SUPREME COURT OF QUEENSLAND

CITATION:	*Greg Roughsedge Realty P/L v Whitecross* [2001] QCA 426
PARTIES:	**GREG ROUGHSEDGE REALTY PTY LTD** (ACN 066 121 284) (plaintiff/respondent/cross-appellant) **v** **RAYMOND JOHN WHITECROSS** (first defendant/appellant/first cross-respondent) **SHARON BRENDA WHITECROSS** (second defendant/not a party to appeal/second cross-respondent)
FILE NO/S:	Appeal No 736 of 2001 DC No 233 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	12 October 2001
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2001
JUDGES:	Williams JA, Jones J, Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Allow the appeal. Set aside the judgment below and order that judgment be entered for the defendant;** **Dismiss the cross-appeal;** **Order that the respondent pay the costs of the trial and of this appeal.**
CATCHWORDS:	PROFESSIONS AND TRADES – AUCTIONEERS AND AGENTS – QUEENSLAND – REMUNERATION – whether respondent estate agent entitled to commission on sale – where four lots involved, three owned solely by the first appellant and one jointly owned with his wife – where respondent introduced a buyer to appellant – where a contract emerged but was later superseded by a second contract which did not identify the respondent as the appellant's agent – where at time of introduction and negotiations the respondent did not hold a real estate agents licence as required under s 19 of *Auctioneers and Agents Act* 1971 CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – agency – real estate agent – terms of engagement – whether engagement in writing – whether

written appointment in clause of contract satisfies s 76(1)(c) of the *Auctioneers and Agents Act* 1971 – interpretation of word "transaction" within s 76(1) of the *Auctioneers and Agents Act* 1971

Auctioneers and Agents Act 1971 (Qld), s 19, s 19(2), s 76(1)(a), s 76(1)(b), s 76(1)(c)
Auctioneers and Real Estate Agents, Debt Collectors and Motor Dealers Act 1922-1961 (Qld) (repealed), s 17, s 23, s 23(1), s 23(1)(a)

Anderson v Densley (1953) 90 CLR 460, cited
Freehold Land Investments Ltd v Queensland Estates Pty Ltd (1970) 123 CLR 418, considered
Meier v Wardell (1924) QWN 19, considered
Moneywood Pty Ltd v Salamon Nominees Pty Ltd (2001) 75 ALJR 408, applied

COUNSEL: H B Fraser QC with D J Kelly for the appellant/ first cross-respondent and second cross-respondent
M W Jarrett for the respondent/cross-appellant

SOLICITORS: Garland Waddington (Maroochydore) for the appellant/ first cross-respondent and second cross-respondent
Elias Mumford (Maroochydore) for the respondent/ cross-appellant

[1] **WILLIAMS JA** : I agree with the reasons for judgment of Jones J and with the orders proposed.

[2] **JONES J**: This is an appeal against a decision in the District Court wherein the respondent, a real estate agent, Greg Roughsedge Realty Pty Ltd, was partially successful in its claim for agents commission. The claim was for the sum of $84,887.50 being the commission calculated on a sale price of $3,437,500.00. The learned trial judge allowed the claim for commission against Mr Whitecross on part only of the land sale which he assessed at $58,378.50. Mr Whitecross has appealed against that judgment. The respondent cross appeals against Mr and Mrs Whitecross to recover that part of the claim disallowed by his Honour.

[3] The relevant contract of sale, dated 13 March 1995 (the first contract), was for the sale of lot 7 on R.P. 851041 containing 12.01ha, lot 8 on R.P. 851041 containing 16.593ha, lot 3 on R.P. 92714 containing 10.11ha and lot 18 on R.P. 26855 containing 8.195ha, as identified in annexure "B" to the contract (Ex.8). Lots 7, 8, and 3 were owned by Mr Whitecross alone and lot 18 was owned jointly by Mr and Mrs Whitecross.[1]

[4] The relevant history commences in late 1994 when, following the publication of a new strategic plan for the Maroochy Shire, Mr Gregory Roughsedge, the person behind the appellant company, identified the appellant's land as being affected by that planning change. He approached Mr Whitecross who expressed willingness on

[1] The purchaser was M.E. Harrison Investment Co. Pty Ltd.

the part of the appellants to sell at least some of the land in question. Mr Roughsedge then made contact with the purchaser who was a well-known land developer in this area.

