

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 1 of 1996
(9507967)

BETWEEN:

YOUR HOME REALTY (NT) PTY LTD
Appellant

AND:

STEVEN JOHN COOKE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(21 June 1996)

This is an appeal from a decision of a stipendiary magistrate in the Local Court at Darwin. The appellant was the plaintiff in the Local Court action which was a claim for \$7,800 being real estate agent's commission upon completion of the sale of property owned by the defendant/respondent at 18 Cullen Street, Woodleigh Gardens.

The learned stipendiary magistrate delivered a very clear and carefully reasoned written Reasons for Decision in which he came to the conclusion that the plaintiff had failed to establish on the balance of probabilities a causal relationship between its actions and the eventual contract of sale.

The grounds of appeal are:

- “1. The learned Magistrate erred in law in finding that, under the terms of the Agreement between the parties, the Appellant “took upon itself the joint responsibility “to submit (the property) to Public Auction and to sell the property”” (Reasons page 20), when the particular provision of the Agreement referred to by the learned Magistrate was concerned with the scope of the Appellant’s authority as the Respondent’s agent and not with the Appellant’s responsibilities or obligations as such agent.
2. The learned Magistrate erred in law in construing clause 1:2 of the Agreement between the parties to the effect that the Appellant should only be entitled to commission if it was the direct, effective or efficient cause of the sale of the Respondent’s property (Reasons page 23).
3. The learned Magistrate erred in law in finding that in order for the Appellant to be entitled to commission under clause 1:2 of the Agreement between the parties, it was necessary for the Appellant to establish a causal relationship between its actions and the eventual contract of sale of the Respondent’s property (Reasons page 25).
4. The learned Magistrate erred in law in finding that the Appellant was not entitled to commission because it was not the direct, effective or efficient cause of the sale of the Respondent’s property.”

Counsel for the appellant sought leave to amend the notice of appeal to include ground 5 which reads as follows:

“The learned Magistrate erred in law in making findings of fact and law in relation to the issue of “effective cause” in circumstances where it was not raised in as an issue on the pleadings nor at any time upon to the completion of the evidence in the case.”

By agreement between counsel for the appellant and the respondent the matter proceeded on the basis that this Court would consider the first four grounds of appeal. In the event that the Court concluded the appellant could not succeed on any of the first four grounds then the matter would be relisted to enable the parties to argue the appellant's application to amend the notice of appeal to include ground 5. The reason for the matter proceeding in this way was because the respondent had not had sufficient notice to prepare arguments in respect of the appellant's application to amend the notice of appeal to include the additional ground 5.

On 15 December 1993 the appellant and the respondent entered into an agency agreement. This agreement was tendered and marked Exhibit P1 in the proceedings before the Local Court. The "conditions of authority" contained in that agreement are as follows:

"1:1 In consideration of the agent undertaking to conduct a public Auction of the property and advertising the same for sale, the vendor appoints the agent sole and exclusive agent for the sale of the property for a period commencing from the date hereof and expiring on the date of expiration specified in the Schedule hereto (herein called sale period).

1:2 Should the vendor enter into a contract for the sale of the property at any time with a purchaser with whom negotiations were commenced during the sale period, or to whom the property was introduced during or prior to the sale period, the vendor shall pay commission to the agent on the final sale price in accordance with

the Schedule of rates specified in the Schedule hereto.

1:3 The property shall be regarded as introduced to a purchaser at the time when that purchaser becomes aware that the property is for sale.

1:4 For the purposes of Clause 1:2 herein, the Vendor shall be deemed to have entered into a contract for the sale of the property if the shareholders of the Vendor enter into a contract for the sale of the majority of shares in the Vendor. In such case, the vendor and the shareholders shall jointly and severally be liable for the payment of commission to the Agent based on the sale price for such shares in accordance with the Schedule of rates contained in the Schedule."

In his written submissions to this Court, counsel for the appellant has usefully provided a chronology which assists in an understanding of the relevant facts found by the learned stipendiary magistrate. There is no challenge to the learned stipendiary magistrate's finding of facts, the chronology of which is as follows:

"late November 1993 Mr and Mrs Ho inspect property at 18 Cullen Street, Woodleigh Gardens in response to one of the respondent's own N.T. News advertisements - this was the basis of the finding by the Magistrate (top p.2) that Mr and Mrs Ho were *first introduced* to the property as potential purchaser by the respondent's own actions in late November 1993.

