

SUPREME COURT OF QUEENSLAND

CITATION: *Sunshine Group Australia Pty Ltd v Trappando Pty Ltd*
[2023] QCA 214

PARTIES: **SUNSHINE GROUP AUSTRALIA PTY LTD**
ACN 168 390 083
(appellant)
v
TRAPPANDO PTY LTD
ACN 112 828 958
(respondent)

FILE NO/S: Appeal No 6461 of 2023
SC No 154 of 2022

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Cairns – [2023] QSC 87 (Bowskill CJ)

DELIVERED ON: 3 November 2023

DELIVERED AT: Brisbane

HEARING DATE: 25 September 2023

JUDGES: Boddice JA and Burns and Ryan JJ

ORDERS: **1. The appeal be dismissed.**
2. The appellant pay the respondent’s costs of the appeal, to be assessed on the standard basis.

CATCHWORDS: CONVEYANCING – THE CONTRACT AND CONDITIONS OF SALE – AGENT’S COMMISSION – where the respondent was appointed as real estate agent for the sale of the appellant’s property by way of a Form 6 appointment – where the Form 6 indicated the appointment was for an “exclusive agency” that would continue as an “open listing” at the end of the exclusive agency period – where the sales manager of the respondent, the director of the appellant and a third party who claimed to have interested buyers also entered into a Deed of Agreement shortly prior to the relevant appointment in order for the third party to be rewarded for any introduction of the buyer to the property – where, pursuant to the Deed of Agreement, no commission was payable unless the contract actually proceeded to settlement – where a contract of sale was entered into, but later terminated for the buyer’s breach, and the deposit was forfeited – where the respondent was successful in recovering the agent’s commission, on the basis that it was the effective cause of the sale and was entitled to its commission despite

the termination of the contract – whether the respondent was properly appointed by the appellant despite the relevant Form 6 not including a mandatory statement that the commission was to be worked out only on the ‘actual’ sale price – whether the Form 6 was to be read and construed jointly with the Deed of Agreement – whether the respondent was the effective cause of sale within the term of the appointment

Acts Interpretation Act 1954 (Qld), s 48A(2)

Property Occupations Act 2014 (Qld), s 89, s 105

Golden Mile Property Investments Pty Ltd (in liq) v

Cudgegong Australia Pty Ltd (2016) 18 BPR 36,121; [2016] NSWCA 224, cited

JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd (No 2) [2020] WASCA 112, cited

Smith v Chadwick (1882) 20 Ch D 27; [1882]

UKLawRpCh 73, considered

COUNSEL: M A Jonsson KC for the appellant
S W Couper KC, with C J Ryall, for the respondent

SOLICITORS: Preston Law for the appellant
O’Reilly Stevens Lawyers for the respondent

- [1] **BODDICE JA:** On 18 May 2023, the primary judge gave judgment for the respondent in its claim against the appellant for relief in relation to commission due and owing pursuant to its appointment as property agent for the sale of land owned by the appellant. A counterclaim by the appellant was dismissed.
- [2] The appellant appeals that judgment on the grounds that the primary judge erred in the proper construction of the relevant appointment in three material respects. First, that the appointment was valid and effective, notwithstanding that it did not specify that the payment of commission was on the *actual* sale price. Second, that the respondent was the effective cause of the sale within the term of that appointment. Third, in not construing the relevant appointment, having regard to the terms of a Deed of Agreement entered into shortly prior to the relevant appointment.

Background

- [3] The appellant was the owner of some 500 acres in North Queensland (“the property”).
- [4] The respondent carried on the business of a real estate agency, holding a real estate agent’s licence under the *Property Occupations Act 2014* (Qld) (“the Act”). Grahame Anderson was its sales manager and his wife was the sole director of the respondent company.

Facts

- [5] In early 2018, the appellant appointed the respondent as its real estate agent for the sale of the property. The Form 6 appointment, dated 15 January 2018, provided that

it was a “continuing appointment” commencing on that date for an “open listing”. The list price was \$12,000,000. Commission was payable as follows:

“4.4% OF THE SALE PRICE IF THE AGENT INTRODUCES THE BUYER TO THE PROPERTY

2.2% OF THE SALE PRICE IF THE SELLER INTRODUCES THE BUYER TO THE PROPERTY...”

