

SUPREME COURT OF QUEENSLAND

CITATION: *Elfbest P/L v Menniti* [2008] QCA 294

PARTIES: **ELFBEST PTY LTD** ACN 059 664 498
(plaintiff/respondent)
v
LUCIANO MENNITI
(defendant/appellant)

FILE NO/S: Appeal No 2303 of 2008
DC No 316 of 2005

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Southport

DELIVERED ON: 26 September 2008

DELIVERED AT: Brisbane

HEARING DATE: 15 August 2008

JUDGES: Holmes and Fraser JJA and Dutney J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: PROFESSIONS AND TRADES – AUCTIONEERS AND AGENTS – CONSTRUCTION OF STATUTORY PROVISIONS – QUEENSLAND – where appellant entered into an agreement for the appointment of a real estate agent in a Form 22a under the *Property Agents and Motor Dealers Act* 2000 (Qld) – where appellant submitted that the real estate agent had failed to inform him of his right to negotiate the length of the appointment and had breached s 135(1)(b) *PAMDA* – where appellant submitted that by virtue of s 140(1)(c) *PAMDA*, the agent was not entitled to recover a commission – whether the real estate agent breached *PAMDA* – whether the real estate agent was entitled to commission

Property Agents and Motor Dealers Act 2000 (Qld), s 133, s 135, s 140(1)(c)

COUNSEL: S Di Carlo for the appellant
P T Morrow for the respondent

SOLICITORS: PHV Law for the appellant
Short Punch & Greatorix for the respondent

- [1] **HOLMES JA:** The respondent, Elfbest Pty Ltd, a licensed real estate agent, sued the appellant, Mr Menniti, for commission on the sale of a Gold Coast apartment. Elfbest had not procured the relevant sale, but contended that it was, nonetheless, entitled to commission under an exclusive agency agreement with Mr Menniti. Mr Menniti defended the claim, unsuccessfully, in the District Court on a number of grounds. He now appeals the judgment on a more limited basis: that Elfbest did not comply with s 135(1)(b) of the *Property Agents and Motor Dealers Act 2000* (Qld) and, by virtue of s 140(1)(c) of that Act, has in consequence no entitlement to recover any commission.

The legislation

- [2] Section 135(1) of the *Property Agents and Motor Dealers Act* provides, inter alia:
- “If the appointment is for sole or exclusive agency, before the appointment is signed, the real estate agent must discuss with the client whether the appointment is to be for a sole agency or an exclusive agency and specifically bring to the client’s notice the information in the form of appointment about –
-
- (b) if the appointment is for the sale of residential property, the client’s entitlement to negotiate the term of the appointment up to a maximum term of 60 days ...”.

At the time relevant to this transaction, s 135(3) rendered the sub-section inapplicable where an appointment was for the sale of three or more residential properties; but that was not the case here.

- [3] Section 140(1) of the Act contained the relevant sanction:
- “A person is not entitled to sue for, or recover or retain, a reward or expense for the performance of an activity as a real estate agent unless, at the time the activity was performed, the person –
- ...
- (c) had been properly appointed under division 2 by the person to be charged with the reward or expense.”

(Section 135 is one of the provisions in division 2 of this part of the Act which set out the requirements for appointment of a real estate agent.)

The pleadings

- [4] In his defence and counterclaim as it stood when the trial began, Mr Menniti pleaded that the agreement for Elfbest’s appointment was void for uncertainty because it specified no price at which the property was to be sold and did not contain a description of it. If there were any agreement, Elfbest had breached an implied term that it would make its best efforts to market and sell the apartment; and he had been induced to enter the agreement by misleading and deceptive representations. In the course of the trial, as will appear, amendments were made to allege, in addition, non-compliance with ss 133 and 135 of the *Property Agents and Motor Dealers Act*.

