

SUPREME COURT OF QUEENSLAND

CITATION: *Citiprime P/L v Darra Development P/L* [2002] QSC 058

PARTIES: **CITIPRIME INDUSTRIAL PTY LTD** ACN: 059 417 337
(plaintiff/respondent)
v
DARRA DEVELOPMENT PTY LTD ACN: 085 788 183
(defendant/applicant)

FILE NO: S1432/02

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 19 March 2002

DELIVERED AT: Brisbane

HEARING DATE: 28 February 2002

JUDGE: Wilson J

CATCHWORDS: CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – CAVEATS AGAINST DEALINGS – application to remove caveat lodged by respondent seeking to exercise option to purchase lots pursuant to agreement with applicant – where respondent purported to exercise option after it had expired – whether option agreement relied on by respondent in support of caveat was void

PROFESSIONS AND TRADES – AUCTIONEERS AND AGENTS – whether respondent acted as “real estate agent” as defined in *Auctioneers and Agents Act 1971* (Qld) and *Property Agents and Motor Dealers Act 2000* (Qld) – whether option agreement allowing respondent to purchase land breached legislation

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION - whether respondent acted as “real estate agent” as defined in *Auctioneers and Agents Act 1971* (Qld) and *Property Agents and Motor Dealers Act 2000* (Qld) – whether option agreement allowing respondent to purchase land breached legislation

Auctioneers and Agents Act 1971 (Qld), s 2, s 70(1)
Land Title Act 1994 (Qld), s 127(1)
Property Agents and Motor Dealers Act 2000 (Qld), s 128(1), s 140, s 144, s 145, s 160, s 262, Schedule 3

Fitzgerald v FJ Leonhardt Pty Ltd (1996-1997) 189 CLR 215, considered.

Jenkins v Kedcorp Pty Ltd [2002] 1 Qd R 49, considered.

Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410 at 413, considered.

COUNSEL: HB Fraser QC for the applicant/defendant
DA Savage SC for the respondent/plaintiff

SOLICITORS: Clayton Utz for the applicant/defendant
Tucker & Cowen for the respondent/plaintiff

[1] **WILSON J:** This is an application to remove a caveat pursuant to s 127(1) of the *Land Title Act 1994*.

[2] The applicant is the registered proprietor of lots 20 and 23 on SP 127956 in the county of Stanley parish of Oxley. On 18 January 2002 the respondent lodged a caveat over the land, claiming “an equitable interest as purchaser of an estate in fee simple”. The grounds of the claim are described as follows -

“Pursuant to a Contract in writing dated 21st December 2001 between the Registered Owner as vendor and the Caveator as purchaser”.

[3] The land forms part of the QCL Industrial Estate at Darra. On 10 August 2000 the applicant (then called “Dalemist Pty Ltd”) and the respondent entered into two agreements -

- (i) Marketing Agreement by which the applicant would market lots 20, 22 and 23 for sale at or above a minimum price; and
- (ii) Option Agreement by which the applicant could require the respondent to purchase the lots for the minimum price, and the respondent could require the applicant to sell the lots.

There is no dispute about lot 22, which was sold to a third party in April 2001. The respondent’s option to purchase lots 20 and 23 expired at 5.00 pm on 21 December 2001.

[4] The respondent has purchased for development other lots in the estate. It is a party to a joint venture agreement with Tinpint Pty Ltd and Citimark Properties Pty Ltd, whereby Tinpint Pty Ltd is to provide financial accommodation to the respondent, and the profits of the joint venture are to be shared equally by Tinpint Pty Ltd and Citimark Properties Pty Ltd.

[5] On 7 December 2001 the applicant made a contract to sell lots 20 and 23 to Applewood Pty Ltd for \$860,000.00. The contract was conditional on the respondent’s failure to exercise its option. The purchaser has contracted to onsell Lot 20 for a higher price.

