



Précis Paper

Absence of written agreement dooms estate agent's case

Savills (NSW) Pty Ltd v ATF CTH Pty Ltd [2020]
NSWSC 956

Abstract – A celebratory, boozy lunch proved no confirmation that a contract had been signed between developers and an estate agent to sell a Surry Hill property and its no show meant a loss to the agent of nearly \$1 million in commission.

Discussion Includes

- Key facts in the case
- Failure of no written agreement
- Rejection of plaintiff's case
- Celebratory lunch
- Why would the plaintiff proceed without an agreement?
- Different form of agreement
- Other key findings
- Other claims
- Key lesson
- Two legal take homes

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Absence of written agreement dooms estate agent's case *Savills (NSW) Pty Ltd v ATF CTH Pty Ltd* [2020] NSWSC 956

1. In this edition of BenchTV, Anthony Cheshire SC (barrister) and Julian Zmood (barrister) discuss the case of *Savills (NSW) Pty Ltd v ATF CTH Pty Ltd*, which showed that s 55 of the *Property and Stock Agents Act 2002* (NSW) is not only in the best interests of the consumer but of the real estate agent too.

Key facts in the case

2. The case surrounds a piece of real estate in Commonwealth Street, Surry Hills, Sydney. The defendant purchased it planning to redevelop the site, including demolition of the existing building and construction with hotel, residential and retail strata. Ultimately, the defendant decided not to pursue development and to simply sell the site. It sold for about \$70 million. The plaintiff, a commercial real estate agent, claimed a commission on the sale of nearly \$900,000.
3. The plaintiff put its claim on several bases and failed on every count.
4. The existence of a written agreement was the key question. There was no dispute there had been a draft of an agreement. The key finding was it had not been executed which was why the plaintiff's case failed.

Failure of no written agreement

5. NSW legislation says a licensed real estate agent such as Savills is not entitled to any commission or expenses unless there is a written agreement. There is no doubt that estate agents would be aware of s 55 of the *Property and Stock Agents Act 2002* (NSW).
' (1) A licensee is not entitled to any commission or expenses from a person for or in connection with services performed by the licensee in the capacity of licensee for or on behalf of the person unless—
(a) the services were performed pursuant to an agreement in writing (an *agency agreement*) signed by or on behalf of—
(i) the person, and
(ii) the licensee ... '

Rejection of plaintiff's case

6. There are two main reasons for rejection of the plaintiff's case – the first problem for the plaintiff was it couldn't produce a written agreement because it said it had lost it.

7. More problematic for the plaintiff was that the parties were in regular email contact around this time but there was no email correspondence supporting the account that it had been signed by either party.

Celebratory lunch

8. Another division of the plaintiff's was working on the development on a fee for service basis and it was that division that had put on the lunch and invited the hotels division in hopes of gaining an agreement.
9. Because you could show another explanation it was neutral at best, but as the evidence came out it was in favour of the defendant.

Why would the plaintiff proceed without an agreement?

10. What the plaintiff was doing was more of a commercial-type arrangement hoping it will all work out.
11. There was some discussion in the background about the terms. There was some uncertainty on the part of the plaintiff whether some of the terms would be agreed precisely as they wanted but the plaintiff hoped those disagreements would never arise.
12. In effect, the hotels division did their work for nothing.

Different form of agreement

13. Plaintiff could have had an agreement that 'if we provide work you pay us for the work that we do ...'. Estate agents usually work in this field on the basis of a success fee.
14. Issues to list include: Is it for a fee, is it for a set period, is it an exclusive agency or is it shared with another agent?

Other key findings

15. Two other issues that arose in relation to the evidence –
16. The defendant didn't call the person the plaintiff said executed the contract. *Jones v Dunkel* adverse inference was available but it doesn't have to be drawn.
17. The other issue that arose was an argument on the plaintiff's behalf that there were inadequacies in the defendant's discovery.
18. There was another issue the defendant won – an interpretation issue. The defendant sold the whole site – not just the hotel component. The commission was confined to the sale of the hotel which in fact never occurred as a separate proposition.

Other claims

19. There were claims of unconscionability under the Australian Consumer Law. Unconscionability under the ACL requires some moral fault or serious misconduct in the defendant.
20. The defendant was looking to sell the hotel component and changed its mind. It decided to sell the whole and to go with a different estate agent. The Judge said there was nothing morally unfair about that. Also, the plaintiff couldn't show any relevant loss.

Key lesson

21. Have an executed contract, executed by both parties, make sure you've got it in your possession, not just a hard copy, have a soft copy as well, so you have lots of different sources.
22. The broader lesson is something one sees a lot in litigation, that issues of live witnesses, assessing their credibility, is a difficult exercise. The most powerful evidence is usually the contemporaneous documentary evidence. Email can be used as a very important tool. Unfortunately for clients, it's usually used in this way, against the credit of a witness.
23. Where it's possible to advise clients, use email as a record to show what actually has happened at any time.

Two legal take homes

24. In terms of the legal issues, there are two take homes for the lawyers. One is deficiencies in discovery. A lot of clients take their responsibilities lightly and it can come back to bite them. It's important lawyers stress the obligations under discovery, subpoenas and notices to produce and ensure the proper searches have been carried out at the time.
25. In seeking to avoid a *Jones v Dunkel* inference, evidence should be put on from all relevant witnesses, even if their evidence is neutral. Even neutral evidence avoids the risk of where a *Jones v Dunkel* inference may lead.

BIOGRAPHY

Anthony Cheshire SC

Barrister, 8 Wentworth Chambers, Sydney

Anthony was called to the English Bar in 1992 and practised at the bar in London before moving to the New South Wales Bar in 2004. He practises from the 8th Floor of Wentworth Chambers in a broad range of areas, but with a particular focus upon general commercial, corporations, insolvency, inquiries, equity, probate, property, insurance, equity and professional negligence. He was appointed Senior Counsel in 2015.

Julian Zmood

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Since coming to the Bar, Julian has been retained in a broad range of commercial litigation including disputes that relate to equitable obligations (fiduciary obligations, breaches of confidence and of trust) and property disputes. He regularly appears at the District Court, Supreme Court and in the Federal Court of Australia.

BIBLIOGRAPHY

Focus Case

Savills (NSW) Pty Ltd v ATF CTH Pty Ltd [2020] NSWSC 956

Benchmark Link

https://benchmarkinc.com.au/benchmark/banking/benchmark_31-07-2020_banking.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/1738e60e6b2bafae6c71cd8b>

Cases

Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8

Legislation

Competition and Consumer Act 2010 (Cth) Sch 2 Australian Consumer Law

Property and Stock Agents Act 2002 (NSW)