



## Transcript of Proceedings

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Date: 30 August, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No BS5981 of 2004

AXIS AUSTRALASIA PTY LTD  
(ACN 095 309 345) TRADING AS  
LOCATIONS REALTY (BN17637387)

Applicant

and

GAYLIA JOY GRIFFITHS

Respondent

BRISBANE

..DATE 20/08/2004

JUDGMENT

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: This is the hearing of an adjourned application by Axis Australasia Pty Ltd which I will refer to as Axis in these reasons to set aside a statutory demand dated 11 June 2004 for payment of a judgment debt pursuant to the provisions of the Corporations Act 2001.

The alleged dispute concerns matters relating to commission associated with the sale of an apartment at the Gold Coast. Axis conducts a real estate agent's business under the name Locations Realty from premises at Hope Island. In late August 2002, the respondent - Ms Griffiths - commenced to work with Axis as a licensed sales person. She was not a licensed real estate agent at that time although studying to be so appointed. Ms Griffiths' terms of engagement inter alia were that she was to be paid a commission in respect of sales actually achieved by her. Her remuneration was half the commission payable and paid to Axis in respect of any sale achieved by her endeavours.

Axis provided Ms Griffiths with an office and the usual facilities associated with a commercial office and paid for advertisements. She was required to keep proper records and each appointment from a seller to act in the sale of property was to be in writing and in the proper form and to be a 60 day exclusive agency appointment consistently with the provisions of the Property Agents and Motor Dealers Act 2000.

There is dispute as to when Ms Griffiths ceased employment with Axis. On her account and on the account of a number of

other deponents, it was the first week in December 2002. On  
Axis's account through its general manager Mr Petty and a  
member of his office staff, it was at the end of January 2003.

In or about the end of January 2003, Ms Griffiths opened her  
own real estate sales business. On 13 February 2003, Mr  
Vaughan Bullivant entered into a contract to sell his  
apartment to people named Henry for about \$4.7 million. Ms  
Griffiths and her husband Mr Richard Griffiths who have both  
sworn affidavits are directors of Black Business Consultants  
Proprietary Limited which trades under the registered business  
name Business Support Groups to which I will refer as BSG.  
Mr Griffiths says he was approached by a Mr John Porter with  
whom he had worked in the past and who has acted as Mr  
Bullivant's solicitor for very many years, to become involved  
in the sale of the Bullivant property to Mr and Mrs Henry.  
This was on or about 23 December 2002. Ms Griffiths was  
retained by BSG to deal with the Henrys in early February  
2003.

On 3 March 2003, Mr Griffiths, on behalf of BSG, invoiced  
Porter Davies, the solicitors, in the sum of \$55,000 for  
marketing consultancy charges incurred in the sale of Mr  
Bullivant's apartment. It is Axis's contention that Ms  
Griffiths was appointed to sell Mr Bullivant's apartment while  
she still worked for the company in December 2002 or that she  
ought to have obtained such an appointment and that she did  
not, in breach of her contract of employment, obtain an

appropriate appointment from Mr Bullivant and, accordingly, Axis lost the right to commission.

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Ms Griffiths contends that she left the employ of Axis because she had not received commission to which she was entitled and was otherwise unhappy with the level of support in the office. After numerous phone calls to Axis and often unanswered correspondence generally on her behalf by her husband, Ms Griffiths commenced proceedings on 11 August 2003 in the Magistrates Court to recover the claimed commission. It is now conceded that commission is owed to her in respect of those sales.

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On 15 September, a notice of intention to defend and defence was filed but it was a bare denial although Mr Petty deposes that he learnt of Ms Griffiths' alleged wrong doing when he read an article about her in the Gold Coast Bulletin in early July where she was reported as saying that the Bullivant sale was her first sale in her new business. On his evidence, she had left at the end of January after a telephone call to him from her husband. The contract, he notes, was executed on 13 February.

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An application for summary judgment on her claim was filed on 17 September 2003 and heard on 8 October. Mr Petty filed an affidavit exhibiting a proposed counterclaim for a set off on the basis of the Bullivant commission. On 15 October 2003, summary judgment was entered against Axis and, on 11 November

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2003, Axis appealed. The appeal was heard and then determined against Axis on 11 June 2004.

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On 16 June, the present statutory demand was served on Axis for the judgment debt. On 7 July 2004, the present application to set it aside was filed. Axis commenced proceedings in the District Court in the form of its proposed counterclaim for damages for breach of contract on 21 July 2004.

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In my view, that is not a promising chronology for a finding of genuineness of the complaints by the company against Ms Griffiths.

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Since filing the application, it has been, to my knowledge, twice adjourned. There has been what might be described as a "drip feeding" of further material by a great many deponents on both sides, no doubt at considerable cost to the parties.

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It is now necessary to say something about the progress of the sale of Mr Bullivant's apartment prior to Ms Griffiths commencing work with Axis. Mr Porter deposes that during the 10 years he has acted as Mr Bullivant's solicitor he has been responsible for engaging real estate agents to market and find buyers for his apartment. Ms Griffiths introduced the Henrys to Mr Bullivant in late 2001. Mr Porter was engaged in these negotiations with Ms Griffiths for the Henrys over many months. The negotiations eventually broke down.

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In August 2002, Mr Bullivant entered into a contract with Yarraden Station Pty Ltd. This contract did not complete and Mr Porter continued to be involved in negotiations about it until December 2002.