- [6] On 21 December 2001, after 5.00 pm, the respondent purported to exercise its option for the option price of \$811,664.00.
- [7] The applicant concedes that the respondent's affidavits raise the following triable issues :
- (a) whether the applicant breached the Marketing Agreement or another obligation (fiduciary or otherwise) by not notifying the respondent that it was negotiating with, or had received an offer from, or had sold lots 20 and 23 to Applewood Pty Ltd;
 - (b) whether the respondent is entitled to rely on this or other conduct as causing it not to exercise the option in time;
 - (c) whether, but for the applicant's submissions on the effect of provisions in the *Auctioneers and Agents Act 1971* and the *Property Agents and Motor Dealers Act 2000*,
 - (i) the respondent would be entitled to relief from forfeiture and specific performance of the Option Agreement; and
 - (ii) the respondent should therefore be regarded as having a caveatable interest in lots 20 and 23.
- [8] Senior counsel for the applicant submitted -
- (a) that under the Marketing Agreement the respondent was its "real estate agent" within the meaning of the *Auctioneers and Agents Act* and the *Property Agents and Motor Dealers Act*;
 - (b) that the option was expressly prohibited by s 70(1) of the *Auctioneers and Agents Act* with the result that it is void and cannot support a caveat;
 - (c) that since the commencement of the *Property Agents and Motor Dealers Act* the respondent has been prohibited from obtaining a beneficial interest in lots 20 and 23;
 - (d) that no Court would make an order enforcing the option or otherwise obliging the applicant to sell lots 20 and 23 to the respondent; and
 - (e) that therefore the caveat should be removed.

He submitted further that in any case the balance of convenience favoured the removal of the caveat.

Illegality

- [9] When the Marketing Agreement and the Option Agreement were made, the *Auctioneers and Agents Act 1971* was in force. That act was repealed and replaced by the *Property Agents and Motor Dealers Act 2000*, which came into force on 1 July 2001.

[10] Section 70(1) of the *Auctioneers and Agents Act* provided -

“When agent prohibited from having interest in option to purchase land

70.(1) An auctioneer or real estate agent shall not, in respect of land had by the auctioneer or real estate agent for sale, obtain or be in any way concerned in obtaining from the seller an option to purchase in which that auctioneer or real estate agent is beneficially interested.

Maximum penalty – 100 penalty units.”

A contract by which a real estate agent obtained an option to purchase land had by it for sale was impliedly prohibited by this section. See *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413; *Fitzgerald v FJ Leonhardt Pty Ltd* (1996-97) 189 CLR 215. Thus, if the effect of the Marketing Agreement was to constitute the respondent as a real estate agent within the meaning of the *Auctioneers and Agents Act*, the Option Agreement (at least insofar as it conferred on the respondent an option to purchase) was void, and cannot support the caveat. If it is quite clear that that was the effect of the Marketing Agreement, then the caveat must be removed. If there remains a serious question to be tried as to whether that was its effect, then, subject to the question of the balance of convenience, the caveat should remain.

[11] What were the functions and responsibilities of the respondent under the Marketing Agreement? It held itself out as skilled in the marketing of the land and agreed to market it for sale on the terms of the contract (recitals). The applicant granted it the right to manage and direct the marketing of the land for sale during the term of the agreement, which was the same as the term of the Option Agreement (clause 5.1). It agreed to promote the success of the “Project”, ie the marketing and sale of lots 20, 22 and 23 (clauses 6.1, 1.1). It contracted both to market the land for sale (clause 6.2) and for “negotiating with any prospective purchasers of the land any sale agreement” (clause 6.2.3). It agreed to submit offers for sale of each lot to the applicant (clauses 6.2.4, 6.3.3, 7.2 and 9.1) and to attempt to conclude sales (clause 6.3.5). It was to be rewarded upon a sale of the land, in the form of a share of the surplus over a specified price (clause 9 and 10).

[12] “Real estate agent” was defined in s 2 of the *Auctioneers and Agents Act* in the following terms -

“real estate agent” means any person who, as an agent for others, and whether on commission or for or in expectation of any fee, gain, or reward, and either alone or in connection with any other business, and either generally or in respect of any 1 transaction, exercises or carries on or advertises or notifies or states that the person exercises or carries on or that the person is willing to exercise or carry on or in any way holds the person out as ready to undertake the business of buying, selling, exchanging, or letting houses, land or estates, or negotiating for such buying, selling, exchanging, or letting, or buying, selling, exchanging, or letting hotel businesses, residential businesses, boarding house businesses, storekeeping businesses, manufacturing businesses, or businesses of any kind, or any interest

in any of such businesses, or buying, selling, or exchanging livestock but, does not include a person who –

- (a) undertakes any such function as a representative of Her Majesty; or
- (b) is employed merely as a clerk or servant; or
- (c) is a registered life assurance company or friendly society, or a financial institution or trustee company.”