- [6] No interest in the property at the nominated price was received at the time.
- [7] In 2019, Anderson was approached by Victor Soh who said he had “international buyers” who would be interested in the property. Soh, who was not a real estate agent, wished to be rewarded for any introduction of the buyer to the property.
- [8] On 13 May 2019, Soh, Anderson and the director of the appellant, entered into a Deed of Agreement. It referred to the property and stated:

“The following sets out this agreement:

1. You are interested in finding a buyer for the above mentioned property.
2. The usual commitment fee of \$6,000 is payable to Victor Soh and Grahame Anderson to secure a buyer, the commitment fee of \$6,000 is payable to Andersons Real Estate Trust Account (The Stakeholder) on the signing of this agreement.
 - (a) The full amount of \$6,000 is refundable to Sunshine Group Australia Pty Ltd if a contract is not signed by 30th July 2019.
 - (b) The full amount of \$6,000 is payable to Victor Soh and Grahame Anderson within one (1) business day of the buyer signing a contract of sale.
3. You agree to pay a success fee to Victor Soh and Grahame Anderson of \$500,000 + GST, this is based on a contract price of \$6.5 million + GST. The success fee is payable by you to us or to our nominated party on the settlement date of the property. (as per the attached Property Occupations Form 6 listing authority).
4. You undertake to keep the identities of our parties private and confidential and not to disclose to anyone.
5. You undertake to keep all discussions confidential, including discussions with our parties confidential. You undertake not to circumvent us or bypass us. You undertake to work with us and assist us. You agree that Victor Soh can assign this agreement to another party at anytime and with written notice to you.
6. The payment obligations and clause 5 stated above survive the termination of this agreement. Any changes to this agreement must be in writing and by mutual consent only.

7. If our party(s) is agreeable to put in their money based on mutually acceptable terms and conditions, and you then change your mind, there is a fee payable to us of 2% of the amount they are going to put in. This fee is payable by you upon issue of an invoice to you. This clause survives the termination of this agreement.
8. If you have other projects you want to discuss with our party(s), you agree to discuss with us first and enter into similar agreement with us prior to approaching our party(s). If we can't reach agreement, then you will not approach our party(s)."

[9] Although the Deed of Agreement referred to a Form 6 being attached to it, no Form 6 was attached to the signed agreement.

[10] Shortly after execution of the Deed of Agreement, the appellant paid \$6,000 to the respondent's trust account. That sum was subsequently transferred to Soh.

[11] On 25 May 2019, Anderson prepared a Form 6 for the appointment, by the appellant, of the respondent as real estate agent for the sale of the property. That form recorded:

- (a) In part 4, section 2 (term of appointment), a ticked box indicating it was a "single appointment for a particular service or services" from 25 May 2019 to 30 July 2019. No specific price was mentioned, with part 4, section 3 stating "reasonable offers considered".
- (b) In part 6, a ticked box indicating the appointment was for an "exclusive agency". The form stated:

"When you must pay the agent

- The client will pay the appointed agent whether this agent, any other agent, or person (including the client themselves) sells the property during the term of the appointment.
 - If the client sells the property, after the exclusive appointment expires and if the agent was the effective cause of sale (introduced the buyer to the property) the agent may be entitled to commission."
- (c) In part 6, there was another ticked box which stated that at the end of the exclusive agency, it was agreed the appointment would continue as an open listing. Part 6 further stated, in relation to open listings, "no end date required" and "appointment can be ended by either you or the agent at any time by giving written notice".
 - (d) In part 5 (termination of appointment), that for an open listing, "you may terminate an open listing for either commercial or residential property sales at any time".
 - (e) In part 7 (commission), it was stated:

"The client and the agent agree that the commission including GST payable for the service to be performed by the agent is:

1. Sale price of up to and including \$6,300,000 + GST. - 4.4% of the sale price.
2. Sale price of over and including \$6,300,001 + GST. - All money above \$6,000,000 + GST. to be paid to the agent + GST.
(eg. sale price of \$6,500,000 + GST - \$500,000 + GST to be paid to the agent)".

In respect of when commission was payable, there was a ticked box beside "other" with the words "refer to item 5 of the essential terms and conditions". Item 5 was in the following terms:

"5. ENTITLEMENT TO COMMISSION – SALE

- 5.1 The Client agrees to pay the Agent Commission as specified in Part 7 of the Appointment of Property Agent if a Contract of Sale of the Property is entered into with a Buyer, whether within the Term or after the Term, where the Relevant Person is the effective cause of the sale within the Term, provided that:
 - 5.1.1 the Contract of Sale of the Property is completed; or
 - 5.1.2 the Client defaults under the Contract of Sale and that Contract is terminated by reason of or following that default; or
 - 5.1.3 the Contract of Sale is not completed and the whole or part of the deposit paid is liable to be forfeited; or
 - 5.1.4 the Contract of Sale is terminated by mutual agreement of the Client and the Buyer.
- 5.2 For the purposes of Clause 5.1 a Relevant Person is, where the Appointment of Property Agent is for:
 - 5.2.1 an Exclusive Agency, any person (including the Client); or
 - 5.2.2 a Sole Agency, any person other than the Client; or
 - 5.2.3 an Open Listing, the Agent only."