The agency agreement

- [5] Ms Aspa Papa was a real estate sales person employed by Elfbest. After a telephone conversation with Mr Menniti in the morning of 2 February 2005, she prepared an agreement, using Form 22a under the *Property Agents and Motor Dealers Act*, “Appointment of Real Estate Agent (Sales and Purchases)”. That afternoon, she

brought it to Mr Menniti for signature. Clauses 1-3 of the form identified the client and agent (Mr Menniti and Elfbest) and the property to be sold. Clause 4 indicated that it was to be sold by private treaty, although no price or price range was specified, and that Elfbest's appointment was a single appointment, rather than a continuing one.

[6] Clause 5 is of particular importance; it read:

5. OPEN LISTING, SOLE AGENCY or EXCLUSIVE AGENCY																				
You may appoint an Agent to sell a property on the basis of an Open Listing or a Sole Agency or an Exclusive Agency.																				
<p>Open Listing You appoint the Agent to sell the property but you retain a right to appoint other agents on similar terms, without penalty. The Agent's appointment can be ended by either you or the Agent at any time.</p> <p>Sole Agency and Exclusive Agency You appoint the Agent for a specified term. For sales of up to 3 residential properties, the term is negotiable up to a maximum of term of 60 days, after which the Agent can be reappointed for one or more further terms. In the case of 3 or more residential properties, the 60 day limit does not apply.</p> <p>If you are dissatisfied with your Agent's service and want to appoint a new agent during the existing Agent's term, and your property is sold during that term, you may have to pay: (a) two commissions: a commission to each agent (b) damages for breach of contract arising under the existing Agent's appointment.</p> <p>When You Must Pay the Agent The table below shows when you will have to pay the Agent, if the property is sold during the term of the Agent's appointment.</p> <table border="1"> <thead> <tr> <th>Open Listing</th><th>Sole Agency</th><th>Exclusive Agency</th></tr> </thead> <tbody> <tr> <td>You must pay the Agent if:</td><td>You must pay the Agent if:</td><td>You must pay the Agent if:</td></tr> <tr> <td> ✕ You sell ✕ Another agent sells ✓ Agent sells </td><td> ✕ You sell ✓ Another agent sells ✓ Agent sells </td><td> ✓ You sell ✓ Another agent sells ✓ Agent sells </td></tr> </tbody> </table> <p>If you need more information before you make a choice between Open Listing, a Sole Agency or an Exclusive Agency, ask your legal adviser.</p> <p>5.1 Open Listing, Sole Agency or Exclusive Agency The appointment will be for a: L M.</p> <table border="0"> <tr> <td>Open Listing</td> <td>Sole agency</td> <td><input checked="" type="checkbox"/> Exclusive agency</td> </tr> <tr> <td></td> <td>Start Date</td> <td>Start Date: 15/2/2005</td> </tr> <tr> <td></td> <td>End Date</td> <td>End Date: 15/4/2005</td> </tr> </table> <p>For the sale of residential property, the term of a Sole or Exclusive Agency is negotiable between the Client and the Agent up to a maximum term of 60 days.</p> <p>5.2. End of Sole Exclusive Agency: Option to continue as open listing</p> <p>To the Client: At the end of the Sole/Exclusive Agency, you may elect to continue the appointment of the Agent as an Open Listing</p>			Open Listing	Sole Agency	Exclusive Agency	You must pay the Agent if:	You must pay the Agent if:	You must pay the Agent if:	✕ You sell ✕ Another agent sells ✓ Agent sells	✕ You sell ✓ Another agent sells ✓ Agent sells	✓ You sell ✓ Another agent sells ✓ Agent sells	Open Listing	Sole agency	<input checked="" type="checkbox"/> Exclusive agency		Start Date	Start Date: 15/2/2005		End Date	End Date: 15/4/2005
Open Listing	Sole Agency	Exclusive Agency																		
You must pay the Agent if:	You must pay the Agent if:	You must pay the Agent if:																		
✕ You sell ✕ Another agent sells ✓ Agent sells	✕ You sell ✓ Another agent sells ✓ Agent sells	✓ You sell ✓ Another agent sells ✓ Agent sells																		
Open Listing	Sole agency	<input checked="" type="checkbox"/> Exclusive agency																		
	Start Date	Start Date: 15/2/2005																		
	End Date	End Date: 15/4/2005																		

which may be ended at any time by you or the Agent.

