an estate agent acting for a vendor, is misleading, as has been pointed out by this court in *Peterson v Moloney* [1951] HCA 57; (1951) 84 CLR 91 at pp94-95; [1951] ALR (CN) 1057, and by the House of Lords in *Sorrell v Finch* (1977) AC 728 pp750-753. Such so called agents do not have a general authority to act on behalf of the vendor in relation to the contract. They have no general authority either to accept a deposit before a contract is made (*Sorrell v Finch*) or to receive the purchase money (*Peterson v Moloney*), although such authority may of course be conferred on an agent in the particular case. Conflicting opinions have been expressed as to whether an agent has a general authority to receive a deposit when a contract is made, but in the present case, as in most cases in practice, authority to do so is expressly conferred by the contract of sale. It is however clear in principle that where the contract of sale expressly provides for the payment of the deposit to the agent, the authority of the agent to receive the deposit is limited by the provisions of the contract."

It seems to me that such an analysis is entirely inconsistent with a proposition that an agent not only has authority to receive a deposit but is contractually bound to collect it and is liable for breach of contract if he fails to do so. As I have already indicated, there does seem to me to be a very considerable distinction between a custom that an agent ordinarily receives the deposit on the one hand and an implication into the agent's contract of employment that he will enforce the payment of deposit on the other.

For the reasons I have stated I think that the Magistrate was in error in holding the applicant liable for breach of contract. The order nisi will be made absolute and the order in the court below will be set aside. In lieu thereof there will be an order that the complaint be dismissed and the complainant pay the defendant's costs.