Up to 15 December Respondent unsuccessful in his efforts to sell the property.

15 December 1993 "Authority to sell by Public Auction" (Exh P1) - Appellant granted sole agency from 15 December 1993 to 11 March 1994 in respect of sale of plaintiff's home (p.3).

- 8/9 January 1994 First weekend open inspections; NT News advertising (p.4)
- 16 January 1994 Second weekend open inspection; NT News advertising (p.4)
- 22/23 January 1994 Third weekend open inspections; NT News advertising (p.4)
- 29/30 January 1994 Fourth weekend open inspections; NT News advertising (p.4/5)

Open inspection attended by Michael and Allison Ho on 29 January (p.5) - they recognized the property as one inspected previously. They gave the agent their names and home telephone number (p.8).

- 5/6 February 1994 Fifth weekend open inspections: NT News advertising (p.6)
- 6 February 1994 Defendant's home featured in "Property in Profile" in NT News - exh P2 (p.6)
- 8 February 1994 Reserve price for auction set at \$208,000.00 by defendant (p.6)
- 9 February 1994 Public auction held - property passed in at \$195,000.00. Mr Ho attended the auction "out of interest to see what the property went for" (p.9). The agent had "contacted Mr Ho and pressed him to attend the auction" (p.9)
- date not stated After the auction, agent telephoned Mr Ho and suggested that he could get the property for \$208,000.00: Mr Ho told the agent he was not interested (bottom p.9)
- 19/20 February 1994 Open inspections recommence after auction (p.10)
- 26/27 Feb 1994 Further open inspections (p.10)
- 5/6/ March 1994 Last open inspections (p.10)
- 11 March 1994 Agency Agreement came to an end (on or about 11 March)

12 March 1994	Respondent re-advertised property for private sale (p.10)
26 March 1994	Respondent again re-advertised property for private sale (p.10)
28 March 1994	Respondent's letter to Appellant terminating listing (Exh. P6) - (p.10). Termination found to be unnecessary - it appears from the evidence that both parties understood and accepted that the appellant was no longer the agent from 30 days after 9 February 1994 (p.10,.5)
dates not stated	Negotiations take place between Respondent and Mr and Mrs Ho (p.11)
14 April 1994	Respondent contracts to sell property to Michael Ho and Allison Ho for \$195,000.00 (p.11.5)
6 May 1994	Contract completed (p.11)"

In considering clause 1.2 of the Agency Agreement the learned stipendiary magistrate correctly, in my opinion, applied the decision in *Gerlach v Pearson* (1950) VLR 321 Dean J stated at 323:

"It is possible to state the legal basis of such a claim in a general way in a few words. It is necessary to inquire what was the event upon which defendants agreed to pay commission, and then to inquire whether that event has occurred. If it has, commission is payable; if it has not, commission is not payable. Each case must depend upon its own circumstances and upon the proper construction of the relevant documents and conversations. It is unnecessary to do more than refer to the case of *Luxor (Eastbourne) Ltd v Cooper*, [1941] AC 108, especially per Viscount Simon LC at p.119, and Lord Russell of Killowen, at p.124. The Lord Chancellor said:

There is, I think, considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for

contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion ..."

This test has been adopted and/or approved in subsequent decisions eg, *L.J. Hooker Ltd v W.J. Adams Estates Pty Ltd* [1976-77] 138 CLR 52 at 66 per Gibbs J; *David Leahy (Aust.) Pty Ltd v McPherson's Ltd* (1991) 2 VR 367 at 375 per Tadgell J; *Di Dio Nominees Pty Ltd v Brian Mark Real Estate Pty Ltd* (1992) 2 VR 732 at 738-9 per Marks J.

In deciding whether an agent has earned his commission, the question is always one to be determined by the interpretation of the agreement under consideration according to the ordinary rules of construction (*Rasmussen & Russo Pty Ltd v Ganigliid* (1982) Qd R 571; *L.J. Hooker Limited v W.J. Adams Estates Pty Ltd*).

The correct approach to the construction of any commercial agreement is to consider the whole of the agreement (*Australian Broadcasting Commission v Australian Performing Right Association* (1973) 129 CLR 99 at 109 per Gibbs J).

