HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

MONEYWOOD PTY LTD APPELLANT

AND

SALAMON NOMINEES PTY LTD RESPONDENT

Moneywood Pty Ltd v Salamon Nominees Pty Ltd [2001] HCA 2
8 February 2001
B22/2000

ORDER

1. *Appeal allowed with costs.*

2. *Orders of the Court of Appeal of Queensland made on 22 December 1998 set aside. In lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Queensland

Representation:

W Sofronoff QC with K Buxton for the appellant (instructed by Russell and Company)

P A Keane QC with L D Bowden for the respondent (instructed by Brown & Fowler)

CATCHWORDS

Moneywood Pty Ltd v Salamon Nominees Pty Ltd

Principal and agent – Commission – Action for recovery of commission by agent – Sale of property – Whether agent was effective cause of sale – Whether engagement or appointment of agent complied with s 76(1)(c) of the *Auctioneers and Agents Act* 1971 (Q).

Contract – Written agreement to engage agent and oral agreement to pay commission – Terms of the contract – Whether commission payable in respect of sale of part only of the property – Whether appointment of agent complied with s 76(1)(c) of the *Auctioneers and Agents Act* 1971 (Q).

Words and phrases – "effective cause" – "implied terms" – "evidenced in writing".

Auctioneers and Agents Act 1971 (Q), s 76(1)(c).

1 GLEESON CJ. The issues in this appeal concern a real estate agent's disputed claim to commission. The appellant was engaged as agent by the respondent, and found a purchaser, BMD Constructions Pty Ltd ("BMD"), which entered into a contract to purchase land from the respondent. The contract identified the appellant as the vendor's agent. That contract was never completed, and there was no commission payable in relation to it. By a later contract, which was completed, and which made no reference to the appellant, BMD agreed to purchase, for a lesser sum, part of the land which was the subject of the first contract. The dispute is as to whether the appellant was entitled to commission on the sale price under the second contract.

2 The detailed facts and circumstances surrounding the appointment of the appellant as agent, and the dealings between the respondent and BMD, are set out in the reasons for judgment of Gummow J. At first instance, in the District Court of Queensland, Botting DCJ found in favour of the appellant[1]. By majority (de Jersey CJ and Chesterman J; McPherson JA dissenting), that decision was reversed in the Court of Appeal[2].

3 The issue upon which the Court of Appeal found against the appellant was whether there had been satisfaction of a condition on the right of recovery of commission imposed by s 76(1)(c) of the *Auctioneers and Agents Act* 1971 (Q) ("the Act"). That was the principal issue in the appeal to this Court.

4 The appellant established that it was appointed as agent by the respondent, in relation to the sale the subject of the first contract, and that such appointment complied with the requirements of the Act. The appellant also satisfied both the trial judge, and all the members of the Court of Appeal, that the work it performed in its capacity as agent in relation to the first contract was an effective cause of the sale the subject of the second contract.

5 The finding of Botting DCJ on that matter was as follows:

> "In my view the plaintiff, in introducing BMD to the land, and in the initial work he [sic] did, pursuant to (as I have found) his appointment as agent for the defendant, enabled the defendant to enter into a contract on most favourable terms with BMD. In my view, so much of the benefit of this work 'flowed through' to the second contract with BMD that it can be fairly said that Mr Murphy's work on behalf of the plaintiff can be said

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1 *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* unreported, District Court of Queensland, 1 May 1998.

2 *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* (1998) Q Conv R ¶54-525.

to be an effective cause of the defendant's entering into the second BMD contract."

6 This conclusion was challenged in the Court of Appeal. It was confirmed by that Court. In this Court, by Notice of Contention, the respondent seeks to dispute these concurrent findings of fact.

7 In *Waltons Stores (Interstate) Ltd v Maher*[3] Deane J said:

"In a context where the cost of litigation has gone a long way towards effectively denying access to the courts to the ordinary citizen who lacks access to government or corporate funding, it is in the overall interests of the administration of justice and of the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact at least when the stage is reached that one party has succeeded upon it both on the hearing before the court of first instance and on a rehearing before the court of first appeal."

8 Here there are no special circumstances, such as "plain injustice or clear error"[4], which warrant disturbance of the findings. The case involves a complex set of circumstances, in which there was ample room for a factual judgment of the kind made by the trial judge and the Court of Appeal. That judgment was not based upon any misapprehension of legal principle. It turned upon an assessment of the causal relationship between the work done by the appellant pursuant to its engagement as the respondent's agent and the sale, the subject of the second contract, which was ultimately completed. Such an assessment is commonly required in disputes concerning an agent's commission. The process of reasoning which led to the finding in the present case was orthodox, and amply justified by the evidence.

9 So far as relevant, the Act provides, in s 76(1):

"No person shall be entitled to sue for or recover … any … commission … or other remuneration for or in respect of any transaction as … a real estate agent … unless –

…

(c) the engagement or appointment to act as … real estate agent … in respect of such transaction is in writing signed by the

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3 (1988) 164 CLR 387 at 434-435.

4 *Louth v Diprose* (1992) 175 CLR 621 at 634 per Deane J.

> person to be charged with such … commission … or the person's agent or representative".

10 As was noted, there was no reference to the appellant in the second contract. However, the first contract, which was in the standard form, identified the appellant as the "Vendor's Agent". It contained standard condition 30, which provided:

> "APPOINTMENT OF AGENT
>
> In the absence of any specific appointment the Vendor by executing this Contract hereby confirms the appointment of the Vendor's Agent (jointly with any other agent in conjunction with whom the Vendor's Agent has sold) as the agent of the Vendor to introduce a buyer."

11 In *Canniffe v Howie*[5], Lukin J compared an equivalent provision of a predecessor Act with the Statute of Frauds, and referred to the mischief at which the legislation was aimed. He concluded that "any document signed by the principal at any time before action brought which evidences the essential fact, the existence of the relationship in respect of the transaction in question, is sufficient to comply with the statute". The existence of the relationship of agency in respect of the transaction in relation to which the claim for commission is made is, as Lukin J observed, the essential fact which the Act requires to be evidenced in writing.

12 To argue, as the respondent argued, successfully, in the Court of Appeal, that the evidence of the existence of the relationship must be specific to the transaction in respect of which commission is claimed is to re-state, but not to solve, the problem. What is required is evidence of the existence of agency "in respect of the transaction in question". Here, the transaction in question was that which was the subject of the second contract. If there was writing which evidenced the existence of the agency in respect of that transaction the requirements of the Act were satisfied. Adjectives such as "specific" or "particular", qualifying "transaction", may give a useful focus to the inquiry, but they should not alter the language of the statute.

13 The question is approached upon the basis of findings that there was an appointment of the appellant as the respondent's agent, that the appointment was evidenced in writing in the first contract, and that there was a relationship between the agency, the first contract, and the second contract, of such a kind that it was proper to conclude that the work done by the appellant in its capacity as the respondent's agent was an effective cause of the sale the subject of the

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5 [1925] St R Qd 121 at 126-127.

second contract. That does not resolve the issue, but it is a significant first step for the appellant.

14 It is true that one ordinarily approaches the question of compliance with s 76(1)(c) only on the assumption that there has been an appointment as agent, and that the work of the agent pursuant to that appointment was an effective cause of the transaction. If it were otherwise, the s 76(1)(c) issue would normally not arise. 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 a sufficient connection with the transaction to justify a conclusion that it is in respect of the transaction.

15 The appointment as agent, evidenced in writing, related to the sale of land, which included the land ultimately sold, to BMD. In that respect the case differs from *Anderson v Densley*[6], where the scope of the written authority of the agent was narrower than the transaction entered into. Standard condition 30 of the first contract referred to the appointment as being "to introduce a buyer". The appellant introduced the buyer, BMD, which entered into the second transaction. There was thus a combination of four circumstances: the terms of the appointment referred to in standard condition 30; the relationship between the parcels of land the subject of the respective contracts; the identity of the buyer; and the fact that the work done as agent was an effective cause of the relevant transaction.

16 In the circumstances there is a sufficient connection between the agency and the transaction in question to treat the appointment as being in respect of the transaction, and to conclude that the requirements of s 76(1)(c) were satisfied.

17 The appeal should be allowed with costs.

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6 (1953) 90 CLR 460.

18 McHUGH J. Moneywood Pty Ltd ("the agent") and Salamon Nominees Pty Ltd ("the vendor") agreed that upon the agent "introducing a purchaser who actually completed a purchase" of land owned by the vendor, the agent would be paid a commission of two percent of the purchase price. As the result of the agent introducing BMD Constructions Pty Ltd ("the purchaser") to the vendor, the purchaser signed a contract to buy the land. While that contract was uncompleted, the vendor entered into a new contract to sell about two-thirds of the land to the purchaser. Concurrently, it sold almost all of the remainder of the land to Redland Shire Council, the local government council for the area. The District Court of Queensland held that the agent was the effective cause of the sale of two-thirds of the land to the purchaser and that it was entitled to two percent of the purchase price for that land[7]. By majority, the Court of Appeal[8] (de Jersey CJ and Chesterman J, McPherson JA dissenting) reversed the District Court and entered a verdict for the vendor. It unanimously upheld the finding of the trial judge that the agent was the effective cause of the sale but, by majority, it held that there was no engagement or appointment in writing of the agent to act as real estate agent "in respect of [the] transaction" as required by s 76 of the *Auctioneers and Agents Act* 1971 (Q) ("the Act").

19 The appeal and the vendor's notice of contention give rise to three issues:

(1) what was the legal effect of the oral agreement entered into between the vendor and the agent?

(2) was the agent the effective cause of the completed sale to the purchaser?

(3) were the requirements of s 76 of the Act satisfied because the original contract declared that "the Vendor by executing this Contract hereby confirms the appointment of the Vendor's Agent … as the agent of the Vendor to introduce a buyer"?

20 In my opinion, each of these issues should be answered in favour of the agent. The appeal should therefore be allowed, and the judgment of the District Court in favour of the agent restored.

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7 *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* unreported, District Court of Queensland, 1 May 1998.

8 *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* (1998) Q ConvR ¶54-525.

The material facts

21 In February 1994, Mr Phillip Murphy, an employee of the agent, informed the vendor that he had a developer who was interested in purchasing land owned by the vendor in the Redland Shire in Queensland. The trial judge found that the vendor agreed to pay the agent a commission "at the rate of 2 per cent of the purchase price upon Mr Murphy's introducing a purchaser who actually completed a purchase, or, as Mr Murphy put it, 'he would pay me on the receipt of moneys, 2 per cent commission.'"

22 On 31 March 1994, the purchaser signed a contract for the purchase of the land, the area of which was 47.5372 hectares. The land was zoned "Rural Non-Urban". The Council had given approval to the rezoning of part of the land, subject to certain conditions which had not been satisfied at the date of the contract. The purchase price was $6,825,000, and a deposit of $270,000 was payable. The contract described the agent as the Vendor's Agent. Clause 30 provided:

> "In the absence of any specific appointment the Vendor by executing this Contract hereby confirms the appointment of the Vendor's Agent … as the agent of the Vendor to introduce a buyer."

23 The contract was to be completed on or before 31 October 1994. The learned trial judge found that the contract was "unusually favourable" to the vendor in respect of eight matters.

24 The contract also required the vendor to continue with its existing application for rezoning and to lodge and pursue an application for rezoning the balance of the land. The vendor lodged the further application in April 1994. The contract contained a special condition that completion was conditional upon the vendor receiving from the local council "written advice ... as to the conditions of approval for rezoning of the whole of the land which would be required by that Council upon giving such approval". This condition gave the vendor the right to vary the time for completion in certain circumstances. Another special condition required the purchaser to accept the land in its "unrezoned state".

25 By September 1994, not only had the Council failed to issue the conditions for rezoning but it had informed the vendor that it might acquire part of the land, apparently because of public concern that a "koala corridor" within the land was needed. In June 1995, the vendor agreed to sell 16.06 hectares of the land to the Council. The next day, the vendor and the purchaser entered into a contract for the sale of 31.338 hectares of the land for $4,260,000. The agent was not identified as the Vendor's Agent in either of the June contracts.

The effect of the agency agreement

26 The express agreement between the vendor and the agent was a simple one: upon introducing a purchaser who bought the 47.5372 hectares, the vendor would pay the agent two percent of the purchase price. That agreement, simple though it was, contained a number of additional terms that are implied by law or necessity in contracts between vendors and real estate agents.

27 In the absence of a contrary agreement, the law implies a term that the agent is not entitled to its commission merely because it has introduced the purchaser of property. If the agreement is that commission is payable on "introducing" or "finding" a purchaser for the property, the agreement will be construed as meaning that the commission is payable only when the agent has introduced or found a purchaser who is ready, willing and able to complete the purchase[9]. Thus, unless the vendor's default was the reason for the contract not being completed, the agent is entitled to the commission only "if the sale is completed"[10]. Moreover, the agent must prove that the introduction was the effective cause of the sale[11]. In this area of the law, as in other areas of contract[12], the common law has rejected the "but for" test of causation.

28 It is also an implied term of an agreement between a real estate agent and a vendor that, if the agent is the effective cause of the sale, the agent is entitled to commission even if the final contract is significantly different from that originally contemplated[13]. Once the agent's conduct is proved to be an effective cause of the sale, the agent is entitled to commission even if the vendor has sold only part of or an interest in the land to the purchaser or has varied the terms or the price that the agent negotiated or even if the actual purchaser was not the person introduced by the agent[14]. It follows that it is also an implied term of the

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9 *Anderson v Densley* (1953) 90 CLR 460 at 467; *Rasmussen & Russo Pty Ltd v Gaviglio* [1982] Qd R 571 at 581.

10 *Anderson v Densley* (1953) 90 CLR 460 at 467.

11 *Burchell v Gowrie and Blockhouse Collieries Ltd* [1910] AC 614 at 624; *Anderson v Densley* (1953) 90 CLR 460 at 467; *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* (1977) 138 CLR 52 at 58, 67, 76, 86.

12 cf *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350 at 362, 363, 365, 370-371.