[5] At this time the respondent was not the holder of a real estate agent's licence as required by s.19 of the *Auctioneers and Agents Act* 1971 ("the Act").[2] The relevant corporation licence was granted to the respondent on 2 February 1995 by which time the introduction of the vendors and purchasers had occurred, as had most of the negotiations about the area of land and the price to be paid. The one significant event occurring after the granting of the licence was the signing of the first contract of sale.

[6] On 19 December 1994 Mr Whitecross signed a document on the respondent's letterhead giving M.E. Harrison Investment Co Pty Ltd an option to buy lots 7 and 8 for 3.75 million conditional on rezoning and a satisfactory feasibility study. Also on that date Mr Whitecross alone signed a document purporting to appoint the respondent as his agent in respect of the sale of lots 7 and 8 of which he was sole proprietor. The terms of this appointment provided for commission to be paid at the rate of 5% for the first $18,000 and 2½% on the balance if –

> "(Roughsedge Realty) introduces a purchaser who enters into a valid and enforceable contract of sale confirmed by me/us for such property, and who completes such Contract; or who does not complete such Contract in circumstances where the Deposit or some part thereof is forfeited; or who does not complete such contract pursuant to any default, act or omission by me/us; or I/we do not complete such contract; or I/we subsequently agree to release the purchaser from further obligation under such contract." (Exhibit 7)

[7] No similar appointment was made by the vendors in respect of the jointly owned block 18 or lot 3 owned by Mr Whitecross alone.

[8] The only other writing relating to the terms of the agency is found in the first contract wherein the respondent is identified in Part B of the **Item's Schedule** as the vendors' agent and in clause 30 which, in the absence of any specific appointment by the vendor, confirms the respondent as the agent of the vendors to "**introduce a buyer**".

[9] It is on the creation of the first contract that the respondent relies for its entitlement to be paid the full amount of commission. The contract however was not unconditional. It depended upon events such as, inter alia, rezoning and local authority approval for subdivision.

[10] Some months after the execution of the first contract there were further negotiations between the appellants and the purchaser, predicated upon the purchaser's concern at not being able to fulfil the conditions within the designated time and within the area of the land which had been bargained for. In the upshot, a second contract was executed on 26 November 1995. The actual description of the subject land in the

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[2] The identification of the relevant sections is made with reference to reprint No. 3 of the Act. The terms of the sections referred to in these reasons are identical to the provisions in the earlier reprints although they were there identified by different section numbers.

second contract was exactly the same as that set out above in the first contract. However, the learned trial judge made the following finding: "under the new contract there was some additional land sold, as it appears to me the balance of lot 18". It is not entirely clear that is so; there is reference in each contract to the subject land being marked on an attached plan and it may be that the reproductions of those plans in the second book does not make the position clear. But it makes no difference to the issues raised by the appeal whether the same land was involved in each contract or not. The purchase price was the same; the only difference was that the latter provided for progressive payments of the purchase price. The conditions as to rezoning and local authority remained essentially the same.

[11] In the preparation of the second contract the respondent was not identified as the vendors' agent. Consequently, the only written evidence of appointment of the respondent as agent remained the terms in Ex. 7 in respect of lots 7 and 8 and in clause 30 of the first contract in respect of all lots.

[12] The second contract by clause 10 provided as follows:

> "10. It is hereby agreed by the parties that upon the execution of this contract by both parties the contract executed by the parties dated 13 March 1995 shall be deemed to be cancelled in all respects it being acknowledged that the deposit paid under that contract should be deemed to be the deposit paid under this contract."

[13] The entitlement of the respondent to commission depended essentially upon clause 10 constituting a release of the vendors of the purchaser's obligation such as to satisfy the basis for payment of agents commission as set out in exhibit 7 (see paragraph 5 hereof).

[14] These negotiations following the execution of the first contract, as the learned trial judge found, were conducted with a view to improving the chances of fulfilling the conditions upon which the purchase depended. The learned trial judge relevantly found:

> that the purchaser was to apply to the Council for such rezoning and to do all things lawful and necessary within its power to procure rezoning and other consents; (*Reasons para 9*)
>
> that the purchaser's position was that it had fulfilled its obligations under the original contract and intended to continue to fulfil these obligations, but believed that because of difficulties which had arisen, the special conditions would not be complied with in the time allowed for under the original contract; (*Reasons para 10*)
>
> that the land was never rezoned – neither contract thereby having its essential conditions fulfilled. (*Reasons para 15*)

[15] The circumstances in which the cancellation of the original contract occurred were the subject of discussion in the course of counsel's address. The following exchange occurred –

