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## SUPREME COURT OF VICTORIA

***N BELLER & CO PTY LTD v COOPER***

Gillard J

22 April 1971

**ESTATE AGENT – COMMISSION PAYABLE ON LISTING OF VENDORS' PROPERTIES – PROPERTY SOLD BY AGENT ON CERTAIN CONDITIONS – COMMISSION NOT PAID TO AGENT – CLAIM BY AGENT FOR COMMISSION – CONTRACT OF EMPLOYMENT – NATURE OF – FINDING BY MAGISTRATE THAT AGENT WAS ENTITLED TO COMMISSION WHEN DEFENDANT BECAME ENTITLED TO ITS COMMISSION – WHETHER MAGISTRATE IN ERROR.**

**HELD:** Order nisi discharged.

1. The Magistrate on the evidence before him was able to find that the contract between the complainant and the defendant entitled the complainant to the 15% listing fee of the commission earned by the defendant in any transaction which the complainant had enabled to be carried out through his obtaining the vendors name and property for listing for each transaction. Looking at it realistically, the word 'sale' was not used in any technical sense but was intended to describe a transaction whereby the defendant was entitled in law to a commission.

2. There was evidence by which the Magistrate could have disregarded the letter, that he could find, as he did, that the contract of employment between the complainant and defendant was such that upon the defendant retaining the commission in the transaction the complainant became entitled to his 15% of the commission so retained.

**GILLARD J:** This is the return of an order nisi to review a decision of the Magistrates' Court at Melbourne on a complaint in which Keith N Cooper was the complainant and N Beller & Co Pty Ltd was the defendant.

It appeared that at all times material Cooper was a registered estate agent who was employed by the defendant on the terms of a weekly retainer and payment of a 15% commission on listing of vendors' properties with the defendant and a further 25% if he sold such property. The 15% was intended to be that percentage of the commission earned by the defendant in the course of its business as an estate agent.

In this case the complainant was able to get certain property listed and subsequently the defendant arranged for the "sale" by such vendors to High Rise Developments Pty Ltd which was a proprietary Company also controlled and owned by Beller, the main director and shareholder of the defendant. The contract entered into between the vendors and High Rise Development Property was somewhat peculiar.

By a contract of sale bearing date 18 July 1968, the vendors acknowledged to having sold on the conditions hereinafter mentioned to High Rise Developments Property all that piece of land being comprised in Certificate of Title, volume 6023, Folio 432 for the price of \$135,000. By the terms and condition of the sale the purchaser was bound to pay a deposit of \$13,500 on the signing and to pay the residue at the expiration of two years from the date.

The land was subject to a restrictive covenant, and accordingly, special conditions were set out in the contract whereby the contract could be cancelled in the event of such covenants not being removed or amended. By Clause 5 of the Conditions it was provided

"If such removal or amendment has not been effected at the expiration of two years from the date of this contract, the purchaser shall be entitled by notice in writing given within one month from the expiration of the said period of two years aforesaid by the purchaser or its solicitors to the vendor at the address set out in this contract, or to their solicitors, cancel this contract in which event the contract shall be at an end and the vendors shall refund to the purchaser the deposit moneys paid."

It will be seen that from this Clause it does not follow that the contract comes to an end merely by the failure to remove or amend the covenant. Indeed it is open to the purchaser to continue the existence of the contract despite the failure to remove or amend the restrictive covenant. It is a contract which is good and binding, but at the election of the purchaser it might be brought to an end and it is noticeable that that election is circumscribed by requiring the purchaser to give a notice in writing within one month from the expiration of the period of two years to cancel the contract.

In my view therefore, there was in terms a "sale" on the conditions that the transaction and the contract might be brought to an end at the option of the purchaser.

After this contract was signed and the deposit was paid by the purchaser to the defendant, the defendant sent a cheque for the \$13,500 deposit received by it less the amount of the commission on the transaction. It does appear that the vendors did give an authority in writing to the defendant to deal with the property. No evidence has been given as to the nature of the authority or what the defendant was required to do in order to earn its commission. The fact is it apparently thought by getting the contract executed by another one of the companies in the group to become entitled to a commission in the transaction as against the vendors. Now its action can be explained away on several bases:

- (a) that the defendant was acting in accordance with the law and the facts;
- (b) that it was guilty of smart practice and was not entitled to commission, or
- (c) that it deliberately retained the commission to cheat or defraud the vendors.