(f) In part 7, there was also the following standard wording:

"To the client

The commission is negotiable. It must be written as a percentage or dollar amount.

Make sure you understand when commission is payable. If you choose 'Other' and the contract does not settle, the agent may still seek commission.

To the agent

You should ensure that commission is clearly expressed and the client fully understands the likely amount and when it is payable. Refer to section 104 and 105 of the *Property Occupations Act 2014*.”

- (g) In clause 1.10 of the essential terms and conditions, it was stated that “Term” means “the term specified in Part 4, Section 2 of the Appointment of Property Agent”.
- (h) In clause 15 of the essential terms and conditions, it was stated:
- “15.1 This document **constitutes the entire Agreement** of the parties with respect to the subject matter of this document and **supersedes all prior negotiations or expressions of intent or understandings** with respect to the Appointment of the Agent to the Property.”
(emphasis added)
- [12] On or about 17 August 2019, the respondent introduced the property to a purchaser who, on or about 21 August 2019, made an offer to purchase for \$7,500,000.
- [13] The appellant accepted that offer. A contract was formed dated 22 August 2019. That contract named the respondent as the seller’s (appellant’s) agent. It provided for an initial deposit of \$75,000, to be paid within seven business days of the contract date and a balance deposit of \$675,000 to be paid within three business days of the satisfaction of the due diligence condition. Settlement was to occur within 90 days of satisfaction of the due diligence condition.
- [14] On 3 February 2020, the buyer’s solicitor advised the respondent that the buyer needed to change to another company. A new contract was requested, to be prepared in the same terms as the original contract, with amendments as to the payment date for the balance of the deposit, the settlement date and the removal of the due diligence condition.
- [15] On 5 May 2020, the buyer and the appellant entered into a Deed of Rescission and Release, rescinding the contract made on 22 August 2019, on the condition that the related company to the buyer enter into a contract on the same terms, and with the deposit paid or payable under the original contract to form the deposit under the new contract.
- [16] On the same date, the new buyer entity and the appellant entered into a contract for the sale of the property. Again, the respondent was named as the seller’s agent. The new contract recorded that the balance of the deposit was to be paid on 6 February 2020, with settlement to be effected on 5 May 2020.
- [17] That contract did not proceed to settlement. The appellant lawfully terminated it on 2 June 2021.¹ The deposit was forfeited and most of it remained in the respondent’s trust account.

¹ Although not raised in the appeal record books, it is presumed the contract (which was due to settle on 5 May 2020) was the subject of extension(s) of the settlement date.

Proceeding

- [18] The respondent claimed recovery of \$1,650,000 from the appellant on account of commission, payable under the agreement recorded in the Form 6 dated 25 May 2019 (“the 2019 appointment”). Alternatively, it claimed \$330,000 as commission, if calculated under the Form 6 executed in 2018 (in the event the 2019 appointment was ineffective) (“the 2018 appointment”).
- [19] The respondent contended that it was the effective cause of the sale of the property, pursuant to both the first and the second contracts; and that it was entitled to recover the commission, as calculated under the 2019 appointment, despite the termination of the second contract, having regard to part 7 of the appointment and clause 5.1.3 of item 5 of the essential terms and conditions.
- [20] The appellant defended the claim on a number of bases. Relevantly, for present purposes, the appellant contended that:
- (a) The respondent was not entitled to recover any commission, because it was not properly appointed under s 89 of the Act, as the 2019 appointment did not state in writing that the commission was to be worked out only on the *actual* sale price, as required by s 105(2)(a) of that Act;
 - (b) Anderson, in his personal capacity, not the respondent, was the effective cause of sale;
 - (c) In any event, the respondent was not the effective cause of sale within the term of the appointment, pursuant to the 2019 appointment, as the term ended on 30 July 2019; and
 - (d) The 2019 appointment had to be read and construed in conjunction with the Deed of Agreement, pursuant to which no commission was payable unless the contract actually proceeded to settlement.
- [21] The appellant also counterclaimed for recovery of the balance of the deposit.