> "HIS HONOUR: I suppose it comes back – this comes back to the point about what happened to the contract, happened to the second contract, that when they did get the variation, that went off as well, although I think we don't have any evidence of that at the moment. Maybe it was relevant after all.
> MR JARRETT: Except that, your Honour, it was a different contact (sic). It didn't have any ---
> HIS HONOUR: It was a more favourable one to Mr Harrison, if he didn't complete that one, he certainly wasn't going to complete the earlier one. I think I – well, I think you've persuaded me that I was wrong to rule that it was irrelevant.
> MR JARRETT: At least I've persuaded your Honour of something.
> HIS HONOUR: Yes. Yes, all right, perhaps there needs to be evidence that the second contract went off, or, at least, perhaps that is relevant.
> MR JARRETT: Your Honour, I'm happy to agree to that fact, to save any applications to reopen ---"

[16] The case proceeded on the basis that the second contract was not completed; as already indicated the land was never rezoned as required by each of the contracts.

Issues

[17] The issues raised on the appeal are identified as:-

(i) whether the respondent was entitled to any commission;

(ii) whether the respondent has an entitlement to commission against both appellants having regard to the differing bases of the respondent's appointment;

(iii) whether the respondent is precluded from claiming commission by reason of its not having the relevant licence under the Act.

[18] The first and second of these grounds can be dealt with together following on from the narrative above.

Entitlement to Commission?

[19] The cancellation of the first contract was not a release of the purchaser's obligations but rather part of a strategy to enhance a continuation of those obligations in a contractual setting more conducive to the fulfilment of the conditions. The release was merely a recognition prior to settlement date of the fact that the conditions precedent to completion could never be met. Despite the respondent not being identified in the second contract, its right to commission would surely have arisen had the second contract been completed. The respondent was entitled to rely upon the written appointment in clause 30 of the original contract to satisfy the requirements of the s 76(1)(c) of the Act.

[20] So much is clear from the decision of the High Court in *Moneywood Pty Ltd v Salamon Nominees Pty Ltd*[3] which involved a similar situation of a second contract

[3] (2001) 75 ALJR 408.

being entered into and the agent having to rely upon clause 30 in the first contract to satisfy the requirement for written support of the agency. Gleeson CJ said:-

> "But the purpose of s 76(1)(c) is to require written evidence of appointment. Where there is such evidence then the purpose of the statute is fulfilled. There is no legislative purpose to be served by requiring a fresh appointment if the original appointment is wide enough to comprehend the transaction in question, and if it has sufficient connection with the transaction to justify the conclusion that it is in respect of the transaction."[4]

[21] It follows then that the lack of identification of the respondent as agent in the second contract is of no consequence. But the fact remains that as neither contract was completed, there was no "buyer" introduced by the respondent so as to entitle it to commission pursuant to clause 30. (*Anderson v Densley* (1953) 90 CLR 460 at 467).

[22] The question remains whether the respondent is entitled to any commission under exhibit 7. That is what the learned trial judge relied upon to hold that part commission had been earned. Fundamental to this approach is the finding that the first contract was enforceable and that the appellants caused its termination by releasing the purchaser from its obligation thereunder.

[23] The learned trial judge took the view that the conditions for rezoning and subdivision were not conditions precedent to the contract; that there was a contract although in certain circumstances a right arose in the purchaser to terminate the contract; that until that situation arose, the purchaser had a clear obligation to apply for rezoning and to use its best endeavours and do everything necessary and lawful in connection with procuring the rezoning. His Honour determined that the fact that completion was conditional upon local authority consent was not a barrier to specific performance of a contract and he determined that the first contract was enforceable and that therefore the basis of the agency agreement applied.

[24] In adopting such a view, the learned trial judge has not taken into account the circumstances in which, nor the purposes for which, the second contract was supplanted by the second. This was a consensual process between the vendors and the purchaser which left the parties with the same rights as to enforcement under the second contract as they had under the first. In the end result the closely similar conditions which had to be fulfilled before there could be performance of these successive contracts were not fulfilled and, by inference, would not have been fulfilled if the first contract had been allowed to run its course. I believe such an inference is inescapable in all the circumstances and consequently, I hold the view that neither contract was enforceable.

[25] The appellant, Mr Whitecross, was not guilty of conduct suggestive of any default or failure to complete the contract, nor was there any release of an enforceable obligation of the purchaser such as to require consideration of the alternative bases upon which commission could be earned pursuant to the agent's appointment in respect of lots 7 and 8. In my view, therefore, there was no entitlement to commission in all the circumstances of this transaction.