13 *Lord v Trippe* (1977) 51 ALJR 574; 14 ALR 129.

14 *Lord v Trippe* (1977) 51 ALJR 574 at 578; 14 ALR 129 at 135-136; *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* (1977) 138 CLR 52 at 59, 83.

appointment of an agent to sell or introduce a buyer that the agent is entitled to commission in respect of any sale of part of the property if its work has been an effective cause of the sale.

29 The implied terms referred to in the previous paragraph may arise by necessary implication from the nature of the agency agreement rather than law. But, whether the jurisprudential basis of the terms is law or necessity, in the absence of a contrary agreement the agent is entitled to its commission when its conduct was the effective cause of the sale of the whole or part of the property. In many situations where the contract is significantly different from the transaction originally contemplated, however, the agent will be entitled to part only of the commission initially contemplated. Thus, if the price of the property is varied or only part of the land is sold, the agent is only "entitled to a commission, rateable to the value of the land sold"[15].

30 In determining whether the agent's conduct was an effective cause, the law looks at the substance of the matter[16]. If the sale could not have occurred until the vendor or another agent arranged finance on terms, not otherwise available to the purchaser and not contemplated at the time of the introduction, the proper conclusion will ordinarily be that the introducing agent was not the effective cause of the sale[17]. On the other hand, the agent will be the effective cause where the person introduced nominates another person to buy the property – at all events where the person introduced directs the property to be transferred into the name of the actual purchaser[18].

The agent was the effective cause of the purchase

31 The trial judge found that the agent was the effective cause of the contract for the purchase of the 31.338 hectares for the sum of $4.26 million. The Court of Appeal upheld this finding. This means that there are concurrent findings of fact on the issue of effective cause. That being so, this Court should not enter on a re-examination of the issue of effective cause unless those concurrent findings were vitiated by legal error.

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15 *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* (1977) 138 CLR 52 at 59.

16 *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* (1977) 138 CLR 52 at 84.

17 *Moran v Hull* [1967] 1 NSWR 723; *Rasmussen & Russo Pty Ltd v Gaviglio* [1982] Qd R 571; *Bradley v Adams* [1989] 1 Qd R 256.

18 *Gunn v Showell's Brewery Co Ltd* (1902) 18 TLR 659; *Lord v Trippe* (1977) 51 ALJR 574; 14 ALR 129.

32 The vendor contends that legal error did occur in the Court of Appeal's evaluation of the facts. It contends that that Court failed to appreciate that the conditional nature of the first contract meant that it was not relevantly capable of completion and, because that was so, the case was governed by two earlier decisions of the Full Court of the Supreme Court of Queensland – *Rasmussen & Russo Pty Ltd v Gaviglio*[19] and *Bradley v Adams*[20]. This contention must be rejected. The findings of the trial judge make this a very different case from *Rasmussen* and *Bradley*.

33 In the present case, the learned trial judge found:

- The agent introduced the purchaser to the land.
- The vendor was largely successful in preserving in the second contract "as much as it could of the benefits it perceived itself as having gained in the first contract."
- The initial work done by the agent, including introducing the purchaser to the land, "flowed through" to the second contract so that it could fairly be said that the agent's work was "an effective cause of the [vendor's] entering into the second … contract."

34 Upon these findings, the agent's work in respect of the first contract was not spent once the parties rescinded that contract. What the agent had done remained operative upon, and influential in the formation of, the second contract between the same parties. There is no valid analogy between the present case and *Rasmussen* and *Bradley*. In both of those cases, the Full Court held, as a fact, that the work of the agent was not causally connected with the second contract signed by the parties to it.

35 In *Rasmussen*, the agent had introduced the purchaser who eventually bought the property. The agent had even arranged for the purchaser to sign a contract for the property. That contract had been rescinded when the purchaser was unable to obtain finance for the purchase. Subsequently, the purchaser signed another contract arranged by a second agent who had obtained finance for the purchase that the purchaser would otherwise have been unable to obtain. In the Full Court, Andrews SPJ, with whose judgment Kelly J agreed, held[21] that there was "a complete cessation of the necessary causal relationship between the

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19 [1982] Qd R 571.

20 [1989] 1 Qd R 256.

21 [1982] Qd R 571 at 576.

[agent's] actions and the sale which eventually took place." McPherson J held[22] that the eventual contract "was not entered into as a result of the agency of the [agent]".

36 In *Bradley*, the agent had arranged for Wool Stores, the eventual purchaser, to sign a contract to buy property from Adams who had a contract on foot to buy the property at a much lower price. The contract between Adams and Wool Stores was conditional upon finance being arranged for the purchase and was rescinded when it could not be arranged. Subsequently, Adams' vendor, Wool Stores and Adams agreed that the head contract should be rescinded and that Wool Stores would buy the property at the price offered to Adams and that Adams would have a 40 percent interest in the property. The agent played no part in negotiating the new contract or the new financing arrangement. The Full Court unanimously held that the agent's work was not an effective cause of the sale from the vendor to Wool Stores.

37 *Rasmussen* and *Bradley* are authorities only for the proposition that, on their respective facts, the agent was not the effective cause of the ultimate sale. They do not lay down, nor are they authority for, any general proposition that governs the present case. The Court of Appeal did not err in law in upholding the District Court's finding of fact that in the present case the agent was the effective cause of the sale of the 31.338 hectares for the sum of $4.26 million under the second contract.

<u>The first contract contained an appointment in writing in respect of the transaction sued upon</u>

38 Section 76(1) of the Act relevantly enacts:

> "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 an auctioneer, a real estate agent, a commercial agent, or a motor dealer, unless –
>
> (a) at the time of the transaction the person was the holder of a licence as … a real estate agent … ; and
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> …
>
> (c) the engagement or appointment to act as … real estate agent … in respect of such transaction is in writing signed by the person to be charged with such … commission … or the person's agent or representative ..."

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22 [1982] Qd R 571 at 582.

39 The origin of s 76 is s 13 of the *Land Agents Act* 1912 (NZ). However, s 13 of the New Zealand Act was confined to commission etc "for or in respect of the sale or other disposition of land, or of any interest in land". In 1921, the *Land Agents Act* 1921 (NZ) was extended to cover commission etc "in respect of his services as agent in any other like transaction".

40 Section 23(1) of the *Auctioneers and Commission Agents Act* 1922 (Q) substantially copied the 1921 New Zealand legislation although, like s 76 of the Act, it made no reference to the sale of land. Instead it simply applied to claims for commission etc "in respect of such transaction". The Queensland legislation of 1922 was repealed by and substantially re-enacted in s 76 of the Act.

41 In *Thornes v Eyre*[23], Cooper J said that the purposes of the New Zealand legislation were:

- to provide that only persons of good reputation could practise as land agents;
- to ensure that these agents would account to their principals for all moneys received; and
- to prevent perjury by agents claiming that they had verbal authority to sell particular properties.

42 No doubt the Queensland legislation seeks to achieve the same purposes although it leaves much to be desired in terms of protecting a principal. Thus, unlike the Statute of Frauds[24] and its analogues, it does not require the whole of the terms of the agency contract to be in writing[25]. Nor does it require the written appointment to exist before the completion of the transaction. All that s 76(1)(c) requires is that "some writing or connected writings exist evidencing the creation of the relationship of principal and agent in respect of the transaction pursuant to an oral contract."[26] A document complies with s 76 if it is signed by the principal before action is brought and evidences the transaction[27]. It is not necessary that the writing constitute the appointment as agent for the specific transaction, as the

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23 (1915) 34 NZLR 651 at 659-660.

24 *British and Beningtons Ltd v NW Cachar Tea Co* [1923] AC 48 at 62.

25 *Thornes v Eyre* (1915) 34 NZLR 651; *Canniffe v Howie* [1925] St R Qd 121; *Anderson v Densley* (1953) 90 CLR 460.

26 *Anderson v Densley* (1953) 90 CLR 460 at 468.

27 *Canniffe v Howie* [1925] St R Qd 121 at 127.

judgment of Chesterman J in the Court of Appeal might be taken to suggest. It is enough that before action there exists some writing that *evidences* the appointment of the agent *in respect of* the transaction that is the subject of the claim for commission.

43 Here the agent claimed commission in respect of the sale of 31.338 hectares for the sum of $4.26 million under the second contract. It was the sale of those 31.338 hectares which constituted the transaction for the purpose of s 76(1) of the Act. Clause 30 of the first contract provided that "[i]n the absence of any specific appointment the Vendor by executing this Contract hereby confirms the appointment of the Vendor's Agent … as the agent of the Vendor to introduce a buyer." Other provisions of the first contract showed that the agency was in respect of the sale of 47.5372 hectares of vacant land, being Lot 1 in Registered Plan No 189159. Did cl 30 evidence the appointment in writing of the agent "to act as … real estate agent … in respect of" the sale of the 31.338 hectares of land that was the subject of the claim for commission? In my opinion, it did.

44 Clause 30 constituted the appointment of the agent to introduce a buyer for the 47.5372 hectares of land of which the 31.338 hectares were part. It constituted the appointment of the agent in respect of a transaction to sell the whole of the land known as Lot 1 in Registered Plan No 189159. For the reasons given earlier in this judgment, the agency appointment confirmed and evidenced by cl 30 contained an implied term that the agent was entitled to commission in respect of the sale of part of the land if the agent's work was an effective cause of that sale. Thus, cl 30 in its context was more than evidence of a transaction concerning an agency to sell the whole of the land. It evidenced the appointment of the agent to act as agent in respect of the sale of any part of the land where the agent's work was an effective cause of that sale. And it was evidence that the agent was entitled to commission, *pro rata*, in respect of the sale of such part.

45 The trial judge found that the agent's work was an effective cause of the sale of the 31.338 hectares. Those 31.338 hectares were part of the 47.5372 hectares, the subject of the first contract. Thus, by reason of the implied term arising from the agency agreement, cl 30 of the first contract confirmed in writing the engagement of the agent to sell the 31.338 hectares. The District Court was correct when it rejected the vendor's defence based on s 76 of the Act.

Order

46 The appeal must be allowed with costs, and the judgment of the District Court restored.

47 GUMMOW J. This appeal concerns a claim to commission upon a sale of a parcel of freehold land situated in the Redland Shire in Queensland ("the land"). The land was at all material times owned by the respondent ("Salamon Nominees"). The appellant ("Moneywood") trades as L J Hooker Brisbane Land Marketing. It appeals from a judgment of the Queensland Court of Appeal[28] which (de Jersey CJ and Chesterman J; McPherson JA dissenting) allowed an appeal from the decision of the District Court (Botting DCJ). The District Court had entered judgment in favour of Moneywood for $116,300, being commission of $90,600 plus interest.

The facts

48 Mr Phillip Murphy, an employee of Moneywood, is a licensed real estate agent with experience in arranging the sale to developers of properties in the Redland Shire. At a time in late 1991 or early 1992, Mr Murphy identified the land as having potential for redevelopment[29]. Mr Murphy ascertained that Salamon Nominees was owner of the land and contacted Mr Alfred Salamon, a director of the company, to canvass the possibility of arranging a sale of the land. Although Mr Salamon's initial reaction was non-committal, Mr Murphy persisted and eventually established that Salamon Nominees might accept an offer of $5.5 million for the land, provided that the other conditions of the offer were acceptable.

49 On 3 February 1994, Mr Murphy rang Mr Salamon to inform him that he had found a developer interested in purchasing the land and there was discussion of the payment of a commission. They gave conflicting evidence but the trial judge found that they had agreed orally that Salamon Nominees would pay Moneywood a commission at the rate of 2 per cent of the purchase price upon Mr Murphy's introducing a purchaser who completed a purchase. It will be necessary to return to the significance of this finding later in these reasons.

50 The interested developer was BMD Constructions Pty Ltd ("BMD"). A director of BMD had previously known of the land and had made an offer for it before he was contacted by Mr Murphy. The offer had been rejected. The trial judge found that Mr Murphy had reawakened BMD's interest in the land. His Honour found that "after [its] initial contact BMD concluded that it was not worthwhile wasting further time in trying to deal with [Salamon Nominees]" and that Mr Murphy was able "to persuade [BMD] that it was worthwhile investing the time and money necessary to bring [Salamon Nominees] to a stage where it

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28 *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* (1999) Q ConvR ¶54-525.

29 Mr Murphy was at the time employed by another company, Land-Q Pty Ltd, which subsequently amalgamated with Moneywood. Nothing turns on this.

would seriously consider BMD's offers, and ultimately accept an offer to purchase".

51 After negotiations, in which Mr Salamon's son, Steven, also played a role[30], Salamon Nominees and BMD entered into a contract for sale of the land, dated 31 March 1994 ("the first contract"). This was in standard form, being the first edition of a standard form adopted by the Real Estate Institute of Queensland ("the REIQ"). Salamon Nominees is identified as the vendor and BMD as the purchaser. The sale price is listed as $6,825,000, with a $270,000 deposit. Moneywood's trading name is entered on the form (in item B) as the "Vendor's Agent". The area of the land to be sold was 47.5372 hectares.

52 The first contract was subject to a number of special conditions, which the trial judge described as "unusually favourable" to Salamon Nominees. They provided, for example, that the deposit of $270,000 was non-refundable and that BMD was to be responsible for the payment of all rates, fire levies, land tax and any other outgoings of any nature from the date of the contract. Two conditions, the third and fourth, dealt with the zoning of the land, which at all material times was zoned "Rural Non-Urban". Both favoured Salamon Nominees and assume some importance for this appeal.

53 In October 1988, Mr Salamon had applied to the Redland Shire Council ("the Council") for the rezoning of part of the land. Approval had been granted subject to a number of conditions, which had not been fulfilled by the time the first contract was entered into. The fourth special condition provided, materially, that completion of the contract was "subject to and conditional upon" Salamon Nominees receiving from the Council and providing to BMD by the date of completion "the conditions of approval for rezoning of the whole of the land which would be required by that Council upon giving such approval"; failing this Salamon Nominees had a right to terminate the contract. The condition also provided that BMD "expressly acknowledges that such conditions need not be to its satisfaction" and reserved to Salamon Nominees the right to vary the time for satisfaction of the condition and the date for completion for such further period not exceeding 12 months as may be determined by it. During this period, BMD was to pay interest on the balance of the purchase price.

