30/90

SUPREME COURT OF VICTORIA

MARBLE MEADOWS PTY LTD v ROBIN DALEY HOLDINGS PTY LTD

Teague J

23, 27 July 1990

AGENCY – ESTATE AGENT – COMMISSION – PAYABLE UPON LEGALLY BINDING CONTRACT SIGNED BY PURCHASER – UNCONDITIONAL SALE NOTE SIGNED BY PURCHASER – NOT ACCEPTED BY VENDOR – PROPERTY SOLD TO ANOTHER – WHETHER PURCHASER "LEGALLY BOUND" – WHETHER AGENT ENTITLED TO COMMISSION.

An estate agent was, by the terms of his engagement, entitled to commission from the vendor of real property "upon a person found or introduced by (the agent) signing a document whereby that person legally bound himself to become the purchaser of the property". The agent obtained a purchaser's signature to an unconditional sale note, however, the vendor declined to proceed after receiving a better offer for the property. The agent then claimed payment of his commission.

HELD: When the unconditional sale note was signed, the offer to buy the property was legally binding on the purchaser. Accordingly, upon a proper construction of the terms of the engagement, the agent was entitled to be paid his commission.

TEAGUE J: [1] This is the return of an order nisi to review the decision of a Magistrate sitting at Dandenong. The complainant/respondent was an estate agent which sued the defendant/ applicant for commission. On 5 September 1988, the applicant, which then owned a property at Lang Lang, engaged the respondent to act in respect of the sale of the property for $250,000, signing a standard form prepared as the "General Engagement to Sell" of the Real Estate Institute of Victoria.

A Mr Daley, a director of the respondent, dealt at all times with a Mr Bevacqua, a director of the applicant. On 8 September 1988, Mr Daley arranged for Claymore Pty Ltd ("Claymore"), to purchase the property for $250,000, for an unconditional sale note to be signed, and for a deposit of $25,000 to be paid, and he telephoned Mr Bevacqua to make an appointment for Mr Bevacqua to sign the sale note. On 9 September 1988, Mr Bevacqua saw another estate agent who had arranged for another purchaser to pay $265,000 for the property, and Mr Bevacqua agreed to sell to that purchaser, and he telephoned Mr Daley to tell him that the sale to Claymore would not proceed, and to terminate the engagement.

On 3 November 1988, the complainant initiated a proceeding in the Magistrates' Court claiming commission of $5,660, and the hearing took place on 23 February 1990, the Magistrate then reserving his decision. On 27 March 1990, the Magistrate held that commission was payable on the basis that the respondent had obtained an unconditional offer to purchase from a purchaser within the terms upon which he had been engaged. **[2]** On 26 April 1990, an order nisi was made to review whether (a) the Magistrate should have held that on the proper construction of the engagement authority given by the applicant to the respondent the respondent was not entitled to commission unless and until the applicant became legally bound to sell the property the subject of the authority to a person introduced by the respondent, and (b) the Magistrate should have held that in the events that happened the applicant was not liable to pay commission to the respondent. There was no contest as to the findings of fact made by the magistrate.

Disputes over liability to pay commission to estate agents have been, and are likely to remain, a constant source of litigation. One reason why that is so is that the terms on which agents are engaged are variable. And it goes without saying that the facts of any situation where commission is potentially payable are infinitely variable. The "precedent value" of other decisions is therefore somewhat limited. That is not to say that familiarity with past decisions dealing with

different terms of engagement of agents will not provide both a conditioning to the proper approach to any dispute, and other reference points which may be of guidance, but not a great deal will be compelling.

Most importantly, what all of the leading cases do emphasize is that contracts engaging estate agents on commission have no special principles applicable only to them, **[3]** and that courts must construe the terms of the particular contract according to the ordinary rules of construction. The contractual terms and the facts in cases such as *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108; [1941] 1 All ER 33, *Scott v Willmore & Randell* [1949] VicLawRp 21; [1949] VLR 113; [1949] ALR 510, and *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* [1977] HCA 13; (1977) 138 CLR 52; (1976-1977) 13 ALR 161; (1977) 51 ALJR 413 are far removed from the contractual terms and the facts of the subject case. The court must first determine by construing the contract, what is the event upon the occurrence of which the parties have agreed to pay commission, and then whether that event has occurred.

In the subject case, what must be construed is the engagement form of 5 September 1988. It is headed - "General Engagement to Sell". It is addressed to the estate agent and provides that the principal(s) - 'hereby engage you to act as agent in respect of the sale of the above-mentioned property...' It further provides that:

> "Commission shall be payable by me/us to you upon a person found or introduced by you signing (either by himself or by his agent) a document whereby that person legally binds himself to become the purchaser of the property provided that where the person to whom the property is sold fails to complete the contract for the purchase of the property and I am/we are entitled to a forfeited deposit I/we agree to take reasonable steps to recover any unpaid deposit from that person and to pay to you commission to the extent of a deposit paid or recovered but not exceeding the amount of commission as aforesaid."