Primary decision

- [22] Relevantly, the primary judge found that although s 105(2)(a) of the Act required that the appointment “state, in writing, that the commission for the service is worked out only on ... the actual sale price” and part 7 of the signed Form 6 referred to the “sale price”, the omission of the word “actual” did not matter as the plain meaning of the words in part 7 was that the commission for the service was worked out on the price for which the property was agreed to be sold, not, for example, an advertised or listed price. Accordingly, the Form 6 appointment in May 2019 was valid and effective.
- [23] The primary judge further found that the respondent was the effective cause of sale, not Anderson in his personal capacity. The email correspondence in relation to the sale of property were all signed off by Anderson, in his capacity as sales manager for the respondent’s real estate business and it was the respondent that was the appointed real estate agent for the sale of the property, by the relevant Form 6. The respondent was also nominated as the seller’s agent in both contracts of sale and the property was marketed by the respondent; it was the means by which the buyer found the property.

- [24] The primary judge further found that the respondent was the effective cause of sale of the property “within the Term” of the appointment. Whilst part 4, section 2 provided for a single appointment for a particular service or services which started on 25 May 2019 and ended on 30 July 2019, part 6 provided that the appointment would continue as an open listing at the end of that period. Although “Term” was specifically defined in clause 1.10 of the essential terms and conditions by reference to part 4, section 2, the word “Term” was to be construed in the context of the agreement as a whole, which specifically provided for a continuation of the appointment as an open listing, after the expiry of the exclusive listing period.
- [25] Finally, the primary judge found that commission was payable in accordance with the terms of the 2019 appointment. Its terms were not to be read down and construed conjointly with the Deed of Agreement. The respondent was not a party to the Deed of Agreement which, insofar as it purported to record an appointment of Anderson personally with Soh as agents for the sale of the property, would be unenforceable for non-compliance with the Act in multiple respects. Further, the Form 6 appointment was an agreement between the respondent as real estate agent and the appellant as seller. Clause 15.1 of its essential terms and conditions specifically provided that it constituted the entire agreement of the parties with respect to the subject matter and superseded all prior negotiations or expressions of intent or understandings.

Consideration

Ground 1

- [26] The appellant submits that on a proper construction of s 105 of the Act, the respondent was not properly appointed under that Act by the appellant as the relevant Form 6 did not include a mandatory statement that the commission was to be worked out only on the *actual* sale price.
- [27] Section 105 of the Act provides:
- “105 Other requirements—commission**
- (1) This section applies to an appointment of a property agent or resident letting agent for a service that is the sale or letting of property or the collecting of rents if commission is payable for the service and is expressed as a percentage of an estimated sale price or amount of rent to be paid or collected.
- (2) The appointment must state, in writing, that the commission for the service is worked out only on—
- (a) for the sale of property—the actual sale price; or
- (b) for the letting of property—the actual rental for the property; or
- (c) for the collecting of rents—the actual amount of rent collected.”
- [28] Section 105(1) of the Act only has operation if the commission payable for the service “is expressed as a percentage of an estimated sale price...”. Only, in that

event, is there a requirement that the appointment state, in writing, that the commission is worked out only on the actual sale price of the property.

- [29] In the present case, the relevant Form 6 provided that commission was to be payable for the relevant service as follows:
- (1) For a sale price up to and including \$6,300,000 plus GST, 4.4 per cent of the sale price;
 - (2) For a sale price of over and including \$6,300,001 plus GST, for money above \$6,000,000 plus GST, to be paid to the agent plus GST.
- [30] Having regard to the wording of that clause, it may be doubted that the commission was expressed as a percentage of an estimated sale price. However, as the respondent has not filed a notice of contention, it is unnecessary to determine that question.
- [31] In any event, there was no error in the primary judge's conclusion that the omission of the word "actual", before "sale price", rendered the relevant Form 6 of no legal effect. The words used in the Form 6 do not set out or express any formula or provision for the payment of commission to the respondent other than by reference to a particular sale price. The only proper construction of the words "sale price" in the relevant Form 6 was that it was referring to the price for which the property was agreed to be sold, which, for the purposes of the section, is the actual sale price.
- [32] The appellant submits that such a conclusion was not open, having regard to the requirement of s 48A(2) of the *Acts Interpretation Act 1954* (Qld), that if a form prescribed or approved under an Act requires "specified information ... to be included in, attached to or given with the form", the form is not properly completed unless there is compliance with that requirement. However, the primary judge correctly found that section did not have application as the requirement as to actual sale price was not required by the approved form; it was required by the Act itself.
- [33] The primary judge also correctly concluded that nothing in the proper construction of the Act as a whole supported a conclusion that a failure to strictly comply with s 105(2)(a) would invalidate the Form 6 appointment. Substantial compliance with the requirements of s 105(2)(a) was sufficient.