54 Salamon Nominees was obliged, by special condition 4(a), to continue with the existing application on behalf of BMD and was required, by special condition 4(b), to lodge and "pursue … vigorously" an application for the rezoning of the balance of the land. Salamon Nominees was to keep BMD

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30 Mr Steven Salamon was, at the time, a newly qualified solicitor employed by a Melbourne firm. He, his father and mother were among the beneficiaries of the trust of which Salamon Nominees was trustee.

informed, inter alia, of the applications' progress (special condition 4(c)), and BMD was to bear the costs and expenses of the rezoning (special condition 4(e)).

55 The third special condition provided that BMD agreed to take the land in its "unrezoned state" and waived any rights it had under standard conditions 20 and 21 of the contract. Standard condition 20 dealt with any valid notice or order issued "pursuant to any statute or by any Local Authority or Court"; Salamon Nominees was required to comply fully with such a notice or order issued before the date of the contract and BMD was required to comply with any issued on or after the date of the contract. BMD was to indemnify Salamon Nominees in the latter case. Standard condition 20 continued:

> "If without default of the Purchaser the contract is terminated the Vendor shall pay to the Purchaser any amount expended by the Purchaser in complying with any such notice which was in the nature of capital expenditure or has resulted in a benefit to the Vendor."

56 Standard condition 21 provided, inter alia, that BMD might terminate the contract and recover all moneys paid if, at the date of the contract, any of a number of certain criteria existed and were not disclosed in the special conditions or elsewhere within the contract.

57 The first contract was due to settle in October 1994. It provided for completion "on or before the expiration of seven calendar months from the date hereof", that is, on or before 31 October 1994. Salamon Nominees endeavoured to satisfy special conditions 4(a) and 4(b). In April it had lodged an application for the rezoning of the balance of the land. However, in the period before October, there was publicity about the perceived need for a "koala corridor" within the land; BMD intended to develop the whole allotment for residential subdivision and sale. As a result of public concern, the Council requested a flora and fauna study and, by September 1994, had not issued conditions of rezoning. This meant that the contract was still conditional.

58 By letter to Salamon Nominees dated 27 September 1994, the Council indicated that it might acquire part of the land. Salamon Nominees urged the Council to decide the rezoning application and, by letter dated 26 October, it sought gazettal of rezoning for the portion of the land the subject of special condition 4(a) and tendered a guarantee for the performance of rezoning conditions in the sum of $250,000. By separate letter of the same date, Salamon Nominees threatened litigation if the Council did not act. Both letters were unanswered. On 27 October, Salamon Nominees exercised its right under special condition 4 to extend the date for completion to 31 October 1995. Following further negotiations, Salamon Nominees instituted litigation against the Council. At about the time pleadings closed on 20 March 1995, the Council indicated an interest in purchasing about six hectares of the land as a way of resolving the impasse.

59 After further, quite extensive, negotiations between the parties, the Council agreed to purchase for $2.2 million a parcel of the land to use as a koala habitat. BMD agreed to purchase the remaining area of the land for $4.26 million. On 13 June 1995, Salamon Nominees and the Council entered into a contract for sale of approximately 16.06 hectares, subject to survey, for $2.2 million, with a deposit of $220,000. This contract was in standard form, being the second edition of the standard form contract adopted by the REIQ. The stipulated date for completion was 29 June 1995. On 14 June 1995, Salamon Nominees and BMD entered into a contract for sale of 31.338 hectares of the land for $4.26 million, with a deposit of $5,000 ("the second contract"). This contract, like the first contract, was in the first edition of the standard form adopted by the REIQ. The stipulated date for completion was 31 July 1995.

60 The trial judge found that, in dealing with the situation created by the Council's concern about the koala corridor, Salamon Nominees had sought to preserve as much as it could of the benefits it perceived itself as having gained in the first contract and that BMD's attitude to, and understanding of, the situation was much the same. He also found that Salamon Nominees was largely successful in so doing. Moreover, his Honour noted that Salamon Nominees and BMD clearly intended that the first contract would remain on foot and be enforceable should the second contract not go to completion, and that the second contract was as far as possible to reflect the first contract and contain its benefits. This was reflected in many statements made in correspondence between Salamon Nominees and, variously, its solicitors and BMD's solicitor. For example, in a letter from Salamon Nominees' solicitors to their client dated 12 May 1995, it was said:

> "You will note that we have provided in Special Condition 15 that the original Contract of Sale remains on foot until completion of this Contract of Sale has been effected. It occurs to us that you would not wish to lose the benefit of that Contract, even upon execution of this new Contract as there are still certain unlikely events which may take place to frustrate this later Contract … Following on from that proposition, if the original Contract of Sale is to come into effect again upon failure of the later Contract for any reason, it would seem advisable to make the Contract with [BMD] and the Contract with [the Council] interdependent upon contemporaneous settlement as the original Contract would be frustrated by any concurrent commitment to sell part of the land to [the Council]."

The correspondence also explains the use of the first edition of the REIQ standard form in the second contract, compared with the second edition used in the sale to the Council. In item 4 of a letter to its solicitors on 16 May 1995, Salamon Nominees queried why the second contract used the first edition, asking: "Is this an oversight or is there a reason for this?" The solicitors' reply of 17 May 1995 stated, inter alia:

> "4. Since the original contract of sale was entered into with [BMD], an updated version of the Standard Conditions of Sale approved by the Law Society and [the REIQ] has now [been] issued. Whilst [the Council] would no doubt expect that form of contract to be adopted, we have not used that form for the replacement contract with [BMD] as it is intended to retain the original format of that contract so far as possible, and it may therefore be necessary to change references to standard conditions of sale and make other adjustments to conform with the current form of standard contract. This is obviously undesirable in reframing the contract with [BMD]."

61 In a facsimile dated 18 May 1995 to its solicitors, Salamon Nominees stated that "[y]our response to items 1, 2, 3, *and 4* have been noted" (emphasis added). That letter also contained an instruction by Salamon Nominees that bears upon the role of Moneywood as agent, a matter of central importance in this appeal and one to which I will return later in these reasons. The instruction reads: "Please delete LJ Hooker as the vendor's agent." The second contract was also subject to special conditions, the eighth of which read:

> "The parties agree that they shall keep the existence of this contract and any prior negotiations completely confidential save that [BMD] shall be entitled to disclose the contents thereof to its financier or any joint venture partner involved in the development of the subject land."

62 The contract with the Council and the second contract went through to completion. In neither contract was Moneywood named as agent for the vendor; the spaces for entry of that information upon the forms remained blank. Salamon Nominees refused to pay Moneywood any commission in respect of any of the contracts other than a cheque for $5,400 which Mr Salamon claimed to have sent Moneywood but which, it was common ground, had never been cleared. Mr Salamon claimed that this sum represented a 2 per cent commission on the deposit moneys received under the first contract.

The trial

63 On 9 January 1996, Moneywood instituted proceedings in the District Court at Brisbane against Salamon Nominees. In its plaint, as amended, Moneywood claimed "commission payable under and pursuant to an agreement made between [Moneywood] and [Salamon Nominees]". It also claimed, in the alternative, the sum of $90,600 "being commission payable under and pursuant to the aforesaid agreement" and $45,900 "being damages payable for breach of the aforesaid agreement". (It should be noted that the trial judge later found that on no view had Moneywood introduced the Council to the land.)

64 Moneywood alleged that it had been retained by Salamon Nominees "to introduce a purchaser for the land" and that, pursuant to this retainer, it had introduced BMD to Salamon Nominees; that BMD was at all material times ready, willing and able to complete the first BMD contract; and that, "[i]n conditional substitution of [Salamon Nominees'] obligations to complete a transfer of the land to BMD under the first BMD contract", Salamon Nominees entered into the contract with the Council and the second contract with BMD, forfeiting the deposit of $270,000 under the first contract and giving BMD credit of $95,000 in respect of land tax saved by Salamon Nominees. The plaint recited the existence of the confidentiality clause in special condition 8 of the second contract and asserted that "[t]he first BMD contract was by separate agreement between [Salamon Nominees] and BMD to be rescinded upon performance of the conditions of the second contracts".

65 In its defence, Salamon Nominees admitted the existence of the first contract but denied that Moneywood's retainer was "recorded in writing on the said contract" and that Moneywood was retained at any time. Salamon Nominees claimed that it agreed only to pay Moneywood $5,400; that the first contract was never completed; that Salamon Nominees did not cause its failure; that it entered into two contracts in "conditional substitution of its alleged obligation to complete a transfer of the land" under the first contract; and that "no agreement or appointment in writing in respect of the transactions referred to … was signed by [Salamon Nominees] in accordance with" s 76(1)(c) of the *Auctioneers and Agents Act* 1971 (Q) ("the Act").

66 Section 76, which is entitled "Restriction on remedy for commission", provides:

> "(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 an auctioneer, a real estate agent, a commercial agent, or a motor dealer, unless–
>
> (a) at the time of the transaction the person was the holder of a licence as an auctioneer, a real estate agent, a commercial agent, or a motor dealer, as the case may be, under this Act; and
>
> (b) being a corporation, it was, at the time of the transaction, the holder of a corporation licence under this Act and complied with the requirements of this Act relating to the carrying on by a corporation of the business of an auctioneer, a real estate agent, a commercial agent, or a motor dealer, as the case may be; and

(c) *the engagement or appointment to act as auctioneer, real estate agent, commercial agent, or motor dealer in respect of such transaction is in writing signed by the person to be charged with such fees, charges, commission, reward, or remuneration, or the person's agent or representative*; and

(d) where the same are prescribed under this Act, the fees, charges, commission, reward, or other remuneration are not in excess of the fees, charges, commission, reward, or other remuneration prescribed for or in respect of such transaction.

(2) Subsection (1)(c) shall not apply in respect of such transactions or classes of transactions as may be prescribed by regulation." (emphasis added)

It has not been suggested that any regulation found in the Auctioneers and Agents (Exemptions) Regulation 1995 (Q) is applicable. I will return to the significance of the Act later in these reasons.

67 Salamon Nominees also contended that the execution of the contract with the Council and the second contract were brought about not as a result of anything which Moneywood did or purported to do, but by other causes. These primarily were Salamon Nominees' negotiations with the Council over the koala corridor and Salamon Nominees' willingness to expend moneys and to release or to forego or to accept lesser amounts for some of its rights in its negotiations with BMD.

68 The trial judge found that Moneywood had proved that it was retained by Salamon Nominees to introduce a purchaser to the land. His Honour said:

> "Whilst it may be the case that at the time of their initial contact [Mr Salamon and Steven Salamon] may not have appreciated Mr Murphy's rôle, I feel confident that well prior to 31st March, 1994 they must have understood that Mr Murphy was working as an agent on their behalf, and that they agreed, through Mr Alfred Salamon, to his doing so. … Further, it seems to me to be apparent that, after some discussions and misunderstandings, the parties agreed that commission would be payable to [Moneywood] at the rate of 2 per cent of the purchase price upon Mr Murphy's introducing a purchaser who actually completed a purchase, or, as Mr Murphy put it, 'he would pay me on the receipt of moneys, 2 per cent commission.'"

69 The parties had incorporated the Standard Conditions of Sale – Residential Land and Residential Units and Houses (First Edition) into the first contract. Standard condition 30, headed "APPOINTMENT OF AGENT", read as follows:

> "In the absence of any specific appointment the Vendor by executing this Contract hereby confirms the appointment of the Vendor's Agent (jointly with any other agent in conjunction with whom the Vendor's Agent has sold) as the agent of the Vendor to introduce a buyer."

70 The trial judge also found that it was clear that Moneywood introduced BMD to the land by reawakening its interest after its original offer had been refused and BMD had concluded that it was not worthwhile wasting time upon the matter. He also held that, had the first contract proceeded to completion, subject to any argument about there being evidence in writing of the appointment, Moneywood would have been entitled to commission at the agreed rate of 2 per cent of the sale price.

71 To recover its commission on the second contract the trial judge said that Moneywood had to show that there was a "causal relationship" between its efforts and the sale, or that it was "an effective cause of the arrangement which was ultimately carried into execution"[31]. His Honour held that Moneywood could be "fairly said" to be "an effective cause of the coming into existence, and of the subsequent completion, of the second BMD contract". In introducing BMD to the land, and in the initial work it did, pursuant to its appointment as agent, Moneywood enabled Salamon Nominees to enter into a contract on most favourable terms with BMD; so much of the benefit of this work "flowed through" to the second contract that it could fairly be said that Moneywood's work on behalf of Salamon Nominees was an effective cause of BMD's entering into the second contract.

72 With respect to Salamon Nominees' reliance upon s 76 of the Act, the trial judge found that the nomination of Moneywood as agent in the first contract, coupled with the incorporated standard condition 30, amounted to written evidence of its appointment as agent. As a result, he held that, upon completion of the second contract, Moneywood was entitled to receive commission at the agreed rate of 2 per cent of the contract price of $4.53 million, that is $90,600. His Honour allowed an amount of $25,700 as interest, and added:

> "Whilst again it is not necessary for my decision in this case, it may be prudent for me to state my view that there was always a good possibility – almost a probability – that the original contract would not proceed to completion through no fault of [Salamon Nominees] (or, for that matter, BMD,) because of the public interest in the 'Koala habitat.'"

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31 *Bradley v Adams* [1989] 1 Qd R 256 at 260 per Connolly J.

Court of Appeal

73 The majority allowed the appeal principally on the basis that, contrary to the requirements of s 76 of the Act, there was no writing signed by Salamon Nominees evidencing Moneywood's agency in respect of the second contract[32]. Chesterman J delivered the leading judgment.