The approach should then be to determine what, on the proper construction of the contract between the plaintiff and the defendant, was the event upon the happening of which the agent acquired a right to commission, and secondly, to determine as a matter of fact whether that event has

occurred. (*David Leahy (Aust) Pty Ltd v McPhersons Ltd* (1991) 2 VR 367).

I agree with the learned stipendiary magistrate's conclusion that in the terms of the agency agreement there were in effect three alternative "events" upon which the defendant agreed to pay commission, all involving a sale at any time by the vendor to the purchaser who met the description set out in clause 1:2, namely that (p13 Reasons for Decision):

- IF** (a) negotiations were commenced during the sale period with Mr and Mrs Ho; or
- (b) the property was introduced to Mr and Mrs Ho during the sale period; or
- (c) the property was introduced to Mr and Mrs Ho prior to the sale period;
- AND:** the defendant entered into a contract for the sale of the property at any time with Mr and Mrs Ho;"

In his Reasons for Decision (p19.6), the learned stipendiary magistrate having regard to his earlier findings concluded that he was satisfied on the balance of probabilities that:

1. Negotiations were not commenced with the purchaser during the sale period.

2. The property was first introduced to the purchaser prior to the sale period.

3. The property was again introduced to the purchaser during the sale period; and

4. The vendor (defendant) entered into the contract for the sale of the property with the purchaser.

The appellant accepts in full and relies on the second and third of the above findings to base its case that two out of the three alternative "events" upon which the defendant agreed to pay commission were satisfied. It is possible to be "introduced" to the same person or property on more than one occasion (*Max Christmas Real Estate v Schumann Marine Pty Ltd* 1 Qd R 325).

It is the appellant's argument that the express terms of the contract of agency in this matter make it unnecessary for the agent to establish that it was the direct, effective or efficient cause of the event upon which commission was payable. On the appellant's argument the principle of "effective cause" has no relevance to the agency agreement in this matter.

I adopt with respect the comments of Marks J in *Di Dio Nominees v Brian Mark Real Estate* (1992) 2 VR 732 at 740.2:

" The purpose of a sole agency agreement is to encourage an estate agent to focus his or her endeavours, including expenditure of time and money, on the sale of the property of the owner in consideration of the promise that the agent will not be deprived of commission in the event that the property is sold by someone else or that a sale results from the activity of others during the period. In effect, the contract is that the sole agent will be paid commission if during the selected period a sale eventuates from an act or acts of introduction by that agent or of others."

I apply the principle established in *L.J. Hooker Ltd v W.J. Adams Estates Pty Ltd* (1976-77) 138 CLR 52 at 66 per Gibbs J:

".... In inquiring whether an agent is entitled to commission it is first necessary, as Viscount Simon L.C. said in *Luxor (Eastbourne) Ltd. v. Cooper* [[1941] A.C., at p. 119] "to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms". The initial question - what, on the proper construction of the contract, is the event upon the happening of which the agent acquires a right to commission - is one which has led to difficulty and to a diversity of opinions in many cases. But it is not the crucial question in the present case. When the question of construction has been determined a second question may arise. If, upon the true construction of the contract, the commission is only payable in the event that a particular transaction was brought about by the agent, e.g. upon the completion of a sale effected by his instrumentality, the question may arise whether the transaction which in fact occurred was brought about as the result of his agency."

I agree with the submission by the appellant that on a true construction of the agency agreement, there is clearly no requirement that the ultimate sale be brought about by the agent. I agree that the clearly expressed terms of the sole

agency agreement in this case exclude any requirement that the agent be the effective cause of the transaction before it is entitled to its commission.

In the appeal before this Court the conditions of the agreement, in particular clause 1:2 and 1:3 defined the event on which commission was payable. I agree with the submission of counsel for the appellant that in this case the principle of effective cause and effect does not apply at all, because of the clear words of the agency agreement itself. The express terms of the contract of agency in this matter make it unnecessary for the agent to establish that it was the direct effective or efficient cause of the event upon which commission was payable. Because of the clear words of the agency agreement, it is not necessary and it is in law an error to go on to consider the second question posed by Gibbs J in *L.J. Hooker Ltd v W.J. Adams Estate Pty Ltd* (supra).

