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SUPREME COURT OF VICTORIA

GLYNN v GRAY

Harris J

21 March 1977

ESTATE AGENT – SUB-AGENT – DEFENDANT MANAGING ESTATE AGENT'S BUSINESS – MEANING OF PERMITS USE OF LICENCE BY ANOTHER – DEFENDANT MAKING USE OF HER LICENCE FOR HERSELF – FINDING BY MAGISTRATE THAT DEFENDANT PERMITTED ANOTHER PERSON TO USE HER LICENCE – DEFENDANT CONVICTED – WHETHER MAGISTRATE IN ERROR: *ESTATE AGENTS ACT*, S20.

In answer to an advertisement, the defendant entered into a service agreement with E & P Mulcair whereby she was to be employed with the firm of estate agents known as JM Gray, Mulcair and Associates – she was only required to supervise the real estate and trust account transactions of the business. On one occasion she stated she was an employee of the firm, and on another occasion she stated that she carried on the business of the firm. She was charged with permitting Mulcair to use her licence so that the firm could carry on the business of real estate agents. The charge was found proved. Upon Order Nisi to review—

HELD: Order absolute. Conviction quashed.

1. Insofar as the defendant was performing functions which were within those of a sub-agent as defined it would seem that she was making a use, herself, of her estate agent's licence. That use might well have been a lawful use because the Act did not actually prohibit such conduct by a person who held a real estate agent's licence.

2. What was relevant was whether the use made by the defendant of her licence was a rightful use or a wrongful use given that it was reasonably clear that she was making a use of her licence herself. The relevance of that finding was that, as she was charged with permitting another person to use her licence, the fact that she was doing something during the relevant period, which appeared to have been the use of the licence by herself, tended against the conclusion that she permitted someone else to use the licence.

3. In any, event, what had to be proved for the conviction to stand was that she did permit Mulcair to use her licence and it had to be proved beyond reasonable doubt that that was so.

4. In the circumstances, the Magistrates' Court was not entitled to find the offence proved. The facts may have given rise to suspicion that something irregular went on, but for an offence to be proved it had to be established beyond reasonable doubt that the facts brought the defendant within the scope of the section under which she was charged.

HARRIS J: The question is whether, on the evidence before the Magistrates' Court on the hearing of the information, the Court could not reasonably have found that the defendant did permit another person to use her licence under the *Estate Agents Act* 1958, as alleged in the said information. It will be appreciated that if there was any basis discernible upon which the Magistrates' Court could reasonably have come to that conclusion that an offence had been committed, the conviction would have to stand.

It is not for this Court to substitute its view for what it considers was the appropriate finding below, merely upon the basis that this Court is disposed to take a different view of the facts. The question is whether or not the Magistrates' Court could reasonably have come to the conclusion that it did upon the evidence, that was before it, and that, as the order nisi indicates, is in substance a question whether there was any evidence upon which the Magistrate could conclude that the offence alleged had been made out.

In managing the business as an employee, the defendant was, it seems clear, performing functions which were within those of a sub-agent as defined in the *Estate Agents Act*. Section 3 of the Act defines "sub-agent" as meaning "any person in the direct employ of or acting for or by arrangement

with an estate agent who performs for such estate agent any of the functions of an estate agent" (other than certain excluded matters) "whether his remuneration is by way of salary wages commission or otherwise", and then it goes on to provide for the case of a corporation, which is the employer.

"Estate agent" and "agent" are defined in the Act, both expressions meaning the same thing. The definition is a long one; it is not necessary to read it all out. I simply read this much: "Estate agent" or "agent" means any person who exercises ... any of the following functions on behalf of any other person or for or in consideration of any payment or other remuneration whether monetary or otherwise namely (a) the selling buying ... of or the negotiating for the sale purchase ... of any real estate".

Insofar as the defendant was performing functions which were within those of a sub-agent, as defined it would seem to me that she was making a use, herself, of her estate agent's licence. That use might well be a lawful use because it may be that the Act does not actually prohibit such conduct by a person who holds a real estate agent's licence. The Act does not seem to deal expressly with this situation. It does contain a prohibition in Section 10 against persons who are not the holders of agents' licences acting as sub-agents, but sub-s.(2) casts, at least, I think, some doubt about the scope of that prohibition in relation to licensed estate agents. I do not express any concluded view about this because it is not necessary to do so.

What is, in my opinion, relevant, is that, whether the use made by the defendant of her licence was a rightful use or a wrongful use it does seem reasonably clear that it can be said that she was making a use of her licence herself. The relevance of that finding is that, as she is charged with permitting another person to use her licence, the fact that she was doing something during the relevant period, which appears to have been the use of the licence by herself, rather tends against the conclusion that she permitted someone else to use the licence. In any event, what has to be proved for the conviction to stand is that she did permit Mulcair to use her licence and, of course, it has to be proved beyond reasonable doubt that that was so.

The difficulty the informant is in is to show how the facts established that the defendant permitted Mulcair to use her licence. Mr Johnston submitted that the Stipendiary Magistrate and the Justice were entitled to draw inferences against the defendant on the evidence, but he did not succeed in persuading me just what were the inferences that could have been drawn and how, whatever they were, they would have established a case against the defendant.

It was put that one example of a way in which an offence under Section 21(c) could be proved would be if it were established that the defendant took no part in the conduct of the business, and that it was actually conducted by the permittee. Even if that is so, and I need not express any concluded view about it, it is not this case, on the evidence. Although I have some difficulty in seeing just what facts would prove an offence under s20(1)(c), all I have to do to decide this case is to say that I am unable to see a basis upon which it can be found that the defendant permitted Mulcair to use her estate agent's licence and that, therefore, I conclude that the Stipendiary Magistrate and the Justice, that is to say, the Magistrates' Court, was not entitled to find the offence proved. The facts may give rise to suspicion that something irregular went on, but for an offence to be proved it must be established beyond reasonable doubt that the facts bring the defendant within the scope of the section under which she was charged. ...