74 In his dissenting judgment, McPherson JA considered that standard condition 30 satisfied par (c) of s 76(1) of the Act. He considered that the word "transaction" in that sub-section was sufficiently broad for the second contract fairly to be considered as part of the same "transaction" in respect of which the relationship of principal and agent was originally constituted by the oral agency agreement[33]. Further, that relationship was recognised or was "evidenced" by the particulars contained in item B of the contract and the terms of standard condition 30 forming part of the first contract which was signed by Salamon Nominees[34].

The appeal to this Court

75 The appeal turns upon three discrete issues. The first is the operation of s 76 of the Act. The second is the construction of the oral agency agreement between the parties, and the third is whether Moneywood did what was required to entitle it to the commission it claims in respect of the second contract. In that regard, Salamon Nominees, by notice of contention, contends that the decision of the Court of Appeal should be affirmed on a ground not relied upon by the majority. This is that Moneywood did not earn its commission because it was not the "effective cause" of the second contract.

76 It is convenient to begin by considering the agency agreement.

The agency agreement

77 The trial judge found that Moneywood had been retained to introduce a purchaser to the land; that Moneywood would be entitled to a commission of 2 per cent of the purchase price upon Moneywood's introducing a purchaser who completed a purchase; and that the commission was to be paid by Salamon Nominees on the receipt of the purchase moneys.

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32 (1999) Q ConvR ¶54-525 at 60,232.

33 (1999) Q ConvR ¶54-525 at 60,229-60,230.

34 (1999) Q ConvR ¶54-525 at 60,229.

78 The agreement between the parties was not expressed as one dependent upon a particular contract of sale; it was in respect of the introduction of a purchaser who would see the sale through to completion. In some cases, an agent is appointed only in respect of a particular contract of sale, or to sell only certain incidents of the principal's property[35] or to act as agent only for a particular period of time[36]. But such a limitation would have to appear in the agency agreement. The trial judge found no such limitation in the agreement between the present parties. However, in the Court of Appeal Chesterman J appears to have proceeded on the basis that the agreement between the parties was in respect of a transaction embodied only in a particular contract of sale, here, the first contract. To approach the case on that basis was, with respect, in error. Nothing would preclude the creation of an agency upon such a limited basis, or indeed upon any discrete and nominated number of contracts of sale if such was the intention of the parties; but that is not this case.

79 For similar reasons, Salamon Nominees' submission that, as a matter of law, it is incorrect to say that an agent earns its commission "by introducing a buyer" should be rejected. That submission moves away from the task of construing and applying the terms of the agency agreement in question by substituting some generalised proposition as a rule of the common law. The true question in the present case is whether the agent was an effective cause of the arrangement which was ultimately carried into execution and whether it was entitled to a commission in respect of that arrangement.

Entitlement to commission on the second contract

80 Did Moneywood, in fact, satisfy the criteria for its entitlement to commission? It introduced BMD to Salamon Nominees as a prospective purchaser of all of the land. Had BMD bought all of the land under the first contract, the entitlement of Moneywood would have been clear. However, BMD bought only part of it. Was this sufficient for Moneywood to earn its commission? The parties made no express provision as to the eventuality that an introduced purchaser might acquire part but not all of the land. Thus it is necessary to look at the terms implied into their agreement. It is not suggested that any term is to be implied from the particular circumstances of the case and to give effect to some apparent underlying intention of the parties about providing business efficacy, so as to engage the criteria found in the well-known statement of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[37].

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35 *Anderson v Densley* (1953) 90 CLR 460 at 469.

36 *Canniffe v Howie* [1925] St R Qd 121; *Hooper v Anderson & Co Ltd* [1918] NZLR 119.

37 (1977) 180 CLR 266 at 283.

The agency contract here was not reduced to any written form and the question would be whether the implication of the particular terms was necessary for the reasonable or effective operation of the contract in the circumstances of the case[38]. Rather than pursuing that line of investigation, reliance is placed upon terms implied by law. It then is necessary to consider the terms implied by the law into agreements of this description, "in the sense of attributed to the contractual intent of the parties, unless the contrary appears on a proper construction of their bargain"[39].

81 The starting point is the criterion of "effective cause" relied upon in the Queensland courts and in the submissions to this Court. The requirement of "effective cause" is one of the various concepts, understood as terms implied by law, which are found in the body of common law learning applicable to real estate agencies. The requirement is an illustration of the point made as follows by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*[40]:

> "There is force in the suggestion that what now would be classified as terms implied by law in particular classes of case had their origin as implications based on the intention of the parties, but thereafter became so much a part of the common understanding as to be imported into all transactions of the particular description."

On this basis, in *L J Hooker Ltd v W J Adams Estates Pty Ltd*[41] Stephen J, in the absence of an express provision in the agency agreement respecting the rate of commission, was prepared to imply a term allowing commission on the sale price calculated at a reasonable rate ascertained in accordance with the custom of the trade. Terms of this kind, although treated as implied by law, may be excluded by express provision made by the parties and as a result of the inconsistency with express terms of the contract in question[42].

82 The notion of "effective cause" reflects the requirement expressed in a long line of cases that it is not enough that the engagement of the agent to find a purchaser or to introduce a purchaser was a step without the taking of which the sale would not have been effected. Something more immediate is required if the criterion of contractual liability is to be satisfied. This is because, as

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38 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 442.

39 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 449.

40 (1995) 185 CLR 410 at 449.

41 (1977) 138 CLR 52 at 74-75. See also at 82-83 per Jacobs J, 90 per Murphy J.

42 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 449.

McPherson J put it in *Doyle v Mount Kidston Mining and Exploration Pty Ltd*[43], it would be "quite artificial to suppose that the parties intended that the agent should earn his commission simply by finding or locating an individual who, independently of any further action by the agent, later agreed to buy the subject property". The cases illustrate Lord Hoffmann's proposition in *Environment Agency v Empress Car Co (Abertillery) Ltd*[44] that one cannot give a "common sense" answer to a question of causation for the purpose of attributing responsibility (and creating rights) without knowing the purpose and scope of the rule or criterion under which responsibility is imposed.

83 What generally is regarded as the foundation case in the field is the decision of the Court of Common Pleas in *Green v Bartlett*[45]. The plaintiff had succeeded in an action to recover commission in respect of the sale of the island of Herm, between Guernsey and Sark. A motion to set aside the verdict failed. Erle CJ said[46]:

> "The agreement between the parties was, that the plaintiff should be paid the commission he claims if the island should be sold by him. Now, it is true that, strictly, it was not sold by him; but after he had been using his best endeavours to sell it, had advertised it for sale, and had put it up for sale by auction, the defendant negotiated with Hyde for the purchase, and then told the plaintiff that it was not his intention to sell, and that he, therefore, withdrew the sale. The question whether the agent is entitled to be paid commission on the sale is one which has been often litigated, and the rule has been to hold that there has been a sale by the agent which would entitle him to such commission, if the relation of buyer and seller has been really caused and brought about by what he has done; if, in other words, he was the *causa causans* by which the property was sold. According to such rule I think in this case the sale was a sale by the plaintiff, and he ought to have the commission."

Thereafter, in *Tribe v Taylor*[47], Brett J said that it was not enough that the transaction probably would not have been entered into but for the original

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43 [1984] 2 Qd R 386 at 392. See also the judgment of Tadgell J in *David Leahey (Aust) Pty Ltd v McPherson's Ltd* [1991] 2 VR 367 at 374-375.

44 [1999] 2 AC 22 at 31.

45 (1863) 32 LJ CP 261. This is a fuller report than that appearing in 14 CB (NS) 681 [143 ER 613].

46 (1863) 32 LJ CP 261 at 262-263.

47 (1876) 1 CPD 505 at 509-510.

introduction by the agent; the agent must show that some act on its part was the *causa causans, causa proxima* not being the question. Sir Richard Henn Collins MR spoke to the same effect in *Millar, Son, and Co v Radford*[48]; to show that the introduction was a *causa sine qua non* was insufficient. Thus, the mere fact that the agents in that case had introduced a tenant or a purchaser was not enough, it being necessary to show that the introduction was "an efficient cause" in bringing about the transaction. These three authorities were then relied upon by the Privy Council in *Burchell v Gowrie and Blockhouse Collieries Ltd*[49] as settling the law. *Burchell* has often been followed in Australia, including by this Court in *L J Hooker Ltd v W J Adams Estates Pty Ltd*[50].

84 The use of the term "*causa causans*" plainly has been of great significance in the development of the law in this field. However it has fallen into disfavour as the means of identification of a criterion of right or liability in law since the discussion of the subject by Windeyer J in *The National Insurance Co of New Zealand Ltd v Espagne*[51]. Windeyer J referred[52] to the use by Brett J (as Lord Esher) of the term "*causa causans*" in marine insurance and shipping contract cases as the equivalent of "real cause" or "efficient cause"[53]. *Tribe v Taylor*[54] is an example of similar usage by his Lordship in another field, that of agency agreements.

85 That is how the matter was understood by Jacobs J in *L J Hooker*, where his Honour said[55]:

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48 (1903) 19 TLR 575 at 576.

49 [1910] AC 614 at 624.

50 (1977) 138 CLR 52 at 67-68, 86.

51 (1961) 105 CLR 569 at 590-597. See also the observations of McHugh J in *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 528-529.

52 (1961) 105 CLR 569 at 592-593.

53 Section 61(1) of the *Marine Insurance Act* 1909 (Cth) uses the expression "proximately caused" in describing the losses for which the insurer is liable and the excluded losses. It identifies "the dominant or effective cause" (*P Samuel & Co v Dumas* [1924] AC 431 at 459) or the "'direct and immediate' cause" (*Becker, Gray and Co v London Assurance Corporation* [1918] AC 101 at 114).

54 (1876) 1 CPD 505 at 509-510.

55 (1977) 138 CLR 52 at 86.

> "In almost any factual situation a result will have more than one cause and if there could only be one effective cause in relation to a sale within the meaning of the implication, then there are plenty of events in this case which would have strong claims for the title in competition with the appellant's actions. 'Effective cause' means more than simply 'cause'. The inquiry is whether the actions of the agent really brought about the relation of buyer and seller and it is seldom conclusive that there were other events which could each be described as a cause of the ensuing sale."

86 Questions respecting the sufficiency of a causal connection usually will arise, as was the case in *L J Hooker*, where the question is whether the agent introduced to the principal the party who eventually purchased the land; or where the question is whether the intention of the purchaser to purchase the land was brought about by the actions of the agent; or in the situation considered hypothetically by Jacobs J in *L J Hooker*[56] where two agents separately introduce the same purchaser[57]. In all of these cases the essential issue is whether the agent brought about a state of affairs giving rise to the contractual right to the commission.

87 However, in the present case, the issue is somewhat different. It is not whether the actions of Moneywood have brought about a certain result, the sale under the second contract, in respect of which it is entitled to commission. Rather the issue is whether, Moneywood having brought about the sale of part of the land under the second contract, it is entitled to commission on that sale. It was found at trial and in the Court of Appeal that the sale to BMD in the form in which it ultimately occurred was effectively caused by Moneywood because the conduct of Mr Murphy on behalf of Moneywood reawakened the interest of BMD in the land to such an extent that in the end BMD purchased a part thereof. Plainly then, the conduct of Moneywood was the effective cause, in the sense of the authorities, of the sale under the second contract.

88 Was that sale of part of the land a sale in respect of which Salamon Nominees had agreed to pay commission? The question should be answered in the affirmative. In the absence of the expression of any contrary indication by the parties in their agreement, an undertaking by a principal to pay a commission to an agent in respect of a sale of a certain interest in land to a buyer introduced by the agent also will contain an undertaking to pay a rateable part of that commission if the buyer purchases only part of that interest in the land. That this

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56 (1977) 138 CLR 52 at 87.

57 This is what happened in *Lordsgate Properties Ltd v Balcombe* [1985] 1 EGLR 20 and each agent recovered a commission.

is so emerges from the judgments of Barwick CJ and Jacobs J in *L J Hooker*. Jacobs J said[58]:

> "In my opinion in a case such as the present, a quite ordinary case of the putting of a property in the hands of a real estate agent 'for sale' (as it is commonly but inaccurately expressed) the implied contract intended by the parties is that the agent is entitled to commission on that which the purchaser located by him purchases, a commission calculated on the price of that which the purchaser purchases."

That his Honour saw this question as distinct from an issue of causation appears from the following sentence[59]:

> "The agent must of course show the necessary causal relationship between the steps taken by him and the subsequent purchase by the purchaser."

In *L J Hooker* Barwick CJ observed that it was a "well recognized" principle of law that "an agent employed to find a purchaser of the whole of a property is entitled to a commission, rateable to the value of the land sold, if the principal sells a portion of the land to a purchaser who was introduced to the land by the agent, though not to the principal"[60]. What was said by their Honours is applicable to the circumstances of the present appeal.

89 The conclusion that Moneywood is entitled to commission in respect of the sale of that portion of the land which is the subject of the second contract may be reached by a slightly different route. The steps by which the first contract was succeeded by the second contract are detailed earlier in these reasons. In a practical sense, the second contract represented a consensual replacement of the first contract. In *Lord v Trippe*[61], Barwick CJ observed that:

> "it is to be remembered that the agent's commission may be regarded as earned when the vendor accepts a purchaser provided by the agent willing to sign a contract to the vendor's satisfaction. That right to commission, in default of some special arrangement, will not be lost because the parties to the contract of sale by mutual arrangement vary its terms."

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58 (1977) 138 CLR 52 at 83.

59 (1977) 138 CLR 52 at 83.

60 (1977) 138 CLR 52 at 59.

61 (1977) 51 ALJR 574 at 578; 14 ALR 129 at 135.

90 It follows that, subject to the final issue, that concerning the operation of s 76 of the Act, Moneywood was entitled to its commission.

The operation of the Act

91 Section 76 of the Act has a relatively long pedigree[62]. It can be traced back to s 13 of the *Land Agents Act* 1912 (NZ) ("the 1912 Act"). That section was headed "Disability of unlicensed agent" and provided:

> "A land agent shall not be entitled to sue for or recover any commission, reward, or remuneration for or in respect of the sale or other disposition of land, or of any interest in land, made or effected after the coming into operation of this Act, unless–
>
> (a) He is the holder of a license under this Act; and
>
> (b) His engagement or appointment to act as agent in respect of such sale or disposition is in writing signed by the person to be charged with such commission, reward, or remuneration."