- ☒ The appointment will continue as an Open Listing until (Insert date)
☐ The appointment will NOT continue as an Open Listing

The start and end dates for the exclusive agency contained in para 5.1 had originally been, in typewritten form, “2/2/2005” and “2/4/2005” respectively. They were amended by hand to read “15/2/2005” and “15/4/2005”, with the alteration initialled by Mr Menniti. In her evidence (at par [10] below), Ms Papa explained the reasons for that alteration.

- [7] Clause 6 prescribed the rates of commission. Clause 7 was headed Fees and Charges and Clause 8 Expenses; no amounts were specified in either. Part 9 was the signature section. There was a schedule attached which is not material to this appeal.
- [8] The argument for the appellant turned around Clause 5, and more specifically that part of it which appears under the heading “Sole Agency and Exclusive Agency” informing the potential vendor, in terms of s 135(1)(b), that “the term is negotiable up to a maximum term of 60 days”. Mr Menniti argued that the proper finding on the evidence was that Ms Papa had not brought that information to his attention as s 135(1)(b) required; to the contrary, she had insisted that Mr Menniti agree to a 60 day term. It is necessary, therefore, to review Ms Papa’s evidence on the point.

Ms Papa’s evidence

- [9] Ms Papa was the only witness at the trial. The first part of her evidence relevant to the s 135(1)(b) issue concerned the telephone conversation of the morning of 2 February. Ms Papa explained in evidence in chief that she had had discussions with Mr Menniti in the preceding days about the listing of the property; she was not prepared to take it as an open listing:

“For open listing he wanted to list it all the time, he insisted, but I did make it clear that I wasn’t able to compete on an open listing with the whole town and just not knowing where I stand, so he promised that he will think about the exclusive and that he will let me know and which he rang on the second of February in the morning. I rang back and he told me that he’s happy and willing to go ahead and give me the exclusive agency. He asked me how long was it for. I said it’s 60 days. I also read out of the form - in Form 22 a we have like 1, 2, 3 ticks as to what an exclusive agency means and I also said to Mr Menniti if you can give me some more details like his proper name and also I said we need to pre-type the form and if we could have the dates, can I start from today and he said today is fine.”

In cross-examination, Ms Papa was asked again about that conversation:

“Well, how long did the conversation last? How long did you talk to Mr Menniti over the phone or do you say you talked to Mr Menniti over the phone?-- I don’t know, a few minutes - from a few minutes to several minutes, because he expressed the wish to go ahead with what we have discussed. He said, ‘How does this go time wise?’ And I explained that it is 60 day period. Then I asked the name that will go on the form, because we - it is better to pre-type and have them clean, ticking the right boxes, such as the exclusive, and we said that. I read out from the form actually the three instances that the seller

has to pay the agent on an exclusive basis. I asked if starting from today would it be okay, so we can go through with the dates and he agreed. Now, how many minutes that could take, I don't know - recall.

Okay. So can I say effectively he asked you how long the exclusive agency would be and you told him it would be 60 days?-- Yes."

- [10] On the afternoon of 2 February, Ms Papa said, she took the form, with details already typed in, to Mr Menniti's apartment and two of them sat down with it at the kitchen table. As to what followed, the relevant questions and answers in evidence in chief were:

"Did you go through the agreement with him?-- Yes, I did.

.....

Prior to his signature, did you go through that document with him?-- I went through the document, yes.

Were any changes made to that document as prepared by you and signed by Mr Menniti?-- At first he agreed to everything except spending any money at all towards marketing and advertising all the way up to signing and we stopped and started talking about all sorts of other things and at some point after he had signed he says, 'Oh, I'm sorry' he says, 'I have promised verbally really another agent to give him the time for about a week or so to produce a contract'."

In consequence of Mr Menniti's concern, Ms Papa said, she agreed to the alteration in the start and end dates in clause 5.1 of the agreement, which Mr Menniti initialled.