My initial reaction on reading the last-mentioned provision was that there appeared to be a sufficiently readily identifiable "event clause". **[4]** But Mr Bloch, who appeared before me for the applicant, contended that there were difficulties about accepting that the event upon the occurrence of which commission was payable was the agent finding a person who signed a document whereby that person legally bound himself to become the purchaser of the property.

One suggested difficulty is that there is uncertainty because the proviso to the "event clause" refers to a failure "to complete the contract for the purchase", and because the completion of the contract for the purchase by the person found by the agent would be a different event to that in the event clause, and an event which did not occur in the subject case. Another suggested difficulty is that there is uncertainty because the title to the document contains the word "Sell" and the engagement provision contains the words "the sale", and an actual sale to the person found by the agent would also be a different event to that in the event clause, and an event which did not occur in the subject case. Another suggested difficulty is that the words of the event clause are not themselves sufficiently clear. Another suggested difficulty is that the event clause does not deal with what is to occur in the event of contingencies such as that the document signed by the person found by the agent is conditional, and that the agent finds and signs up, or more than one agent find and sign up, more than one person, so that multiple commissions might be potentially payable.

My assessment of those difficulties is that, although individually and collectively, they cannot be seen to be **[5]** entirely without foundation, they do no stand up to close scrutiny. Having said that, I find it hard to understand why the proviso has been added, when it seems to offer a procedure for dealing with but one of many contingencies that might arise. But that difficulty in understanding why that contingency warrants special treatment, does not seem to me to warrant selectively importing into the main provision, an aspect of the proviso, so that the main provision is to be taken to mean something different, or to warrant the conclusion that there is any real doubt what the main provision means. I do accept that the heading on the form and the reference to "sale" could be seen as a detraction from the event clause, but not that they warrant the ignoring of its express terms, or that they significantly detract from an appreciation of what those terms mean. Mr Bloch urged on me, as to the terms of the event clause itself, matters that had found favour with Judge Franich in a case that came before him in April 1978. That case of *Bob Hamilton Pty Ltd v Marinjo Nominees Pty Ltd* was one of two specifically referred to by the

learned Magistrate in the written reasons for his decision. The other was *Trotter v McSpadden and Another* [1986] VicRp 32; [1986] VR 329; [1985] V Conv R 54-177, a decision of Gobbo J. Both were Victorian cases where the estate agent had sued for commission, claiming under a Real Estate Institute of Victoria form signed by the vendor. It is not difficult to understand why the two cases should have been seen as having a bearing on the subject case. **[6]** In *Trotter*, the terms of the event clause were almost identical with those in the subject case.

Unfortunately, neither counsel had been able to obtain a copy of Judge Franich's reasons, and all that was available to them and to me was a brief report of the decision published in the *Law Institute Journal* of November 1979, and an extract from *Estate Agency Law and Practice in Victoria*, by Mr Hockley, published in 1985, which appears to have been based only on the *Law Institute Journal* report. Because of the problems associated with the reporting of those reasons, I can do no more than treat the decision as one on a provision which was similar to the provision before me. Judge Franich is reported to have commented that a person cannot be said to be legally bound by an offer or by a contract in writing signed merely by one party since the offer or contract can be withdrawn before acceptance. Although counsel for the applicant would have me endorse that comment, I am not disposed to do so.

Although, in the sale note signed by Claymore, there was set out, immediately below the position on the form where the purchaser was to sign, the words – "By signing this document you will be legally bound but it", I do not consider that those words do more than confirm the position that would apply if the words did not appear there. Unless and until withdrawn, Claymore's offer would have been legally binding on Claymore. Neither the words "legally binds" nor the words "to become the purchaser" strike me as words that are uncertain to a degree which is of significance in the context of this case.

[7] The subject of degree of certainty is one to which I shall return. I do not see that there is any role for addressing the numerous cases, of which *Trotter* is one, where the purchaser introduced by the agent has entered into a contract which is conditional upon a particular event occurring that was not related to obligations resting on either of the parties to the contract. The learned Magistrate characterized the sale note as unconditional, after noting that there were terms which the parties conceded were of no significance to the present dispute. For the reasons that I have set out, I am satisfied that the engagement sufficiently clearly specifies the event upon the happening of which commission is payable. And I am satisfied that the event has occurred in that the respondent found Claymore and arranged for an unconditional sale note to be signed on behalf of Claymore. However, Mr Bloch submitted to me that it was necessary to take a particular position in relation to the construction of the terms of the relevant contract in the light of certain of the authorities. In *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108; [1941] 1 All ER 33, Lord Russell of Killowen said this at AC page 129:-

> "It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract, would, in my opinion, require clear and unequivocal language."

[8] In *Midgley Estate Ltd v Hand* [1952] 2 QB 432, Jenkins LJ said at page 436:-

> "... *prima facie* the intention of the parties to a transaction of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting ... but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms, even if they do involve the result that the agent's commission is earned and becomes payable although the sale in respect of which it is claimed, for some reason or another, turns out to be abortive."