92 The 1912 Act has been repealed and replaced by a succession of statutes. Although the wording of the relevant provisions of each statute differed slightly, sections approximating the effect of s 13 of the 1912 Act all utilised terms referring to evidence of the contract of agency[63].

93 As Macnaughton J noted in *Roach v Hough*[64] and McPherson JA remarked in this case[65], the provisions of the 1912 Act were reproduced in substantially the same form in s 23(1)(b) of the *Auctioneers and Commission Agents Act* 1922 (Q) ("the 1922 Act"). This section provided:

> "A real estate agent, debt collector or motor dealer shall not be entitled to sue for or recover or retain any fees, charges, commission, reward, or other remuneration for or in respect of any transaction, unless–

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62 Section 76 was previously numbered as s 70. It was renumbered in Reprint No 3 of 21 December 1995, apparently pursuant to the *Reprints Act* 1992 (Q).

63 Section 30 of the *Land Agents Act* 1921 (NZ), s 25 of the *Land Agents Act* 1953 (NZ) and s 79 of the *Real Estate Agents Act* 1963 (NZ) were headed "Evidence of contracts of agency", while s 62 of the current Act, the *Real Estate Agents Act* 1976 (NZ), is headed "Real estate agent to have written contract of agency".

64 [1926] St R Qd 24 at 28.

65 (1999) Q ConvR ¶54-525 at 60,228.

…

(b) His engagement or appointment to act as real estate agent, debt collector or motor dealer in respect of such transaction is in writing signed by the person to be charged with such fees, charges, commission, reward, or remuneration, or his agent or representative".

94 The 1922 Act was repealed and replaced by the present statute with effect from 28 February 1972. Both s 23(1) of the 1922 Act and s 76 of the Act have at all times been headed "Restriction on remedy for commission". The heading is not part of the Act[66] but may be considered to confirm the ordinary meaning of s 76[67].

95 An apparent difference between the terms of s 13 of the 1912 Act and s 76 of the Act is that the former speaks of "the sale or other disposition of land, or of any interest in land" whereas the latter speaks of "any transaction as … a real estate agent". It was not until the *Land Agents Act* 1921 (NZ) that the New Zealand legislation was broadened to cover "the sale, lease, exchange, or other disposal of land or any interest in land, *or in respect of his services as agent in any other like transaction*" (emphasis added).

96 Although there has been dispute in New Zealand as to the exact reach of the current equivalent section – s 62 of the *Real Estate Agents Act* 1976 (NZ)[68] – the reach of the Queensland legislation has always been quite extensive. In the Court of Appeal, McPherson JA noted that the wider term "transaction" was adopted in 1922 and deliberately retained in the Act[69]. This term is coupled with the phrase "in respect of", which has "the widest possible meaning of any expression intended to convey some connexion or relation between the two subject-matters to which the words refer"[70]. 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

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66 *Acts Interpretation Act* 1954 (Q), s 14(2).

67 *Acts Interpretation Act* 1954 (Q), s 14B(1)(c), s 14B(3).

68 See eg *Houlahan v Royal Oak Realty (1993) Ltd* [1996] 3 NZLR 513.

69 (1999) Q ConvR ¶54-525 at 60,229. See also *Canniffe v Howie* [1925] St R Qd 121 at 124.

70 *State Government Insurance Office (Qld) v Crittenden* (1966) 117 CLR 412 at 416.

relevant "transaction" for which the agent was appointed was the arrangement of a sale by Salamon Nominees of the land.

97 The apparent policy of the Act has been explained in various authorities. The observations of Cooper J in the Supreme Court of New Zealand in *Thornes v Eyre*[71] in respect of the 1912 Act are equally applicable to the Act. (It should, however, be borne in mind that the 1912 Act referred just to a "sale or other disposition of land" and not to "any transaction as … a real estate agent".) His Honour said[72]:

> "The Act was passed for two purposes. First, to provide that only persons of good reputation should practise as land agents, and to secure the due payment by them to their principals of all moneys received by them on behalf of their principals. … Second, to require the engagement or authority to act as agent for the sale of a particular property to be in writing, and to prevent the possible commission of perjury in cases – of which there were frequent instances – where the alleged agent asserted and the alleged principal denied a verbal authority. … I think the words in paragraph (b), 'his engagement or appointment to act as agent in respect of such sale or disposition,' mean his appointment as agent in respect of such sale or disposition, and that the subsection really means 'his engagement' – that is to say, his appointment – 'to act,' and that two matters only are required to be in writing – namely, the appointment to act as agent, and the specific property which the agent is authorized to sell. … [I]t is not essential that the rate of commission or the other terms of the appointment should be in writing. The mischief aimed at by paragraph (b) was the danger of perjury when an agent was relying upon a verbal authority. … [I]f all the terms of the appointment were required to be in writing it is reasonable to expect that this would have been expressly stated in paragraph (b). The cases under the 4th section of the Statute of Frauds do not, therefore, apply, for that section requires that the 'agreement' or some note or memorandum thereof shall be in writing."

98 Whilst, as McPherson JA explained in this case, the legislation was akin to the provisions of the Statute of Frauds (which is often referred to as the Statute of Frauds and Perjuries), it differed because the Statute of Frauds "required every term of the contract to be in writing, whereas s 13 required no more than the appointment and the property to be recorded"[73]. However, the Act does not require the recording in writing of the property to be sold; that matter need only

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71 (1915) 34 NZLR 651.

72 (1915) 34 NZLR 651 at 659-660.

73 (1999) Q ConvR ¶54-525 at 60,228-60,229.

be part of the agreement between the parties, whether that agreement is oral or not. What the Act requires, to prevent spurious claims and perjury, is that the fact of the appointment of the agent be recorded. That was done in this case.

99 The issue here is whether the "engagement or appointment" of Moneywood "to act as … real estate agent" *in respect of the sale to BMD* was "in writing signed by" Salamon Nominees. This in turn requires construing standard condition 30 of the first contract. Counsel for Moneywood submitted that standard condition 30 was a "perfectly general appointment" of the appellant. However, he did not need to go so far. In *Anderson v Densley*, this Court said of the 1922 Act[74]:

> "A long line of cases in Queensland has decided that the paragraph does not require the contract of engagement or appointment of the agent to be in writing. *It is sufficient if some writing or connected writings exist evidencing the creation of the relationship of principal and agent in respect of the transaction pursuant to an oral contract*. The leading case is *Canniffe v Howie*[75], and that case has been followed and applied in *Skipper v Syrmis*[76]; *Roach v Hough*[77]; *Dawson v Wade*[78]; *Pettigrew v Klumpp*[79]; and *Bennett & Co v Connors*[80]. The principle of construction embodied in these decisions is that stated by *Lukin* J in *Canniffe v Howie*[81]: '[A]ny document signed by the principal at any time before action brought which evidences the essential fact, the existence of the relationship in respect of the transaction in question, is sufficient to comply with the statute'[82]." (emphasis added)

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74 (1953) 90 CLR 460 at 468.

75 [1925] St R Qd 121.

76 [1925] St R Qd 129.

77 [1926] St R Qd 24.

78 [1933] St R Qd 105.

79 [1942] St R Qd 131.

80 [1953] St R Qd 14.

81 [1925] St R Qd 121.

82 [1925] St R Qd 121 at 127.

All that Moneywood was obliged to show in respect of standard condition 30 was that it "evidenced in writing" its appointment as agent[83]. Standard condition 30 did so. It provided evidence of the agreement between the parties by which Moneywood was appointed agent to find a buyer for the land or, by the process of implication addressed above, a portion of it. This is evident from its terms: "In the absence of any specific appointment" – and it has been found that there was none – "the Vendor by executing this Contract hereby confirms the appointment of the Vendor's Agent … as the agent of the Vendor to introduce a buyer."

100 At this point, it is convenient to consider the construction of standard condition 30 favoured in the Court of Appeal by Chesterman J. His Honour did not differentiate between that provision operating as an *appointment* – that is, constituting the very agreement creating the agency – and merely supplying *evidence of it*. The agreement creating the appointment is to be found from the conduct of the parties, whether it is brought about by negotiations and oral agreement of the kind in the present case, or by some other more formal arrangement. However, neither the agreement nor its terms need be reduced to writing to satisfy par (c) of s 76(1).

101 It follows that Moneywood is correct in its submission that Chesterman J fell into error in construing standard condition 30 as "written evidence of an agent's appointment with respect to any sale of any of the vendor's land on any terms at any time" and in raising the possibility that "every time a vendor of property signs a standard form contract he will appoint an agent for the sale of all his real property whenever and wherever put to market. If the appointment is not limited by its context to the particular contract in which the clause appears there is no basis for imposing any limitation on the appointment."[84]

102 If standard condition 30 be seen as evidence of the agreement of agency and not its source, then there is removed any ground for the fear expressed by his Honour that a provision such as standard condition 30 could constitute "a general appointment of an agent for the sale of any land subsequently sold" so that a vendor who, "perhaps years after selling pursuant to a contract containing [standard] condition 30, may list another property for sale with another agent" may somehow be obliged to pay the first agent in respect of the second sale[85]. The agreement of agency upon which standard condition 30 would operate would be one for arranging the sale of the original parcel of land and, in the absence of

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83 eg *Bradley v Adams* [1989] 1 Qd R 256 at 260.

84 (1999) Q ConvR ¶54-525 at 60,234.

85 (1999) Q ConvR ¶54-525 at 60,234.

specific provision, not the second or any other parcel of land. The first agent, even if the effective cause of the later sale, could not rely upon the earlier contract because the appointment of which it provided evidence would not be one in respect of the second parcel of land.

103 *Anderson v Densley*[86] does not support any contention that standard condition 30 is to be read (as Salamon Nominees would have it) as "transaction specific"; that case, as McPherson JA recognised, turned on the fact that the actual terms of the appointment as agent were insufficiently wide to encompass the sale ultimately entered into and upon which the agent in that case claimed its commission[87].

104 The submission (which reflects what was held by the majority in the Court of Appeal[88]) that standard condition 30 is in some sense "transaction specific" should be rejected. When incorporated into a contract such as the first contract, standard condition 30 provides written evidence of the agency of the agent listed in the contract in respect of the property identified in that contract. This agency includes the transaction of sale to the buyer listed in the contract but it is not limited to it. It will also, for example, include subsequent transactions of sale, under different contracts, in respect of the same buyer specified in the signed contract. This follows from the general words used in standard condition 30. These refer to "a buyer" introduced by the agent, whereas elsewhere the standard conditions refer to "the Buyer", being the party listed on the standard form contract. The agent is confirmed, in writing, as the agent in respect of any such party introduced as a "buyer".

Conclusion

105 The first contract, which incorporated standard condition 30, served as evidence in writing, signed by Salamon Nominees, of the appointment of Moneywood to act as its agent to introduce a buyer for the land. The "transaction as … a real estate agent" (the terms of s 76(1)(c)) which is involved was the introduction of a buyer for the land. BMD was such a buyer. The first contract was "in respect of" this transaction; as was the second contract. No commission was payable on the first contract because no land was sold under it. Commission was, however, payable under the second as part of the land was sold under it. The writing in the first contract is thus sufficient to satisfy s 76(1)(c) of the Act

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86 (1953) 90 CLR 460.

87 (1999) Q ConvR ¶54-525 at 60,227-60,228.

88 (1999) Q ConvR ¶54-525 at 60,222, 60,234.

in respect of the claim to commission for the sale under the second contract. The appellant is entitled to recover its commission.

106 The appeal should be allowed with costs. The orders of the Court of Appeal should be set aside and the appeal to that Court be dismissed with costs.

107 KIRBY J. This appeal[89] concerns a dispute between a vendor of land and a real estate agent claiming commission for having introduced a purchaser who later acquired part of that land. Two issues are presented. The first is whether, in law, the agent was entitled to the commission. The second, if the first is answered favourably to the agent, is whether the engagement of the agent complied with the necessary requirements for recovery set out in the *Auctioneers and Agents Act* 1971 (Q) ("the Act")[90] so as to make the entitlement enforceable.

108 The primary judge[91] and all judges in the Court of Appeal found the first issue in favour of the agent. However, although the primary judge found the second issue for the agent, a majority of the Court of Appeal[92] disagreed, set aside the judgment in its favour and entered judgment for the vendor. By special leave, the agent now appeals to this Court.

The facts, the applicable legislation and the trial

109 All of the relevant facts are set out in the reasons of Gummow J[93]. The provisions of the Act upon which Salamon Nominees Pty Ltd ("the respondent") relied to defeat the claim of Moneywood Pty Ltd[94] ("the appellant") for commission, upon which it succeeded in the Court of Appeal, are found in s 76(1)(c). That section is also set out in the reasons of Gummow J[95].

110 In the proceedings in the District Court of Queensland, the primary judge rejected the respondent's defences that it had no relevant agreement to pay commission to the appellant[96]; that the appellant was not the effective cause of

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89 From a judgment of the Supreme Court of Queensland (Court of Appeal): *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* (1999) Q ConvR ¶54-525 ("*Salamon*").

90 s 76(1)(c).

91 *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* unreported, District Court of Queensland, 1 May 1998 ("reasons of Botting DCJ").

92 *Salamon* (1999) Q ConvR ¶54-525 per Chesterman J, de Jersey CJ concurring, McPherson JA dissenting.

93 Reasons of Gummow J at [48]-[62].

94 The predecessor company to Moneywood Pty Ltd, by which the relevant agent was employed, was Land-Q Pty Ltd. The two companies have since been amalgamated. All references in these reasons will be to Moneywood Pty Ltd.

95 Reasons of Gummow J at [66].

96 Reasons of Botting DCJ at 19-20.

the transaction in respect of which it claimed commission[97]; and that the appellant was disentitled to recover by reason of the provisions of the Act[98]. Accordingly, he entered judgment for the appellant in the sum of $116,300. That sum comprised $90,600, being 2% commission on the purchase price agreed in the second contract with BMD Constructions Pty Ltd ("BMD"), together with $25,700 for interest from the date of settlement of the second contract to the date of judgment. No separate question arises in respect of the interest.