That complex definition was considered by the Court of Appeal in *Jenkins v Kedcorp Pty Ltd* [2002] 1 Qd R 49. It is clear that -

- a person may be a real estate agent if, in respect of any one transaction, he or she acts as agent for another in a way which, if done repeatedly, would constitute the carrying on of a business;
- negotiating a sale is enough; the alleged agent need not have the authority to commit the owner to sell;
- it is not relevant that another licensed real estate agent may participate in bringing about the sale.

[13] It was submitted that the respondent is a property developer, not a real estate agent. (It was not suggested that it comes within the definition of “property developer” in s 262 of the *Property Agents and Motor Dealers Act*). However, being a property developer and being a real estate agent within the meaning of the 1971 Act are not mutually exclusive. I consider that its functions and responsibilities under the Marketing Agreement were clearly those of a real estate agent.

[14] That being so, the Option Agreement cannot support the caveat.

[15] I was addressed also on the applicability of ss 144 and 145 of the *Property Agents and Motor Dealers Act* which are as follows -

“144 Beneficial interest—options

(1) This section applies to property placed by a person (“**client**”) with a real estate agent for sale.

(2) The real estate agent commits an offence if the agent obtains from the client an option to purchase the property in which the agent has a beneficial interest.

Maximum penalty—200 penalty units or 3 years imprisonment.

(3) A real estate salesperson employed by the real estate agent commits an offence if the salesperson obtains from the client an option to purchase the property in which the salesperson has a beneficial interest.

Maximum penalty—200 penalty units or 3 years imprisonment.

- (4) The real estate agent must not sell the property if the agent obtains a beneficial interest in an option to purchase the property.

Maximum penalty—200 penalty units or 3 years imprisonment.

145 Beneficial interest—other than options

(1) This section applies to property placed by a person (“**client**”) with a real estate agent for sale, but does not apply if section 144 applies.

(2) The real estate agent commits an offence if the agent obtains a beneficial interest in the property.

Maximum penalty—200 penalty units or 3 years imprisonment.

(3) A real estate salesperson employed by the real estate agent commits an offence if the salesperson obtains a beneficial interest in the property.

Maximum penalty—200 penalty units or 3 years imprisonment.

(4) A person does not contravene subsection (2) or (3) if—

- (a) the person—
 - (i) before a contract for the sale of the property is entered into, obtains the client’s written acknowledgment in the approved form that the client —
 - (A) is aware that the person is interested in obtaining a beneficial interest in the property; and
 - (B) consents to the person obtaining the interest; and
 - (ii) acts fairly and honestly in relation to the sale; and
- (b) no commission or other reward is payable in relation to the sale; and
- (c) the client is in substantially as good a position as the client would be if the property were sold at fair market value.”

[16] Section 144 is clearly inapplicable because the option to purchase was obtained before the commencement of the legislation.

[17] Having regard to my conclusion that the Option Agreement (at least insofar as it conferred on the respondent an option to purchase) is void, it is not necessary for me to decide the issues raised by s 145. However, out of deference to counsel's submissions, I make the following observations.

- (i) It would be necessary to determine whether the respondent was a real estate agent within the meaning of the new legislation. The definition in Schedule 3 is -

“see section 128(1).”

That section defines a real estate agent as the holder of a real estate agent's licence, and goes on to list the activities which the holder of such a licence is authorised to perform. Arguably s 145 is applicable to the holder of a real estate agent's licence - which the respondent was apparently not. There are other provisions prohibiting an unlicensed person from acting as a real estate agent (s 160) or obtaining a reward for performing the activities of a real estate agent (s 140). Further, there are arguable points as to whether the authorised activities of a real estate agent under the new legislation are different from those which constituted a person a real estate agent under the old legislation. These are all issues which I would be reluctant to determine on an application such as this.

- (ii) Assuming the option was valid, and thus that it created an interest in land capable of supporting a caveat, that interest was lost when the option was not exercised in time. If the respondent obtained some or more of the relief sought in its statement of claim (eg relief from forfeiture), would the effect be to revive the pre-existing interest in the land, or to create a fresh interest? The determination of this issue would be critical to when the respondent obtained a beneficial interest - whether before or after s 145 came into operation. It is an issue on which extensive submissions would be required, and would probably warrant sending the matter to trial.

[18] I will hear counsel on the form of the order.