Ground 2

- [34] The appellant submits that as the respondent did not introduce the property to the buyer until on or about 17 August 2019, the respondent was not the effective cause of sale "within the Term" which, by part 4, section 2, specified an exclusive agency appointment commencing 25 May 2019 and expiring 30 July 2019.
- [35] A consideration of the terms of the relevant Form 6, read as a whole, does not support the appellant's contention.
- [36] Whilst clause 1.10 of the essential terms and conditions defines "Term" as that set out in part 4, section 2, that section must itself be read in the context of part 6 of that form, which provides for the nature of the appointment.
- [37] In the relevant Form 6, the nature of that appointment was an exclusive listing for the specified period and a continuation of the appointment, after that specified period, as an open listing. Read as a whole, the term continued beyond 30 July

2019, as an open listing. The construction contended for by the appellant would have the consequence that the agency would continue as an open listing after the exclusive agency period, but the respondent would be disentitled to any commission if it was the effective cause of sale after the expiry of the initial exclusive agency period, irrespective of its actions to continue to act as agent and market the property.

- [38] At the time the buyer was introduced to the property, on or about 17 August 2019, the respondent's appointment under the Form 6 was continuing and the introduction occurred within the relevant term.

Ground 3

- [39] The appellant submits that the circumstances of the case support a conclusion that the relevant Form 6 was to be read in conjunction with the Deed of Agreement and that the Deed of Agreement was to be the dominant instrument. Accordingly, it is submitted, Anderson in his own capacity, was the effective cause of the sale and the respondent was not entitled to recover commission on the sale of the property.

- [40] Alternatively, the appellant submits that, when read conjointly, the respondent was only entitled to commission upon the settlement of the sale of the property and as the sale did not proceed to settlement, the respondent was not entitled to recover the commission provided for under the appointment.

- [41] In support of this ground, the appellant seeks to rely upon the principle stated by Jessel MR in *Smith v Chadwick*:²

“...when documents are actually contemporaneous, that is, two deeds executed at the same moment ... or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to show the meaning of the sentence, and be equally read, although not contained in one deed, but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose.”

- [42] Whilst that principle is capable of application in circumstances where two deeds of that nature are between different parties,³ the principle only operates where the two deeds may properly be said to make up one document for the purposes of a single transaction. Accordingly, its application is dependent upon the particular factual circumstances of the case.⁴

- [43] Having regard to the particular factual circumstances of this case, there was no error in the primary judge's conclusion that the relevant Form 6 was not to be read and construed conjointly with the Deed of Agreement. That conclusion was consistent with the factual findings pertaining to the particular transaction. Further, nothing in

² (1882) 20 Ch D 27 at 62.

³ *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd (No 2)* [2020] WASCA 112 at [80].

⁴ *Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd* [2016] NSWCA 224.

the terms of the relevant Form 6 supported a conclusion that the pre-existing Deed of Agreement was to impact upon its interpretation or operation.

- [44] The factual circumstances did not support a conclusion that the Deed of Agreement and the Form 6 formed one transaction, such that the plain terms of the subsequent Form 6, as to the payment of commission on a specified basis and in specified circumstances, including in the event of commission being payable even though the relevant sale did not proceed to settlement, was to be read down as not entitling the respondent to commission, in the event of the sale not proceeding to settlement.
- [45] Once it is concluded that there was no error in the primary judge's conclusion that the relevant Form 6 and the Deed of Agreement were not to be read and construed conjointly, there is no substance in the appellant's contentions in respect of this ground.

Conclusion

- [46] The Form 6 appointment appointed the respondent as real estate agent for the sale of the property. It expressly provided for the payment of commission in the factual circumstances that prevailed in respect of the contract.
- [47] There was no error in a conclusion that, in those circumstances, the respondent had established an entitlement to the claimed commission on the basis that a contract of sale of the property, with a buyer, had been entered into during the term of the open listing, with the respondent being the effective cause of the sale within that term.

Orders

- [48] I would order:
1. The appeal be dismissed.
 2. The appellant pay the respondent's costs of the appeal, to be assessed on the standard basis.
- [49] **BURNS J:** I agree that the appeal be dismissed with costs for the reasons expressed by Boddice JA.
- [50] **RYAN J:** I agree.