Mr and Mrs Henry then came back into the market to purchase the apartment. Mr Porter and Mr Griffiths discussed this and concluded that Ms Griffiths was the appropriate person to liaise with the Henrys given her previous involvement. A contract was delivered to the Henrys' solicitors, Corrs, with a covering letter signed by Ms Griffiths undated but at least before 24 December 2002 because that date is mentioned as a date on which Ms Griffiths would collect the contract from Corrs.

In early January 2003 another real estate agent sent a letter of offer from another purchaser to Mr Bullivant and Mr Porter. There was further correspondence about this sale through January.

On 7 February Mr Porter, on behalf of Mr Bullivant, engaged BSG to handle the further negotiations with the Henrys. Mr Bullivant denies he ever appointed Axis or Ms Griffiths to act on the sale, nor did he approach Ms Griffiths to act. In 2001 he notes that Ms Griffiths was acting for the Henrys. He deposes that if approached he would not have appointed Axis. During 2002 he says that he had appointed a Sunshine Coast real estate firm under an exclusive agency and then he entered into the Yarraden contract.

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By far the preponderance of deponents say that Ms Griffiths had ceased to work for Axis by early December 2002, including Nicola Payne, who occupied Ms Griffiths' desk from 16 December. She said she was told by Mr Petty, his wife and Mr Blanksby, formerly a director of Axis, that Ms Griffiths no longer worked there. Mr Blanksby has sworn an affidavit to similar effect.

His affidavit is of considerable assistance, not least because he explains the process of placing advertisements in journals such as the REIQ magazine, an advertisement in which an ad for Mr Bullivant's apartment appeared inserted by Ms Griffiths. Mr Petty has made much of this advertisement which appeared in January to show that Ms Griffiths still worked for Axis.

But Mr Blanksby explains that the arrangement was an attempt to lift the profile of the business and that each salesperson was responsible for the cost of any advertising done in this way and Ms Griffiths was ultimately charged for it, although initially it was charged to Axis. Mr Blanksby deposes that the advertisement was placed in the hope of eliciting a potential purchaser without having any specific appointment to act for any owner.

Ms Patricia Nixon, the office manager at Axis, suggests that Ms Griffiths was still working up until the first week of January and refers to telephone messages, but these seem to relate to incoming calls. It seems clear that Ms Griffiths was possibly in and out of the office over several days, but

these incoming calls could easily have been for people seeking her, not knowing that she was no longer working there. They are inconclusive. There are some calls to Mr Porter's telephone number. He deposes that they are social calls and they were in October and early December, consistent with Ms Griffiths' evidence.

He deposes that he has not charged for any telephone calls or consultations to Ms Griffiths on Mr Bullivant's conveyancing account until the 10th of February 2003. This account was constructed well before there was any suggestion of wrong doing on the part of Ms Griffiths by Axis.

Mr Blanksby deposes - and there is evidentiary proof in the form of photographs - that Ms Griffiths attended the office Christmas party at Axis in early December not later in the month as suggested. Mr Griffiths denies making phone calls to Mr Petty in late January saying that his wife would not be returning to work.

There are many other facts which have been set out in this extensive material to which I make no reference. I have had an opportunity, however, to read all the material. The principles on an application of this kind are not in dispute and need not be elaborated in these reasons.

It is the case that there is some disagreement on the material about the date when Ms Griffiths ceased working at Axis, but

in my view that is insufficient to send the matter to trial.  
The clear evidence of Mr Bullivant has not been challenged.

Mr Porter has been said to be unreliable because of changes in  
detail in his explanation of the contact he had with Ms  
Griffiths in December, January and February, but to my mind  
they are not crucial matters.

Against the background of Ms Griffiths' earlier dealings with  
the Henrys, Mr Bullivant's evidence, the complete failure of  
Mr Petty to raise any concerns about Ms Griffiths' alleged  
conduct in removing material from her computer before she left  
Axis, either to anyone in the office, including Mr Blanksby,  
or in response to Ms Griffiths litigation in the Magistrates  
Court, allegedly done to cover her tracks of wrongdoing, the  
failure to respond to the claim in the Magistrates Court with  
a timely defence, suggests that this offsetting claim does not  
have that quality of genuineness sufficient to set aside the  
statutory demand and I would accordingly refuse the  
application.

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HER HONOUR: The respondent seeks her costs of the application  
and there is no opposition to an order of that kind. There  
are, however, two sets of reserved costs which are in  
contention.

The matter came on on its due date before Justice Holmes on the 27th of July this year. On the morning at 11.30, the respondent produced a large number of contentious affidavits. It had had adequate time either to serve them on the applicant so that they could have been responded to or, had that not been possible, it would have been appropriate to make an offer to the applicant's solicitors to adjourn the matter without incurring further costs. That did not occur.

I am of the view not that the costs of that adjournment should lie where they fall as submitted by the respondent but that the respondent should pay the applicant's costs thrown away consequent upon the adjournment on the 27th of July 2004.

The matter came on before me last week on the 13th of August. A large number of affidavits had been served on the respondent on the 12th of August. They were responded to on the 13th of August by the respondent. It seems to me that those costs thrown away fall within the general order about the costs on the application, namely, that the applicant should pay the respondent's costs thrown away on the 13th. All to be assessed on the standard basis.

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