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[4] *ibid* at para 14. See also Gummow J at paras 42 and 99; Kirby J at para 137, 146 and following. See also *Anderson v Densley* (1953) 90 CLR 460 at 468.

Was the respondent licensed at the relevant time?

[26] This issue raises a question of the proper construction of the terms of s 76(1) of the Act. Before this can be determined, however, there must be considered the terms of the definition of real estate agent. They are:-

> "**"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 generally or in respect of any one 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 …"

[27] Section 19(2) prohibits a corporation acting as a real estate agent without a relevant licence. Its terms are as follows:

> "19(2) A Corporation shall not –
>
> act as or advertise, notify or state that it acts as, or is willing to act as, an auctioneer, a real estate agent, a commercial agent or a motor dealer; or carry on or advertise, notify or state that it carries on, or is willing to carry on, a relevant business; unless it is the holder of a licence (a "**corporation licence**") appropriately endorsed under section 24(4)(b)."

[28] From the undisputed facts it appears that the respondent, prior to it receiving its licence on 2 February 1995, was engaged in activities which were prohibited by the Act in accordance with the terms of that definition.

[29] The appellants rely upon s 76(1)(b) for their contention that they are not obliged to pay commission. It provides:-

> "**Restriction on remedy for commission**
>
> **76(1)** No person shall be entitled to sue for or recover or retain any fees, charges, commission, reward, or other remuneration for or in respect of any transaction as … a real estate agent unless -
>
> (b) being a corporation, it was, at the time of the transaction, the holder of a corporation licence under this Act …"

[30] The learned trial judge found that this provision did not preclude the respondent suing for commission because the phrase "or in respect of any transaction" related to the transaction between the vendors and the purchaser which gave rise to the respondent's entitlement to commission. At the time of that event (execution of the contract) the respondent was licensed.

[31] The word "transaction" is not defined for the purpose of this section. So the conflict between the parties is to be determined by considering the proper construction of its terms. We were advised that there were no decided cases expressly dealing with this question.

[32] Mr Fraser QC for the appellant points firstly to the purpose of the section which is intended to preclude recovery of commission "in respect of any transaction **as a real estate agent**". He submits that the words emphasised are the defining terms for the section and that they are consistent with the purpose of precluding a person who acts without a relevant licence from recovering for services thus provided illegally. He referred to the equivalent provisions in earlier legislation, the *Auctioneers and Real Estate Agents, Debt Collectors and Motor Dealers Act 1922-1961* ("the 1922 Act"). Section 17 of the 1922 Act provided that a person shall not act as or carry on the business of a real estate agent unless the person is the holder of a real estate agent's licence and set out the penalty for a person so doing. Its terms are the equivalent of s 19 of the present Act.

[33] Section 23 of the 1922 Act provided:-

> "**23(1) Restriction on remedy for commission**
>
> A real estate agent … shall not be entitled to sue for or recover … commission or other remuneration or in respect of any transaction, unless –
>
> (a) he is a holder of a licence as a real estate agent …"

It is relevant to note that these terms do not have any temporal element such as is found in s 76(1)(b) of the Act.

[34] Mr Fraser QC then referred to *Freehold Land Investments Ltd v Queensland Estates Pty Ltd*[5], which considered those provisions of the 1922 Act. Walsh J identified the rationale for the statutory provision in the following passages:-

> At page 442 –
> "it is typical of the business of a real estate agent that the transactions of sale or the purchase of land in which he takes part or with which he is associated are not his personal transactions but are those of other people. It is in that sense that the business is one which he exercises or carries on "as an agent for others" and, if a person does not do this "generally" but does it "in respect of any one transaction", that transaction as a whole is carried out as an agent for others. But in carrying on such a business the agent is, of course, acting for his own benefit and for the advancement of his own business interests. Therefore he seeks retainers or selling rights and he advertises. His object is that he will have more opportunities available to him to buy or to sell or to negotiate for buying or selling, that is to say, more opportunities to do those things which, when he does them, he will do as an agent for others".