The relevant writing

111 The appellant propounded two written documents to constitute the "writing" signed by the person to be charged within the meaning of s 76(1)(c) of the Act. The first of these, a letter sent by the respondent to the appellant, was found not to amount to an appointment or a recognition of an appointment[99] and need not be considered further.

112 The second document was the original contract. This contract incorporated the Standard Conditions of Sale, including condition 30 ("cl 30"), which provided:

> "In the absence of any specific appointment the Vendor by executing this Contract hereby confirms the appointment of the Vendor's Agent ... as the agent of the Vendor to introduce a buyer."

113 In the original contract, the "Vendor's Agent" was identified as the appellant. The respondent was named as the "Vendor". The respondent's execution of the original contract was not disputed. Accordingly, so it was submitted, the respondent by cl 30 confirmed, in general terms, the appointment of the "Vendor's Agent" in a way sufficient to give the appellant the entitlement to enforce the recovery of commission.

114 The respondent disputed this interpretation of cl 30 and the adequacy of its execution of the original contract containing that clause to conform with the requirements of s 76(1)(c) of the Act in respect of the transaction constituted by the second contract with BMD, being the only contract that was completed.

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97 Reasons of Botting DCJ at 24, 30.

98 s 76(1)(c). See reasons of Botting DCJ at 14.

99 *Salamon* (1999) Q ConvR ¶54-525 at 60,225 per McPherson JA.

The decision of the Court of Appeal

115 All of the judges of the Court of Appeal upheld the primary judge's determinations that the parties had agreed that the respondent would engage the appellant as a real estate agent and pay it commission of 2% upon completion of the transaction[100], and that the appellant had been the "effective cause" of the eventual settlement between the respondent and BMD[101]. The only point of difference that emerged in the Court of Appeal concerned compliance with s 76(1)(c) of the Act.

116 Upon this last point, de Jersey CJ and Chesterman J concluded that s 76(1)(c) required that there be "a written appointment in respect of the specific transaction giving rise to the claim for commission"[102]. Chesterman J explained this view by reference to what he took to be a need to read down the general words in cl 30 of the original contract so as to confine their operation to the "context" and thus to the transaction referred to in the original contract[103]. Upon this footing, cl 30 had no application to the second and different contract between the respondent and BMD. Although the parties to that contract were the same, and although part of the land referred to was the same, the area of land was substantially different, as was the price and as were (in his Honour's view) the applicable conditions of the second contract. Accordingly, s 76(1)(c) of the Act had not been complied with. On that basis, the appellant was disentitled to sue for, or to recover, the commission.

117 The dissenting judge in the Court of Appeal, McPherson JA, explained his opinion by reference to the general language of cl 30, the broad words of connection contained in s 76(1)(c) of the Act ("in respect of such transaction"), decisional authority permitting a proportionate recovery of commission where a modified transaction proceeded to settlement which was different from that initially contemplated by the vendor[104] and the factual evidence linking the appellant's initial introduction of the respondent to BMD with the eventual

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100 Reasons of Botting DCJ at 20; *Salamon* (1999) Q ConvR ¶54-525 at 60,222, 60,223, 60,237.

101 Reasons of Botting DCJ at 24; *Salamon* (1999) Q ConvR ¶54-525 at 60,222, 60,224-60,225, 60,239.

102 *Salamon* (1999) Q ConvR ¶54-525 at 60,222 per de Jersey CJ. See also at 60,233 per Chesterman J.

103 *Salamon* (1999) Q ConvR ¶54-525 at 60,233-60,234.

104 *Canniffe v Howie* [1925] St R Qd 121; *Lord v Trippe* (1977) 51 ALJR 574; 14 ALR 129.

settlement between those parties. Upon his view of the requirements of the Act, McPherson JA would have upheld the appellant's entitlement to recover its commission[105].

118 In this Court, the appellant submitted that the Court of Appeal was correct in upholding the primary judge's decision that the parties had agreed that the respondent would be liable to the appellant in respect of commission of 2% on the settlement of the transaction in respect of the respondent's land and that the appellant was the "effective cause" of that sale. By a notice of contention, the respondent challenged the concurrent findings of fact and the conclusions of the courts below in this regard. The appellant, for its part, urged this Court to adopt the analysis of the Act favoured by McPherson JA, to overrule the majority in the Court of Appeal on that issue, and to restore the judgment in its favour.

The "cause" of the completed transaction

119 It is convenient to deal first with the issue presented by the respondent's notice of contention. Although this point was not determinative of the outcome of the proceedings in the Court of Appeal, logically it comes first. Identifying the agreement between the parties and determining that, by the common law, such agreement was fulfilled by the agent is a precondition to establishing the liability of a party to pay commission. It is only if there is an obligation to pay such commission that the question arises of compliance with the formalities required by s 76(1)(c) of the Act.

120 I accept that it may sometimes be convenient to consider the requirements of the Act as a threshold question. In certain circumstances (as the majority in the Court of Appeal held this to be) failure to conform to the Act will disentitle the agent to commission, whether or not there was an agreement, written or otherwise evidenced in writing, to pay it. It will be remembered that the sub-section opens with the words: "No person shall be entitled to sue". In most circumstances, however, as in this, in order to decide the application of the statutory provisions, it is necessary to go beyond the written document propounded. Only by examining the facts in more detail will it usually be possible to decide how the Act applies in the particular circumstances.

121 The importance of the facts in determining the entitlement of an agent has been emphasised in many authorities[106]. This is so because most of the disputes

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105 *Salamon* (1999) Q ConvR ¶54-525 at 60,230.

106 See eg *L J Hooker Ltd v W J Adams Estates Pty Ltd* (1977) 138 CLR 52 at 82 ("*L J Hooker*"); *Black & Armstrong (1977) Ltd v Great-West Life Assurance Co* (1986) 26 DLR (4th) 691 at 693.

between agents claiming commission and principals refusing to pay it have concerned questions of causation, that is, whether in the particular circumstances the agent can be said to have caused the transaction that was completed, upon the basis of which the agent seeks its commission[107]. Depending upon the approach taken, many events may be seen as having a relationship with other, earlier, events. In contests such as the present, legal analysis has therefore attempted to assist the decision-maker in the task of classification by the use of verbal phrases designed to mark off the relevant causative considerations from those deemed to be irrelevant to the task in hand.

122 In some of the cases, the definite article is used, such that a court will say, in the particular case, that the conduct of the agent was "the" cause of the completion of the transaction[108]. Or an adverb may be used so that the court will describe the agent as responsible for the action which "really" brought about the completion of the transaction[109]. Sometimes, an adjective is invoked, so that the agent will succeed in the claim for commission if it can show that it is the "effective" cause of the transaction[110]. Alternatively, a Latin phrase ("*causa causans*"; "*causa proxima*") may be invoked to mark off the applicable cause[111]. As fewer lawyers and other citizens study Latin, it can be expected that such resort to a dead language in legal exposition will decline, as, in my view, it should. But, however helpful such expressions may be to identify the nature of the problem being addressed, they will only have a limited utility in solving it. Their purpose is to assist in the act of judgment required to distinguish the case where it is proper to regard the agent as entitled to commission because in a relevant way it caused the transaction in question from the case in which the agent did not cause the transaction.

123 In the nature of cases coming before courts, particularly appellate courts, the problem will usually be presented in a case where, although the agent initially

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107 *L J Hooker* (1977) 138 CLR 52 at 68 per Gibbs J.

108 cf *L J Hooker* (1977) 138 CLR 52 at 86 per Jacobs J.

109 cf *L J Hooker* (1977) 138 CLR 52 at 86 per Jacobs J.

110 *Burchell v Gowrie and Blockhouse Collieries Ltd* [1910] AC 614 at 625; *L J Hooker* (1977) 138 CLR 52 at 58, 76.

111 *Tribe v Taylor* (1876) 1 CPD 505 at 509-510; *Black & Armstrong (1977) Ltd v Great-West Life Assurance Co* (1986) 26 DLR (4th) 691 at 698; cf *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 590-597. The use of Latin phrases was common in past times to clothe legal concepts with apparent authority: *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 74 ALJR 743 at 768 [121]; 170 ALR 594 at 628.

introduced the purchaser to the vendor, events thereafter ensued which led to the alteration of the transaction ultimately completed from the one which was first contemplated[112]. It is in such circumstances that problems, such as those in the present case, arise. On the one hand, the party seeking to avoid liability to pay commission will lay emphasis (as the respondent did here) upon the points of difference between the original contract between the parties and the ultimate transaction that was completed. The agent seeking the commission (such as the appellant here) will lay emphasis on the points of similarity, usually involving examination of the substantive identity of the parties, of the subject matter of the transaction, of the consideration or proportionate consideration, the substantive benefit to the principal of the initial introduction and the limited time interval between that act and the subsequent settlement. If, as a result of the consideration of all of the relevant facts, the decision-maker concludes that the transaction, as completed, cannot be regarded as the "transaction" which was in contemplation when the agent introduced the parties to each other, the claim for commission will be dismissed.

124 At common law, in default of an express provision in the agreement between an agent and a principal, imposing liability on a different basis[113], an agent may only recover the agreed commission if the transaction in respect to which it introduced the purchaser to the vendor is completed[114] and the agent is the cause of the completed transaction[115]. This is because the agent's reward is usually regarded as dependent upon the success of the transaction with respect to which the agent claims its commission and because the experience of the law teaches that the introduction of a purchaser to a vendor is, of itself, necessary but not sufficient for a successful settlement.

125 Introduction is necessary because, without it, no completed transaction will usually be possible. But it is insufficient because (as the decided cases repeatedly demonstrate) many transactions fail. The purchaser who is introduced may be willing, but not able, to complete the contemplated transaction[116]. Into

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112 *L J Hooker* (1977) 138 CLR 52 at 76 per Stephen J.

113 See eg *Turnbull v Wightman* (1945) 45 SR (NSW) 369; *Moran v Hull* [1967] 1 NSWR 723 at 727.

114 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 123-124; *L J Hooker* (1977) 138 CLR 52 at 67, 73.

115 *Anderson v Densley* (1953) 90 CLR 460 at 467; *Rasmussen & Russo Pty Ltd v Gaviglio* [1982] Qd R 571 at 579-580; *Salamon* (1999) Q ConvR ¶54-525 at 60,223 per McPherson JA.

116 *L J Hooker* (1977) 138 CLR 52 at 67. As Gibbs J there points out, in some jurisdictions it had been held that "it is enough ... that a binding contract has been

(Footnote continues on next page)

the failure of one transaction will often step other agents with the same principals but with access to funding that cures the purchaser's previous inability to complete the transaction[117]. When this happens, such agents will commonly stake their own claims to commission. This will then oblige courts, in resolving disputed claims, to determine the contested issues of causation which such claims present[118].

126 The starting point for a court faced with this obligation is an appreciation that contracts concerning agents and commission, including that of real estate agents, are simply instances of contracts under the general law. They are thus governed by the law which regulates all contracts and all questions of agency[119]. The fact that an original contract is rescinded between parties introduced to each other by an agent is not necessarily fatal to a claim by that agent to commission if a later contract between those parties or their assigns is such that the agent concerned can still be classified as the cause of the transaction ultimately completed[120]. Even where there are material changes between successive contracts, so that a second contract contemplates a different subject matter and even some materially different terms, it may yet be demonstrable that the transaction, as completed, was, in law, the result of the engagement of the agent and of the agent's conduct pursuant to that engagement[121].

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entered into as a result of the agency, even though the purchaser subsequently proves unable to complete it": *Scott v Willmore & Randell* [1949] VLR 113; *Latter v Parsons* (1906) 26 NZLR 645; *Manns v Bradley* [1960] NZLR 586. In Queensland, on the other hand, "it has been held that the agent is not entitled to commission unless the purchaser who signed the contract was ready, willing and able to complete it": *Pettigrew v Klumpp and Klumpp* [1942] St R Qd 131; *Hill v Davidson* [1950] St R Qd 31. In *Anderson v Densley* (1953) 90 CLR 460 at 467, this Court effectively resolved this dispute by holding that the commission only becomes payable if the sale is completed.

117 cf *Blocksidge and Ferguson Ltd v Campbell* [1947] St R Qd 22; *Wyatt v Ball* [1955] St R Qd 515; *Rasmussen & Russo Pty Ltd v Gaviglio* [1982] Qd R 571 at 580; *Bradley v Adams* [1989] 1 Qd R 256 at 259.

118 *John D Wood & Co v Dantata* [1987] 2 EGLR 23 at 25 applying Reynolds, *Bowstead on Agency*, 15th ed (1985) at 230.

119 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 124; *Black & Armstrong (1977) Ltd v Great-West Life Assurance Co* (1986) 26 DLR (4th) 691 at 697.

120 *Burchell v Gowrie and Blockhouse Collieries Ltd* [1910] AC 614 at 625.

121 *Lord v Trippe* (1977) 51 ALJR 574; 14 ALR 129.

127 Questions of degree may ultimately turn into differences that are classified as so significant that the second transaction is viewed, for legal purposes, as distinct from the first. The agent will not then be seen as "the" cause of the completed transaction or the "effective cause". Alternatively, the "transaction" will be viewed as materially different from that which the agent initially "caused". But if the difference is simply that the anticipated sale of a larger subject matter cannot proceed but a supplementary contract is entered for sale of a portion of that subject matter, it is open to the decision-maker (depending on the evidence) to view the agent nonetheless as the cause of the smaller sale and to adjust the commission payable proportionately[122].

128 Because the answers to disputes of this kind involve evaluation and judgment (and to some extent impression) based on a consideration of the entirety of the evidence, absent recognisable error it will be normal for an appellate court to accord a high measure of deference to the decision of the primary judge on such questions. This is because of the advantages which the primary judge has in considering the entirety of the evidence[123]. Such advantages are not confined to (but include) those conventionally ascribed to the assessment of the credibility of witnesses[124].