In *Ackroyd & Sons v Hanson* [1960] 2 QB 144, Upjohn LJ said at page 154:-

> "... contracts under which a principal is bound to pay commission for an introduction which does not result in a sale must be expressed in clear language."

All three cases emphasize the need for clear language. It troubled me that Mr Dennis, who appeared before me for the respondent, was only able to take me to one Australian case where the court had entered judgment for an agent on a claim for commission payable by a vendor who had not executed a contract for the sale of the relevant property. That was the early case of

Macnamara v Martin [1908] HCA 86; (1908) 7 CLR 699 which was concerned with directions to a jury, and in which the reasons for judgment of the High Court referred to no other authorities. He did refer me to *Tynan v A'Beckett* [1923] VicLawRp 54; [1923] VLR 412; 44 ALT 189, where, although the agent's suit for commission failed because the agent had not performed her part of the contract, the court indicated that the vendor could not, by refusing to complete the transaction, have avoided payment of the commission.

[9] And he did refer me to *Gerlach v Pearson* [1950] VicLawRp 56; [1950] VLR 321; [1950] ALR 717, where Dean J at VLR page 325 said, referring to *Luxor*:-

> "... I do not think I am obliged to accept Lord Russell's statement ... that to negative his construction "clear and unequivocal language" is necessary. The question is one of construction with, I think, no onus either way. However difficult of construction the contract may be, I do not think the degree of difficulty should affect the construction arrived at by the application of the ordinary principles of interpretation."

And he also referred me to *Christie Owen & Davies v Rapacioli* [1974] 1 QB 781, where the Court of Appeal held that the agents were entitled to their commission, the event on which commission was payable being "an introduction ... of a person ready able and willing to purchase", and where the vendor first accepted the offer of the purchaser found by the agent, then had a contract prepared, which the agent arranged for the purchaser to sign, then declined to proceed after receiving a better offer. Orr LJ said at page 790:-

> "The result is that where a prospective vendor binds himself, on the terms with which we are here concerned, to more than one estate agent, he may find himself liable to pay more than one commission ... the remedy of the prospective vendor, if he wishes to avoid paying more than one commission, is not to enter into a contract on such terms ..."

An earlier English case where the Court of Appeal had also found that commission was payable to an agent, Denning LJ dissenting, was *John Trinder and Partners v Haggis* [1951] WN 416, where the event was "being successful in introducing a person willing to sign a contract to purchase at an agreed price", and the purchaser did, but the vendor would not, sign the contract prepared by the vendor's solicitors. **[10]** Evershed MR was reported as having said first, that if a commission were to be attracted at any stage before the coming into existence of a binding contract, it must be so provided in the contract of agency in clear terms, secondly that the argument that the words "introducing a person willing to sign a contract to purchase at an agreed price" meant no more and no less, than introducing a person who had signed an enforceable contract to purchase was over subtle, and thirdly that the words covered the events which happened.

Those who draft, and those who construe, can only seek relative certainty, as words must be a fallible, imperfect vehicle for conveying meaning. When involved in the construction of a contract, it is not appropriate to take a narrow or pedantic approach. See Barwick CJ in *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* [1968] HCA 8; (1968) 118 CLR 429 at 437; 41 ALJR 348, and Mason J in *Meehan v Jones* [1982] HCA 52; (1982) 149 CLR 571 at 589; 42 ALR 463; (1982) 56 ALJR 813.

In the subject case, I would characterize as over subtle the arguments as to why the terms of the engagement are uncertain. Even if this represents an especially rare case, and even if the level of clarity required is relatively higher, I consider that the test is satisfied. I referred earlier to the consideration that a vendor could be liable to pay several commissions, if commission is payable where more than one person signs a contract to become purchaser, although the vendor does not sign. I consider that that is likely to be only a rare event, although I note from comments of Orr LJ in *Christie Owen & Davies* **[11]** additional to those which I have quoted above that it was a factor affecting Denning LJ, in his consistent rejection of claims for commission where there was not an actual completed sale.

In certain circumstances, more than one commission may be payable, but it may be that in other circumstances the proper conclusion may lie in the application of what was said by the Full Court in *Dainton v Chivers* [1928] VicLawRp 80; [1928] VLR 555; 34 ALR 394; 49 ALT 299 that there is an implied condition attaching to a promise to pay commission, that the agent should introduce the purchaser before the vendor has actually sold the property to another person. That

consideration is not relevant here as it is clear from the findings of the learned Magistrate that the applicant had not agreed to sell the property to the ultimate purchaser when Mr Powell telephoned Mr Bevacqua to tell him that Claymore had signed the sale note. Like the learned Magistrate, I am satisfied that the words of the engagement covered what happened, and that the agent is entitled to be paid commission. I order that the order nisi be discharged and that the applicant pay the respondent's costs.

APPEARANCES: For the applicant Marble Meadows: Mr GD Bloch, counsel. HS Wise, Gershov & Co, solicitors. For the respondent Robin Daley Holdings: Mr BM Dennis, counsel. Noel Waters, solicitor.