- [11] Asked in cross-examination to revisit the discussion at the table, Ms Papa said:
 "I explained to Mr Menniti the various parts of the form-----
 All right. Would you put the form away, please?----- as to how we do it and he signed."

After another interruption asking her to put the form away, she continued:

"Again, we sat down----- Yes?-- ----- and I explained that according to our understanding in the telephone conversation in the morning I had prepared the Form 22 A.

.....

I went through the various pages - parts of the form and I explained to Mr Menniti what was it about, although it was very clear to me that Mr Menniti had seen forms of that type and had signed tens of hundreds of times and he-----

Tens of hundreds of times? It was very clear to you that he had been through forms of that kind and he had signed them tens of hundreds of times, is that what you said?-- I said he appeared to me to be quite aware of all of this, because, as he said to me at various times, that he has got lots of projects on the go every year, he buys and sells these properties and he has done it, in his own words, for much longer than I have done it."

- [12] Ms Papa confirmed that at the beginning of the conversation, she had said something to the effect that she had the document agreed upon. Asked what happened next, she said:

“After I explained to Mr Menniti the contents of the form to the best of my ability -----”.

Ms Papa was interrupted there and asked to give the conversation in the terms actually used. She continued:

“I have form in front of me. As I look at it he looks at it and we go through-----

Thank you?----- if he has questions he answers [sic] and we explain.”

- [13] In relation to cl 5 of the form, the cross-examination began as follows:

“Can we then go to paragraph 5? Do you have any recollection of what you told him in respect to that?-- I believe that this deals mainly with the types of the listing, open, sole and exclusive. We explained this again, although we had talked about this in our previous conversations since Mr Menniti wanted to do only open. And also the - what entails from an exclusive, which is if I sell I get paid a commission. If he sells I’d get basic, and if another agent sells it gets to be paid as well. He was happy with that.

And can you assist me, please, I’m going to suggest to you that this is important and I’m wanting to know the answer to this? Can you recall what you told him about this part? What you said to him? Do you recall the words or the gist of what you said to him at that table in respect to this client?-- I - the only way I can - verbatim, this is if I had a tape with me, which I didn’t. I went through all the forms of open listing, sole and exclusive. I - also I read through it and I explained in a more brief way the importance of the exclusive and the liability of the commission.

The two commissions. So, you read that through to him; is that what you’re saying?-- I wouldn’t have read this word by word. No, we don’t really do this. We offer to the client if they wish to read or take it away, all the time.”

Ms Papa said she had gone through the table in cl 5 with Mr Menniti “very specifically”. She had told Mr Menniti that he could take the form away with him if he wished, to consider it further before signing it.

- [14] The questioning then moved to focus on cl 5.1. Ms Papa confirmed that it had been completed before the form was shown to Mr Menniti, including the start and end dates; but after Mr Menniti exclaimed, “Oh, my God, sorry, Aspa, I just remembered another agent”, they discussed the matter briefly and agreed that the dates should be altered:

“And that was typed in on the basis that it would be for a 60 day period, you told him it would be 60 days and you typed in the 60 day period, is that correct?-- Yeah.

Okay. In any case, in respect of that, in what you told him, there was no change to that really, was there, it was still the same period, but it

was just shifted in time?-- Well, that's right, it was the same agreement, we just changed dates.

Exactly the same agreement except you changed dates?-- But 30 there is one thing that changes here that I have to start work during that period unless I want to work also before the 15th while my agreement doesn't start and work together with the other agents, that's the only difference.

Okay, I appreciate that, I accept that's the only difference. Can you tell me - think as hard as you can - tell me, was there any other discussion about 5.1 other than that, 'Oh, my God' and the changing of the dates and the initialling; was there any other discussion whatsoever?-- Absolutely not.

Positive?-- Positive, positive. –

Okay. Thank you. You don't want to think about that again?-- No. I remember that part very clear, as I said, it made an impression that it was like this, but I agreed that that was that.