129 In the present case, the credibility of witnesses, as such, was not a significant consideration. The primary judge concluded that both Mr Murphy, for the appellant, and Mr Salamon, for the respondent, were impressive witnesses who, on the whole, gave honest evidence, although understandably coloured a little by their emotional commitment to their respective causes[125].

130 Both at trial, and in the Court of Appeal, the judges rested their conclusion on the issue of the agent's entitlement to commission (statute apart) on the objective evidence. In the words of Chesterman J in the Court of Appeal, they approached the question of the liability of the respondent to the appellant, absent

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122 *Lord v Trippe* (1977) 51 ALJR 574; 14 ALR 129.

123 *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-211; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 330-331 [89]-[92]; 160 ALR 588 at 619-620.

124 *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178-179; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 478-479, 480; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 321 [64], 330-331 [89]-[92], 340 [148]; 160 ALR 588 at 607, 619-620, 633.

125 Reasons of Botting DCJ at 17.

the requirement of the Act, by the application of "common sense"[126] to the entirety of the evidence. Specifically, they declined to subject the conduct of the agent to "subtle or sophisticated analysis"[127]. In my view, this was the correct approach. On the first issue, it produced the correct conclusion.

The agent "caused" the completed transaction

131 The respondent, supporting its notice of contention, argued that an objective analysis of the evidence led to the conclusion that the original contract between BMD and the respondent could not be completed either at all, or certainly within the time fixed following the exercise of the option to extend the date for completion by a year. This was so despite the respondent's energetic endeavours to procure completion of that contract. According to the respondent, the "transaction" that was eventually completed constituted a second and different contract. So far as the respondent was concerned, the second contract was for a lesser area, at a lesser price, and was entered into more than a year later. The appellant had made no specific contribution to it.

132 The respondent submitted that the causative parties were itself and BMD, their respective lawyers and other advisers, in cooperation with the Council and its officers. In such circumstances, so it was put, the appellant had not "earned" commission on the transaction which was completed. The appellant was not to be viewed as "the" cause or an "effective cause" of that transaction. As that was the only transaction which "was ultimately carried into execution"[128], the fact that the appellant had "caused" an earlier transaction which had failed was irrelevant. It did not entitle the appellant to any commission. Indeed, to bring about the transaction which was carried into execution, the respondent had itself been put to a great deal of trouble, inconvenience and expense. Combined, these considerations justified viewing "the" cause or an "effective cause" ("*causa causans*", "*causa proxima*") of the completed transaction as the conduct of the respondent itself, specifically of Mr Salamon. To allow the appellant to recover, proportionately, commission on a partial transaction with which it had no direct connection would, so it was argued, be contrary to authority and unjust in the circumstances[129].

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126 *Salamon* (1999) Q ConvR ¶54-525 at 60,238.

127 *Salamon* (1999) Q ConvR ¶54-525 at 60,237.

128 *Bradley v Adams* [1989] 1 Qd R 256 at 260. See also *L J Hooker* (1977) 138 CLR 52 at 58, 66-67.

129 The respondent relied on *Moran v Hull* [1967] 1 NSWR 723; *Rasmussen & Russo Pty Ltd v Gaviglio* [1982] Qd R 571.

133 The starting point for resolving the dispute presented by these submissions is a series of findings made by the primary judge, accepted, in turn, by the Court of Appeal. These were that the appellant had introduced BMD to the land[130]; that the respondent had agreed to pay the appellant commission at the rate of 2% of any settled contract for the sale of the land[131]; and that, in dealing with the situation arising from the presence of koalas on the land, the respondent had sought (in the result successfully) to preserve as many of the benefits secured to it by the original contract as it could in the terms of the second contract[132]. The second contract between the respondent and BMD was substantively the same as the first. The only significant changes were those necessary to accommodate the rearrangement obliged by the resolution of the presence of koalas[133]. The appellant did not have control of the preparation of the second contract from which its business name was deleted on the suggestion of the respondent. Nevertheless, it was accepted that Mr Murphy had made a number of calls to the respondent. He had attempted to keep himself informed of the progress being made on the second contract. It was not seriously suggested that he had ever waived the appellant's entitlement to commission on the completion of the transaction with BMD.

134 Reviewing these findings, Chesterman J concluded, correctly, that the primary judge had been right in deciding that the appellant was "the effective cause of the sale and/or ... introduced to the [respondent] a purchaser who was ready, willing and able to buy its land"[134].

135 BMD may not have been "able" to buy the entirety of the land, as initially contemplated by the parties. But this was only because of the supervening "problem" discovered by reason of the presence on the land of koalas. As Chesterman J pointed out, this was by no means fatal to the appellant's claim to commission[135]. On the contrary, the measure of BMD's willingness to go ahead with the transaction as modified, once its interest in development of the land was "reawakened" by the appellant, was demonstrated by the events that ensued. The standard terms of the second contract with BMD remained the same. The first

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130 Reasons of Botting DCJ at 21.

131 Reasons of Botting DCJ at 20.

132 Reasons of Botting DCJ at 24.

133 Reasons of Botting DCJ at 28.

134 *Salamon* (1999) Q ConvR ¶54-525 at 60,239; cf at 60,224-60,225 per McPherson JA.

135 cf *Lord v Trippe* (1977) 51 ALJR 574; 14 ALR 129.

edition of the standard form was, exceptionally, continued to avoid "reframing" the original contract. BMD promptly agreed to the terms and obligations of the second contract. Settlement ensued expeditiously on the basis of those terms. The settlement was achieved within the time ultimately limited for completion of the original contract. The congruence of the parties, the substantive land, the hectare price, the contractual terms, the purposes of the purchase and the time interval involved all pointed to the correctness of the conclusion which the primary judge reached expressed thus[136]:

> "[T]he plaintiff, in introducing BMD to the land, and in the initial work he did, pursuant to (as I have found) his appointment as agent for the defendant, enabled the defendant to enter into a contract on most favourable terms with BMD. In my view, so much of the benefit of this work 'flowed through' to the second contract with BMD that it can be fairly said that Mr Murphy's work on behalf of the plaintiff [was] an effective cause of the defendant's entering into the second BMD contract."

136 No error has been shown in this conclusion, either in the factual analysis leading to it, or in the legal principles applied to produce the result. Subject, therefore, to the requirements of the Act, the appellant was entitled to sue for, and to recover, its commission.

The statutory requirement of writing

137 I turn therefore to the second issue, namely whether the claim for recovery of commission owing at common law was unenforceable by reason of a failure to comply with s 76(1)(c) of the Act. The requirements of s 76(1)(c) bear some similarity to the familiar provisions of the Statute of Frauds[137]. However, whereas the Statute of Frauds requires that every term of an affected contract must be in writing, the provision in question is more specific and limited[138]. It merely requires that the engagement or appointment of the agent "in respect of such transaction" be in writing signed by or on behalf of the person sued as liable. It has long been accepted that, under such provisions, the terms of the

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136 Reasons of Botting DCJ at 30.

137 In respect of modern Australian equivalents, see eg *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68; *Leipner v McLean* (1909) 8 CLR 306; *Heppingstone v Stewart* (1910) 12 CLR 126; *Dowling and H G Hamilton Pty Ltd and Kelly v Rae* (1927) 39 CLR 363; *Harvey v Edwards, Dunlop & Co Ltd* (1927) 39 CLR 302; *Pirie v Saunders* (1961) 104 CLR 149; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; cf *Salamon* (1999) Q ConvR ¶54-525 at 60,229 per McPherson JA.

138 *Salamon* (1999) Q ConvR ¶54-525 at 60,229 per McPherson JA.

engagement or appointment to act as a real estate agent need not themselves be in writing. It is sufficient that the engagement or appointment in fact be evidenced in writing[139]. It is not necessary for commission to be recoverable for the entire terms of the contract of agency to be in writing[140].

138 The origin of provisions of this kind appears to be s 13 of the *Land Agents Act* 1912 (NZ). That section was somewhat more specific than the provision applicable in Queensland. The New Zealand progenitor provided that a real estate agent "shall not be entitled to sue for or recover any commission ... for or in respect of the sale or other disposition of land ... unless ... (b) [h]is engagement or appointment to act as agent in respect of such sale or disposition is in writing signed by the person to be charged with such commission". The emphasis is upon the transaction being carried out "as agent". Explaining the original New Zealand provision, judicial authority in that country made it clear that only two matters had to be in writing to permit recovery – namely evidence of "the appointment to act as agent, and the specific property which the agent is authorized to sell"[141].

139 Similar terms to those of the New Zealand provision were enacted in Queensland. The predecessor to the Act was the *Auctioneers and Commission Agents Act* 1922 (Q). It was s 23(1)(b) of that legislation, as amended, which, in 1953, came under the consideration of this Court in *Anderson v Densley*[142]. That sub-section provided that a commission agent "shall not be entitled to sue for or recover ... any ... commission ... for or in respect of any transaction, unless ... (b) [h]is engagement or appointment to act as commission agent in respect of such transaction is in writing signed by the person to be charged with such ... commission". In the context of that provision, this Court noted the legislative history and concluded[143]:

> "There will ... be a sufficient engagement or appointment of a commission agent in writing within the meaning of this paragraph if the writing shows that a person is engaged or appointed as the agent of another to do any of the work specified in par (b) of the definition of commission agent ...

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139 *Bradley v Adams* [1989] 1 Qd R 256 at 260.

140 *Canniffe v Howie* [1925] St R Qd 121 at 127.

141 *Thornes v Eyre* (1915) 34 NZLR 651 at 659. See also *Looney v Pratt* [1919] GLR 231 at 232.

142 (1953) 90 CLR 460.

143 *Anderson v Densley* (1953) 90 CLR 460 at 468 per Williams ACJ, Webb and Taylor JJ.

> whether or not the writing expressly refers to the appointment of the agent as a commission agent or to the fact that he is to be remunerated by commission. The fact that he is engaged or appointed to do this work implies, in the absence of an agreement to the contrary, that he is to be paid the usual or prescribed remuneration (if there be any such prescription) for the performance of his duties.
>
> ... It is sufficient if some writing or connected writings exist evidencing the creation of the relationship of principal and agent in respect of the transaction pursuant to an oral contract."

140 However, there are certain differences between the original New Zealand provision and the successive provisions enacted in Queensland[144]. The former referred to a "sale" and to the fact that the agent had acted in respect of "such sale". The latter used the more generic description of "transaction". On the face of things, the word "sale" would appear more specific to the particular dealing from which commission is said to arise. The word "transaction" is a looser one, capable of including dealings going beyond a specific and identifiable "sale". An inference is available (so much else having been copied from the New Zealand provision) that this distinction was deliberate. The point of difference was commented upon soon after the original Queensland enactment came into force[145].

141 What is the mischief to which provisions such as s 76(1)(c) of the Act, its predecessor and the New Zealand source are directed[146]? One obvious purpose is to reduce the potential for perjury on the part either of an agent or a vendor, inherent in a dispute concerning an obligation to pay commission where such obligation is dependent solely on an oral agreement[147].

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144 These were noted in *Salamon* (1999) Q ConvR ¶54-525 at 60,228 per McPherson JA.

145 *Canniffe v Howie* [1925] St R Qd 121 at 124 per McCawley CJ.

146 In respect of writing and signature requirements generally, Fuller, in his classical analysis, identified three historical policy objectives for such legislation. These were "evidentiary", "cautionary" and "channeling". Fuller conceded that these functions were not discrete but interconnected and mutually reinforcing: see Fuller, "Consideration and Form", (1941) 41 *Columbia Law Review* 799 at 800-803. The problem has many modern analogies, for example, in the field of electronic signatures: see Sneddon, "Legislating to Facilitate Electronic Signatures and Records: Exceptions, Standards and the Impact on the Statute Book", (1998) 21 *University of New South Wales Law Journal* 334 at 346-349.

147 *Thornes v Eyre* (1915) 34 NZLR 651 at 659.

142 Another connected purpose is to reduce the kind of litigation of which the present is an illustration. Where, for some reason, an original contract goes off, the subsequent sale of the subject matter of the original contract, or part of that subject matter, to the same or an associated purchaser, is likely to give rise to disputes such as the present. Because, in most cases, the dispute will be over relatively small sums, the requirement of evidence of written authority to act as an agent in respect of an identified transaction may have a tendency to reduce the scope for litigation. It will also tend to ensure that proper practices are observed by agents who later claim commission. It may promote clarity as to the rights and obligations of agents and vendors in relation to each other.

143 A further purpose of such legislation is to reduce the opportunity for an attempt by some vendors, introduced to a purchaser by an agent, to escape their obligations to the agent. Such an attempt might be wholly unprincipled, as where a contract with the purchaser whom the agent has introduced is replaced by another for no reason other than to defeat the agent's claim to commission. In other cases, as here, where the second contract can be explained and justified on grounds having nothing to do with evasion of liability for commission, questions arise concerning the ambit of the statutory provision and whether it applies to the particular circumstances.

Support for a requirement of specificity in the writing

144 In considering the operation of s 76(1)(c) of the Act, it is appropriate, in my opinion, to acknowledge that there are arguments that support the position of both parties. They are collected in the majority and minority reasons in the Court of Appeal.

145 In favour of a conclusion that cl 30 of the standard conditions, incorporated into the original contract, did not constitute relevant "writing" for the second contract, arguments can be drawn from the perceived policy of the legislative provision and from the facts of the present case.

146 So far as the policy of s 76(1)(c) of the Act is concerned, it may be accepted that the purposes of protecting consumers and reducing the ambit of disputation over claims for commission tend to favour a relatively strict interpretation of the requirements of the Act. According to this, the word "transaction" might be given a meaning confined to the particular "transaction" out of which the claim for commission arises. In the present case, that was the second contract. It was not the original contract contained in the documents in which, alone, there appeared the "writing signed by the person to be charged" acknowledging the engagement or appointment of the agent. To the extent that an ambiguous provision in a specific contract is given a general operation to include a subsequent and different "transaction", it may tend to diminish the effectiveness of s 76(1)(c) of the Act to achieve its objects.