The construction contended for by the appellant is supported by the Full Court of the Victorian Supreme Court in *Di Dio Nominees Pty Ltd v Brian Mark Real Estate Pty Ltd* (1992) 2 VR 732. I apply the principle expressed by Hedigan J at 742.40:

"The agreement in this case was a sole agency agreement. By that, the vendor acquired a particular concentration of the agent's effort to sell. This was balanced by an agreement to pay commission if the property was sold other than through the agent's

specific conduct, so long as the purchaser was introduced during the sole agency period.”

I consider the learned stipendiary magistrate fell into error in deciding that it was necessary for the appellant to establish a causal relationship between its actions and the eventual contract of sale. On my reading of the agency agreement no such causal connection is required and this amounts to a misconstruction of the agency agreement and an error in law.

Ground 1 of the Appeal:

In his Reasons for Decision at p20.4, the learned stipendiary magistrate states as follows:

“.... Mr Barr argued that the agent would still be entitled to his commission even though the agent had nothing to do with the eventual contract. In effect, Mr Barr seems to be arguing that under clause 1:2 of the Agency Agreement there is no requirement that the agent must be the effective cause of the eventual contract. On a reading of clause 1:2 alone that appears to be so. However, in my view, this approach is too narrow. In order to give the Agency Agreement its full force and effect the whole document must be considered in order to ascertain what the parties have agreed to.

On the first page of the Agency Agreement it is stated:

“By this agreement the vendor hereby appoints the Agent to submit to Public Auction and to sell the property more particularly described in the Schedule Hereto (herein called “the property”) in accordance with the conditions set out in this agreement.”

Accordingly, the Plaintiff in this matter took upon itself the joint responsibility “to submit to Public Auction and to sell the property” (emphasis added).”

Further in his Reasons for Decision at p25.2, the learned stipendiary magistrate held:

"In my view, when the Agency Agreement is looked at as a whole (rather than just looking at clause 1:2) it is clear that the Plaintiff was engaged as agent to sell the property and upon a contract for sale being entered into then commission was payable. It follows, that there needs to be a connection between the Plaintiff's efforts to sell and the eventual contract for sale. If it were intended that there be no such connection then it was open to the Agency Agreement to say so, but in my view it would need to do so in clear and unambiguous terms. No such clear terms appear in the Agency Agreement."

I agree with the submissions by counsel for the appellant that the agency agreement gave the appellant the authority firstly to submit the property to public auction and, secondly, to sell the property. I agree the learned stipendiary magistrate erred in finding in his Reasons (p20.8) that "the plaintiff in this matter took upon itself the joint responsibility to submit to public auction and to sell the property". The reference "and to sell the property" is not an obligation of the agent but rather establishes the scope of the agent's authority.

Ground 2

At p23 of his Reasons for Decision the learned stipendiary magistrate held as follows:

".... given that the Plaintiff had been engaged by the Agency Agreement "to sell the property" and further, given that the property was in fact sold is it necessary that the Plaintiff be the direct, effective or efficient cause of that sale? In my view, the answer to this question in the instant case must be yes."

I agree with the appellant's submission that the learned stipendiary magistrate erred in law in construing clause 1:2 of the agreement between the parties to the effect that the appellant should only be entitled to commission if it was the direct, effective or efficient cause of the sale of the respondent's property.

Ground 3

I have found that it was not necessary and amounted to an error in law for the learned stipendiary magistrate to consider the second question posed by Gibbs J in *L.J. Hooker Ltd v W.J. Adams Estates Pty Ltd* (supra). The express terms of the agency agreement in this matter make it unnecessary for the agent to establish that it was the direct, effective or efficient cause of the sale upon which the commission was payable. I agree that the learned stipendiary magistrate erred in law in finding that in order for the appellant to be entitled to commission under clause 1:2 of the agreement between the parties, it was necessary for the appellant to establish a causal relationship between its actions and the eventual contract of sale of the respondent's property.

Ground 4

For the reasons already stated, I have come to the conclusion the learned stipendiary magistrate erred in law in finding that the appellant was not entitled to commission because it was not the direct, effective or efficient cause of the sale of the respondent's property.

I would allow the appeal and order judgment in favour of the appellant in the sum of \$7,800.

The respondent to pay the appellant's costs of this appeal and of the hearing before the Local Court.