He asked you how long on the phone and you told him 60 days?-- Yes.

Thank you. You're quite positive about that?-- I'm positive about that, but also in the previous conversations I think that everyone, and, most especially Mr Menniti that buys and sells all the time, the agencies across Queensland that I know it is always 60 days for everyone, not a special arrangement we make.”

- [15] In relation to cl 5.2, Ms Papa said she had explained that at the end of the period of exclusive agency, unless Mr Menniti wanted to enter another such agreement, Elfbest would continue with the listing of the property as an open listing. He had no objection to that. Although no price was specified in the agreement, they had discussed the commission in terms of the percentages to be paid and Mr Menniti had performed a calculation. After Mr Menniti’s counsel had reached this point of the form with Ms Papa, he put it to her that none of what she said occurred had actually happened and that she had not gone through the form with Mr Menniti. She denied that that was so and added: “Mr Menniti knew very well what the commission was”.
- [16] Counsel went on to finish his questioning on the balance of the clauses in the form. At the end of that process, Elfbest’s counsel raised with the trial judge the fact that the defence did not allege any failure to comply with *Property Agents and Motor Dealers Act*. The result was an amendment to plead a failure to comply with ss 133 and 135 of the Act, disentitling Elfbest to commission, by virtue of s 140. After that had occurred, counsel resumed cross-examination of Ms Papa but did not ask any further questions about the content of the form or her discussion of it with Mr Menniti.

The judgment

- [17] The critical paragraph of the learned trial judge’s judgment reads:

“The criticisms of Ms Papa’s evidence [made by Mr Menniti’s counsel: that she was evasive, unresponsive and unable to give the direct conversation] are, in my view, not capable of being sustained. Her evidence is that she went through the Form 22a with Mr Menniti. Her inability to recall direct conversation with respect to individual components of the form is to be expected after the passage of such a long period of time. She made no notes of the conversation. Again, I can see nothing untoward in that. Her evidence is not contradicted by any sworn testimony from another source. Although Ms Papa did not in terms state that she informed Mr Menniti that he could negotiate a term of up to 60 days, if she did in fact go through the form with him, she must have done so when discussing clause 5.1. Ms Papa was at no stage directly asked whether she had informed the defendant that he could negotiate a term of up to 60 days. Her evidence remains that she went through the form with Mr Menniti. That form encompasses the provision directly relating to this issue. As the evidence stands I am unable to conclude that section 135(1)(b) was not complied with and that therefore, as a consequence of section 137(1), the appointment was ineffective from the time it was made. In my view there has been compliance with section 135 by the plaintiff.”

The appellant’s arguments

- [18] Counsel for Mr Menniti argued that the learned judge should have found on the evidence of Ms Papa that Elfbest had not complied with the provisions of s 135(1)(b). It was, he said, apparent from Ms Papa’s evidence that she did not have any actual recollection of her conversation with Mr Menniti, merely repeating that she took him through the form. She had been lax in her completion of the form in other ways, which suggested that she was not concerned with compliance with it. Demonstrating that laxity (although not relied on as grounds of appeal) were breaches of s 133 of the *Property Agents and Motor Dealers Act*: the form did not state the service to be performed or how it was to be performed, because it failed to include any listing price or price range; although it indicated that commission could be negotiated, it did not equally indicate that fees and charges could be negotiated; it did not state the expenses which the agent was authorised to incur or the period for which the open listing would continue; nor did it name the agent or reflect the date signed by the agent.
- [19] The trial judge ought, it was contended, to have concluded from Ms Papa’s evidence that she had told Mr Menniti on the telephone that the agreement was to be for a 60 day period, and presented him with a form which reflected that agreement, that she did not inform him he could negotiate a shorter term. She had given no evidence of bringing Mr Menniti’s attention to the provision in the form to that effect, as opposed to saying in general terms that she had gone through the form with him. Indeed Ms Papa did not seem herself to appreciate that the term could be negotiated; she had said “I know it is always 60 days for everyone, not a special arrangement we make”. When Ms Papa’s attention was drawn to para 5.1 of the form, she was adamant that there was no discussion about the paragraph other than the changing of the dates which Mr Menniti initialled. The *Property Agents and Motor Dealers Act* was to be construed strictly; it was not sufficient that the warning statement appeared in the form.