In my view it is the first of these three inferences that should be drawn in the absence of some explanation as to why the commission was retained. In law the defendant was bound to account to its principals, the vendors, for money received on their behalf. It accounted for money received on their behalf by deducting from such moneys its commission. It is true, as has been pointed out by counsel, that when the money was received by the vendors' solicitors they, on 25 July 1968, wrote to the defendant stating,

"It is noted that you have deducted your commission in this matter and we wish to draw your attention that this contract is a conditional one being subject to the removal of a restrictive covenant prior to settlement on 18 July 1970. Should the purchaser be unsuccessful in having the covenant removed all moneys paid under the contract must be refunded including the commission which you have deducted."

This is a view that presented itself to the vendors' solicitors and undoubtedly, was written by them to protect their interest, if any. The fact is however, that they did not call upon the defendant to make an account at that stage, and secondly, the defendant did not make an account at that stage. Either the defendant was entitled to the commission or the defendant was not entitled to the commission, and the mere statement by the solicitors of this character does not alter the inferences that should be drawn from the defendant's acts, that is, insofar as it concerns the contract of employment of the complainant. It therefore becomes necessary to consider what was that contract of employment.

This is a question fact. It is always a question of fact as to whether or not there is a subsisting contract existing between two or more persons. Equally where it is alleged the contract is oral or implied, it is also a question of fact as to the nature, conditions and terms of such contract.

In this case the Magistrate has found that the contract of employment of the complainant provided that he was entitled to 15% listing commission upon the defendant becoming entitled to its commission.

Looking at the matter broadly, one would think that this was a very reasonable inference to draw. But counsel has urged to me that both from the verbiage used by the complainant in a letter to which I shall make reference in a moment, the answers to the interrogatories made by his client and to the particulars of demand set out in the summons, it would appear that the complainant was only entitled to commission for listing upon the sale of the property in the strict and technical sense.

Now it is notorious that there is always an area for dispute as to what is comprehended by the word 'sale'. In this case the Magistrate has found that 'sale' and 'sell' were not being used in their strict sense. With that I agree.

We do not know on the state of the evidence what was the contract of agency entered into between the vendors and the defendant. Nevertheless we do have the very telling admission against the defendant that it retained its commission as soon as it got the contract signed between the vendors and purchaser and received a deposit from the purchaser. I agree therefore with the Magistrate that so far as the defendant was concerned it did not regard the word 'sale' and 'sell' in the technical sense in its arrangement with its employee.

Nevertheless there was a letter written by the complainant to the defendant which originally bore date 5 July 1968. It will be remembered that the contract between the vendors and purchaser was the 18 July 1968. It rather suggests therefore that this letter was typed prior to the contract of sale of the property between the vendors and purchaser. Nevertheless, the complainant in evidence swore that he altered the typewritten date 5 July 1968, by writing over it 18 July 1968, and he swore that it was signed after the contract of sale was executed by the parties.

The Magistrate has so found and since this finding depends upon his assessment and appraisal of the witness in the witness box clearly it must bind this Court. It is however necessary to look at this letter to consider whether in any way it deprives the complainant of his *prima facie* right to 15% of the commission earned by the defendant which itself was claiming from the vendors at this period.

The letter reads:

"Re Property listed South Yarra Williams Road, corner Lechalde Street. I hereby acknowledge the offer made to me by the directors of N Beller & Co Pty Ltd, concerning my listing of the above property. This provides that I will be paid the listing fee before settlement takes place conditional always upon the proceeding to completion or removal of the covenant as provided by the contract. Should the sale not proceed for this reason I agree the commission paid will become refundable immediately without deduction."

It has been urged to me that this letter constituted a variation of the arrangement between the complainant and the defendant, or alternatively that on its terms it clearly showed that the complainant was not entitled to anything in the way of a listing commission until any contract entered into had been completed. The Magistrate, in giving his reasons, said of this letter:

"So far as the letter of 18th July is concerned, I do not take very much notice of it. At this stage the contract of sale had just been signed. It was expected there would be delay in the completion."

He has found that it was not part of or affected the contractual relationship between the complainant and defendant. He has followed the simple course of considering only the arrangement between the complainant and defendant, namely, that the complainant was to get a 15% of any commission earned by the defendant on any transaction which came about as a result of the complainant getting a listing of the vendors' property thus sold.