[5] (1970) 123 CLR 418

> At page 443 –
> "In my opinion one must look to the whole transaction which is on foot. In the present case, it was a transaction under which the appellant was authorised to bring about a sale of land which belonged to the respondent and was to get remuneration, in accordance with the agency authority which I have described above, which was given to it by the respondent. The appellant was engaged throughout (at least at all times after it had obtained the authority) in the process of seeking to negotiate that sale. Every step which it took which could aid in the achievement of a completed sale was a step in the transaction of negotiating the sale. It was "as an agent for others", that is, as an agent for the owner of the land, that the appellant was carrying out the whole of this process of seeking to bring about a completed sale".

[35] Even though, in that case, most of the work had been performed overseas, the fact that part of it was done in Queensland in contravention of the provision requiring that the agent be licensed prevented him from suing for his commission. It is apparent from this reasoning that the time at which the licence is required relates to the conduct which is properly regarded as acting "as a real estate agent". In other words, engaging in the conduct which would be illegal if done by an unlicensed person.

[36] The fact of illegality alone would prevent a person suing for commission for carrying on the activities of a real estate agent. In *Meier v Wardell*[6] the agent was unlicensed throughout the period when he engaged in activities upon which the commission was earned but took out a licence before he sued for his commission. Shand J described the effect of s 17 of the 1922 Act as follows:-

> "This s 17 of the Act provides in effect that a person who acts as or carries on business as a commission agent in places where the provisions of the Act are in force without being licensed under the Act, is guilty of carrying on a business which is illegal, and that each transaction into which he enters in the course of his business exposes him to criminal proceedings and a substantial penalty".

[37] In that context, the word, "transaction" there clearly referred to the arrangement between agent and client.

[38] The 1922 Act was re-enacted by the 1971 Act which introduced the temporal provision giving rise to the present issue. The question is whether that change by using words "time of the transaction" brought any change in the position as it was understood in the earlier provisions.

[39] Mr Jarrett of counsel on behalf of the respondent submitted to the effect that "time of the transaction" referred to the event by which the commission was earned. In most cases this would be the creation of contractual obligations between the vendor and purchaser. It was submitted that only by that construction could there be certainty of entitlement given that an agent's activities could extend over a long period of time. On this submission the effect would be to read for the word "transaction" wherever it appears, the word "contract" or "contractual obligation".

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[6] (1924) QWN 19

[40] The construction of paragraphs (a) and (b) of s 76(1) of the Act was not in issue in *Moneywood* but some remarks in the judgment of Gummow J commenting on the policy of the legislation gives support for the argument advanced by the appellant. At paragraph 96 of his Honour's judgment, the following appears:-

> "In the Court of Appeal, McPherson JA noted that the wider term "transaction" was adopted in 1922 and deliberately retained in the Act. This term is coupled with the term "in respect of" which has the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer". This catches a good number of transactions that may be entered into by real estate agents, something obviously considered desirable by the legislature to fulfil the policy of the Act. It also means that one should not strain unduly to narrow the content of the transaction for which the agent's appointment is required to be in writing. In this case, the relevant "transaction" for which the agent was appointed was the arrangement of a sale by Salamon Nominees of that land".

[41] Hence, Gummow J took the view that "transaction" concerned the relationship between the agent and the client rather than between vendor and purchaser.

[42] In my view, this is the only way in which effect can be given to the evident policy behind the legislation as identified by Walsh J in *Freehold Land Investments* as well as giving sense to the meaning of the words.

[43] The construction contended for by the respondent would not give effect to that public policy of controlling who might be permitted to act as an agent for another person. Rather it would encourage unlicensed activity enabling persons acting as agents only having to concern themselves about being licensed in the event of success in bringing about a sale. The evident purpose of s 76(1)(a) and (b) is as an adjunct to the general rule that a Court will not lend its support to the recovery or retention of monies obtained through illegal activity.

[44] On the proper construction of s 76 of the Act, the word "transaction" refers, in my view, to the engagement of a person or corporation as a real estate agent to carry out the activities of the kind referred in the definition of "real estate agent".[7]

[45] In the context of this appeal, the respondent was not licensed either at the time of its engagement nor when it performed the activities by which it argued it had earned commission. For this reason, it was not, by virtue of s 76, entitled to sue for commission even if, contrary to my finding, its commission has been earned.

[46] For these reasons, I would allow the appeal and dismiss the cross appeal. I would set aside the judgment below and in lieu order that judgment be entered for the defendant and further order that the respondent pay the costs of the trial and of this appeal.

[47] **DOUGLAS J:** I have read the reasons of Jones J and agree with them and the orders he proposes.

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[7] The signing of the authority and the option agreement on 19 December 1994 would clearly be part of "the transaction".