Discussion and conclusions

- [20] It is true that Ms Papa said only very generally that she had gone through the form and explained it to Mr Menniti, without any reference to the passage about the negotiability of the agency's term. Clearly there were parts of the document she regarded as significant, on which she focussed in her evidence, and this was not one of them. However, that is not surprising when her evidence in chief and answers to the relevant part of her cross-examination were given at a time when s 135(1)(b) had not been put in issue; and it was not put to her in cross-examination at any stage, before or after the amendment was made, that she had failed to bring the passage to Mr Menniti's notice.
- [21] The learned trial judge, who had the advantage of seeing Ms Papa, rejected the criticism that she was "evasive, difficult and unresponsive" and it would be difficult for this Court, not having seen her giving evidence, to reach a contrary view. Certainly, there is nothing in the transcript which renders Ms Papa's evidence obviously unacceptable. One gains the impression that she was voluble, and did not always grasp the point of the questions asked; but again, one can hardly be critical, given that many of those questions were not, at the time she was asked them, relevant to any issue.
- [22] The matters pointed to by way of showing that Ms Papa took a cavalier approach to the completion of the form are not compelling. The form did identify how Elfbest's service was to be performed; it indicated that the property was to be sold by private treaty, with Elfbest to communicate to Mr Menniti all written offers. It was not imperative that there be a specified listing price; it was up to Mr Menniti whether he would or would not accept any offer. The open listing could be ended at any time by either party, so there was no need for fixed dates to be specified. Ms Papa's evidence was that Elfbest was not authorised to incur any expenses for advertising or marketing, so there was nothing to be inserted in that regard. There were no fees and charges other than commission to be payable under the agreement, so there was no reason to indicate that they could be negotiated. Ms Papa made a mistake when she signed the form; she dated it 3 February rather than 2 February but that error seems to be of little consequence. The omission of the name of the agent and the agency occurred only in the schedule to the agreement, not in the agreement itself. None of those matters provides a proper basis for an inference that Ms Papa was generally remiss in her review of the form with Mr Menniti.
- [23] Ms Papa said that she had told Mr Menniti that Elfbest required the agency to last for a period of 60 days, and she had made repeated statements to that effect. It is obvious from her evidence that any negotiating by Mr Menniti was not going to get very far, because her clear perception was that exclusive agencies were always 60 days. But that is a different issue from whether she made him aware that negotiation was possible (albeit unpromising) by drawing his attention to the statement on the form that the period could be negotiated. Elfbest's position that it wanted a 60 day agency did not preclude a finding that Ms Papa did bring the clause to Mr Menniti's notice.
- [24] Mr Menniti sought to rely on the cross-examination in which Ms Papa was adamant that there was no discussion about cl 5.1 other than that relating to the changing of the dates. The flaw in that argument, however, is that the reference to the negotiability of the term appeared not in cl 5.1, but immediately above it, in the opening part of cl 5. It did not follow from Ms Papa's answers, therefore, that she had not spoken about it.

- [25] The obvious difficulty for Mr Menniti is that Ms Papa's evidence, scant though it might have been on the s 135(1)(b) point, was not contradicted by any evidence in the defence case. Ms Papa said on at least four occasions that she had gone through the form with Mr Menniti and explained it to him. One might in other circumstances regard evidence of that general nature as unsatisfactory, but in this case, where nothing contrary was offered, there was simply no reason to do other than accept that each part of the form had been brought to Mr Menniti's attention, including that part of cl 5 which conformed to the requirement in s 135(1)(b).
- [26] I would dismiss the appeal with costs.
- [27] **FRASER JA:** I agree with the order proposed by Holmes JA and her Honour's reasons for the order.
- [28] **DUTNEY J:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with the orders she proposes for the reasons she has set out.