It has been earnestly submitted that this was not a proper finding, that the complainant was only entitled to his commission on the completion of the transaction. I think there are several answers to this. But the one main answer is the Magistrate's finding of the contractual relationship between the complainant and defendant. If his finding is correct at the time the contract was entered into between the vendors and purchaser whereby the defendant thought it was entitled to retain a commission, then the complainant was entitled to his share of it. The letter properly interpreted was something not intended to vary the contractual relationship at all but was something signed under an apparent mistake of law as to the rights of the parties. At that stage, the complainant's rights had crystallised and he was entitled to his commission.

It seems to me that it would be an extraordinary result if the defendant had obtained from the vendors an authority whereby it was entitled to commission upon finding a purchaser ready, willing and able to buy on the terms required by the vendors, that that fact could defeat the complainant of his commission in introducing such vendors to the defendant. I repeat there

is no evidence of the nature of the agency given or the authority conferred by the vendors on the defendant, Clearly such an authority was given but no effort was made by the defendant to show what that authority was.

On the other hand, it did appear that the defendant had retained its commission when it first accounted to the vendors for the deposit, and secondly, late as December 1969 as shown from the correspondence between the vendors and the purchaser, the defendant still retained that commission. I believe that the Magistrate was also entitled to draw the inferences he did because the defendant which had a peculiar knowledge of all the facts failed to lead any evidence to assist the Court in obtaining and ascertaining the true facts. If the defendant had not retained the commission throughout up to the present, as was suggested would have been the position, then the defendant can blame nobody but itself for failing to call evidence of the fact that it had passed back to the purchasers the amount of commission.

I think therefore the Magistrate, because of the failure of the defendant to give him any evidence as to the course of the dealing, that he could with more confidence draw adverse inferences to the defendant's interest, Accordingly in my view the Magistrate was entitled, on the evidence before him, to find that the contract between the complainant and the defendant entitled the complainant to 15% listing fee of the commission earned by the defendant in any transaction which the complainant had enabled to be carried out through his obtaining the vendors name and property for listing for each transaction. Looking at it realistically, I agree with the Stipendiary Magistrate that the word 'sale' was not used in any technical sense but was intended to describe a transaction whereby the defendant was entitled in law to a commission. That brings me to the final point. Was the defendant entitled in law to a commission?

It has been earnestly argued before me that there is no proof that it was entitled to a commission. In order to be entitled to a commission the defendant would have to have an authority in specified terms and conditions, and that upon its observance of those specified terms and conditions by either selling the property or finding a purchaser, as the case may be, so it would earn its commission. If therefore any challenge is made to the entitlement of an agent to commission, two questions emerge, (a) what was the precise terms of the retainer, and (b) did the agent carry out the employment of agency that he was specifically retained for. Both of these questions are primarily questions of fact. It might become necessary to construe as a matter of law words used in some written retainer but what was the retainer and whether the agent had performed the requisites or the conditions of his retainer would be questions of fact to be resolved by evidence.

In this case the only evidence available was the fact that a retainer in writing was given but never produced in evidence, and secondly that upon the contract being signed by the vendors and purchaser, the agent immediately retained his commission or remuneration. Now if it were only entitled to remuneration or commission upon a sale in the strict sense, then it was guilty of misappropriation and of falsifying its accounts.

In my view the law requires me to adopt a presumption of innocence in its actions, as was required of the Magistrate in this case. He took the view that the defendant was entitled to law to the commission, and in my view and in the absence of evidence to the contrary, it was the only reasonable inference to draw and he could more confidently draw that inference in the absence of evidence from the defendant.

Having regard to these views, it seems to me that the grounds upon which the order nisi was granted here cannot be upheld. Those grounds cover the question of whether or not the letter of 18 July should have affected the Magistrate's decision. For the reasons I have ventured to give, it seemed to me that there was evidence by which the Magistrate could disregard that letter, that he could find, as he did, that the contract of employment between the complainant and defendant was such that upon the defendant retaining the commission in the transaction the complainant became entitled to his 15% of the commission so retained.

For these reasons then the order nisi must be discharged with the usual result as to costs.

**APPEARANCES:** For the applicant N Beller & Co Pty Ltd: Mr CW Porter, counsel. Keith A Ness, solicitor. For the respondent Cooper: Mr B Kayser, counsel. Clarence Smith & Co, solicitors.