147 Whilst cl 30 is in its terms certainly wide enough to include the engagement or appointment of an agent to act as a real estate agent in respect of a later contract, a number of arguments may be advanced as to why that view of the meaning of the clause should not be adopted.

148 Especially having regard to the apparent policy of the Act, the respondent submitted that cl 30 should be given a meaning limited to its context. This was the particular (original) contract. To extend the authority provided to later contracts, despite the omission from those contracts of the name of the agent, would, it was suggested, expose persons (such as the respondent) to a potentially open-ended liability. It was said that it would be surprising to find in a specific contract a general appointment of an agent having operative force in later and different contracts in respect of different properties. If a general authority were intended, one would expect (so it was put) a separate and freestanding authority, not one contained in a standard printed condition of a specific contract which referred to particular land sold for a specified price. One should, as Stephen J warned in *L J Hooker*[148]:

> "guard against any tendency to strain the proper limits of construction ... due to a feeling of the apparent injustice involved where an estate agent goes unrewarded despite its protracted efforts on a vendor's behalf, a feeling no doubt heightened when the vendor has in fact achieved a sale and the agent has not been altogether unconnected with its occurrence".

149 It was reasoning such as this that persuaded the majority in the Court of Appeal that, despite its apparently broad terms, cl 30 of the standard conditions was "transaction specific"[149]. The alternative, so it was put, would be the prospect of serious inconvenience, perhaps years later, when, relying on cl 30 in a particular contract, a claim was made by the agent for commission concerning a later and different transaction[150].

The contractual provision was a sufficient writing

150 I accept the force of this argument. However, in my opinion, the better view of the Act and of the facts of the present case supports the approach favoured by the primary judge and by McPherson JA in the Court of Appeal. Whilst it is true that the Act is intended to protect consumers and to reduce the ambit of disputes of the present kind, it is also true that it must operate in

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148 (1977) 138 CLR 52 at 78.

149 *Salamon* (1999) Q ConvR ¶54-525 at 60,234 per Chesterman J.

150 *Salamon* (1999) Q ConvR ¶54-525 at 60,234 per Chesterman J.

circumstances in which, not infrequently, the original transaction contemplated between the parties, introduced by an agent, needs to be varied between the vendor and purchaser. Notwithstanding such variation, the agent may still be considered, as here, as the cause or "effective cause" of the "transaction" which proceeds to completion. It is also true that the Act must operate in circumstances where sometimes parties, behind the back of the agent, act in a way that attempts to deprive the agent of commission to which it is lawfully entitled[151]. Thus, s 76(1)(c) of the Act should not be construed so that it becomes, needlessly, a means of defeating otherwise justifiable claims to commission by agents.

151 Two textual considerations support my preferred approach to s 76(1)(c) of the Act. The first is the repeated reference both in the opening words of s 76(1), and in par (c) itself, to the word "transaction". As has been pointed out, this represented a change from the New Zealand legislative source where the more specific word "sale" had been used. It was a change which the legislature of Queensland introduced into the provision in that State in 1922[152] and continued when the present Act was adopted in 1971. Secondly, there is the repeated reference, both in the language of s 76(1) and in par (c), to the words of connection "in respect of". Crucially, in the present case, it is enough to show that the "engagement or appointment to act as ... real estate agent" that must be "in writing", signed as required, is "in respect of such transaction", being the transaction for which the agent is suing to recover the commission in question. The width of the words "in respect of" has been the subject of many judicial observations[153]. There is no reason in the present context to cut down that width.

152 It follows that it is not necessary that the writing required should be contained in a particular written instrument of sale or even within the particular instrument evidencing the transaction giving rise to the claim[154]. It is enough that the "engagement or appointment to act" propounded by the agent should be "in respect of such transaction"[155]. The "writing" relied upon may therefore appear in private correspondence which comes to light and, by its terms, adequately evidences the engagement or appointment that is in question. These considerations sufficiently answer the propositions which found favour with the majority in the Court of Appeal.

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151 *Burchell v Gowrie and Blockhouse Collieries Ltd* [1910] AC 614 at 625.

152 *Auctioneers and Commission Agents Act* 1922 (Q), s 15.

153 See eg *State Government Insurance Office (Qld) v Crittenden* (1966) 117 CLR 412 at 416.

154 *Bradley v Adams* [1989] 1 Qd R 256 at 260.

155 The Act, s 76(1)(c).

153 In relation to the "writing" relied upon by the appellant in this case, namely cl 30 of the incorporated conditions of the original contract, there are several answers to the arguments that led the majority in the Court of Appeal to their conclusion. Whilst it is true that, in other circumstances, one might construe cl 30 as limited to the particular contract to which it, and other standard conditions of sale, was attached, certain considerations point in the opposite direction here. First, there is the very generality of the language of cl 30. It is not, in its terms, transaction specific as many of the other standard conditions are. Secondly, whereas many other such conditions refer expressly to "the Purchaser", cl 30 contains an acknowledgment confirming the appointment of the "Vendor's Agent" as "the agent of the Vendor to introduce *a buyer*"[156]. Whereas "Vendor" and "Vendor's Agent" are defined in the contract, respectively by reference to the "party named in Item C"[157] and the "person named in Item B"[158], the word "buyer", which appears in lower case, is not defined. It therefore carries its normal meaning. Moreover, it is preceded by the indefinite article ("a"). It is not specific to the introduction of the particular buyer named in the particular contract. That "buyer" is "the Purchaser", being the party named in Item E[159]. By juxtaposition, in the reference to "a buyer", cl 30 makes it plain that it is referring, without definitional restriction, to buyers generally. This includes the particular "buyer" in the form of the "Purchaser" named in the contract. But, in case the particular "Purchaser" fails or is substituted by someone else who can be regarded as having been introduced as "a buyer" by the agent for the "transaction", cl 30 is designed to protect the agent's right to recover commission.

154 That this is the construction of cl 30 that should be adopted is reinforced by extrinsic considerations. The clause appears in a standard printed document adopted by the Real Estate Institute of Queensland Ltd. It may be presumed that such document was drafted with the requirements of s 76(1)(c) of the Act in mind. It may reasonably be inferred that it was drafted to protect the members of the Institute from the peril, disclosed by many cases, of disputes about agents' entitlements to commission. It would not stretch the imagination for a conclusion to be reached that the facility of the Standard Conditions of Sale was utilised to incorporate a general standard condition that would protect an agent (such as the appellant) in just such a situation as has arisen in this case. Further confirmation of this inference may be found by contrasting cl 30 with other provisions for the appointment of agents and by contemplating the way in which

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156 Emphasis added.

157 Definition 1.1(y).

158 Definition 1.1(z).

159 Definition 1.1(r).

the clause would have been drafted if it had truly been intended that it should be "transaction specific"[160].

155 The concerns which affected the conclusion of the majority in the Court of Appeal on this point appear, with respect, to respond to difficulties more apparent than real. The notion that the Act requires identification of the engagement or appointment of a person to act as real estate agent for a specific sale is contradicted by the broad language in which s 76(1)(c) of the Act is expressed. Contrary to the conclusion of the majority in the Court of Appeal, there is no obligation to produce "documentary evidence which has specific reference to the very transaction out of which the claim for commission arises"[161]. It is sufficient that the relevant "writing", relied on by the agent, is "in respect of such transaction". Were it otherwise, an agent could never rely upon a general appointment. It would always be obliged to secure a fresh appointment and to get it signed each time a distinct contract was brought about. Such an interpretation of s 76(1)(c) of the Act would produce seriously inconvenient consequences that should not be attributed to the Parliament of Queensland. If a prudent agent were to obtain a written appointment at the inception of its agency, before any purchaser had been identified or procured, it would be impossible at that time to identify the "specific reference to the very transaction out of which the claim for commission arises". It seems unlikely that s 76(1)(c) of the Act would strike down general retainers in such an indirect way.

156 If the agent were obliged, by this logic, to await the emergence of a particular transaction, every agent would be at risk. Although the agent had procured and introduced to the vendor a purchaser able to complete and who in fact does so, the vendor would be entitled to refuse to sign in writing the "specific" document without which the agent would not be entitled to sue or to recover commission. As happened in this case, the vendor could argue, once a purchaser was introduced, that it did not then require the services of an agent. Or, in the event of some variation between the transaction contemplated at the time of the introduction and the final completion, it could argue (as the respondent did here) that the "transaction" was different and that the agent was not the "effective cause" of the eventual settlement.

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160 *Salamon* (1999) Q ConvR ¶54-525 at 60,234 per Chesterman J; cf *Houlahan v Royal Oak Realty (1993) Ltd* [1996] 3 NZLR 513 at 518.

161 *Salamon* (1999) Q ConvR ¶54-525 at 60,235 per Chesterman J.

157 The Act is intended to operate in a wide range of commercial situations. It should be given a sensible operation appropriate to its commercial context[162]. It is not confined in its operation to the sale of real property where a written contract is necessary, in law, to bind the seller. In other transactions to which the Act applies, there would be even greater scope for an unwilling vendor to dishonour obligations to an agent who introduced, and effectively procured, a sale if an overly specific view were taken of the requirements of s 76(1)(c) of the Act. No such requirements are inherent in the language of the paragraph which has been deliberately chosen to permit "writing", signed as required, to be taken into account as confirming the "engagement or appointment to act as ... real estate agent" so long as it is sufficiently connected to the parties and their dealings that it can be viewed as "in respect of" the "transaction" giving rise to the claim for commission.

158 The fears of the majority in the Court of Appeal that such a construction would leave vendors open, perhaps years later and in respect of other and unconnected transactions, to claims for commission seem, with respect, to be far-fetched. The words "in respect of" are broad. But they are not meaningless. It would still be necessary for the agent claiming commission to establish that it had introduced and brought about the relevant "transaction" and was thus to be regarded as its "effective cause". If that could be established, there appears no reason why cl 30 should be read down or confined, contrary to its language, to the "sale" identified in the specific contract in which cl 30 appears. There is every reason why the clause should be given effect according to its terms. This does not mean that it is read without regard to the context in which it appears. In the absence of any specific appointment providing differently, given the multitude of cases which demonstrate the changes that can and do occur in the detailed provisions of contracts between an initial introduction of the parties and final settlement, the provisions of cl 30 are to be regarded as confirmation of the appointment of the nominated agent and as writing "in respect of [a] transaction" within s 76(1)(c) of the Act.

159 Even if that "transaction" is not exactly the one contained in the contract in which cl 30 appears, it will be sufficient for the purposes of s 76(1)(c) of the Act if the written appointment propounded can be considered as being "in respect of" the "transaction" that was ultimately completed. In the present case, that was the better view of the meaning of s 76(1)(c) of the Act. It follows that the requirements of the Act were sufficiently complied with so as to entitle the appellant to sue for, and recover, its commission. McPherson JA was right to so

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162 *Moran v Hull* [1967] 1 NSWR 723 at 726; *Pan Foods Co Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 74 ALJR 791 at 794-795 [24]; 170 ALR 579 at 584-585.

hold. The majority in the Court of Appeal erred in coming to the opposite conclusion.

Orders

160 I agree in the orders proposed by Gummow J.

161 CALLINAN J. In this appeal this Court was required to decide what a commission agent must do to become entitled to be paid commission on a sale, and the extent to which that entitlement may be affected by statutory requirements of a relatively common form in various jurisdictions in this country and elsewhere.

Facts

162 The respondent owned 47.5372 hectares of land at Capalaba near Brisbane. On 31 March 1994 the respondent agreed to sell the land to BMD Constructions Pty Ltd ("BMD") for $6.825 million. The purchaser wished to develop and subdivide the land into residential allotments. To appease protesters and others who were expressing concerns about dangers to a koala habitat, the local authority agreed to purchase 16.06 hectares of the respondent's land for $2.2 million in order to dedicate that part of it as a "Koala corridor". The local authority could have acquired the land by compulsory acquisition from either the respondent or BMD. As McPherson JA in the Court of Appeal said[163], it appeared to have been left to BMD to decide what procedure should be adopted in relation to the acquisition of the land, whether by way of resumption or purchase by the local authority, and that the course adopted may have been chosen because it reduced the liability for stamp duty. BMD and the respondent then entered into a fresh contract for the purchase and sale of the balance of 31.338 hectares for $4.26 million. The original contract was not rescinded until after two new contracts (one with the local authority and the other with BMD) were executed because the respondent wished to keep the purchaser bound throughout. The two new contracts were completed within the period fixed by the parties for completion of the first contract, although, as the respondent submits, it is unlikely that the conditions for the benefit of the purchaser (who had not waived any of them) would have been satisfied within the period fixed by the contract for their satisfaction. The sum of the prices of the two later contracts, together with the non-refundable deposit of $270,000 paid by BMD under the first contract, was $95,000 less than the price under the first contract. The respondent, however, received the proceeds of the two sales some months earlier than the price would have been received under the first contract. That the difference of $95,000 is approximately the amount of commission that the respondent would have been obliged to pay under the second contract with BMD does not have any significance, as there were various other, different, practical consequences, albeit relatively minor in sum, arising out of the two new contracts.

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163 *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* [1998] QCA 440 at [2].

163 The first contract identified the appellant in terms as the respondent's agent, and BMD as the purchaser. Standard condition 30 of the contract provided as follows:

> "**APPOINTMENT OF AGENT**
>
> In the absence of any specific appointment the Vendor by executing this Contract hereby confirms the appointment of the Vendor's Agent (jointly with any other agent in conjunction with whom the Vendor's Agent has sold) as the agent of the Vendor to introduce a buyer."

The second contract between the respondent and BMD did not identify the appellant or anyone else as agent for the sale of the reduced area.

The Appellant's Claim in the District Court

164 The appellant claimed to be entitled to commission on the sale of the reduced area at the rate of 2%, the rate which had been agreed between the parties as appropriate in respect of the first contract. The respondent refused to pay. The appellant sued and succeeded in the District Court of Queensland (Botting DCJ) in recovering $90,600 together with interest.

The Appeal to the Court of Appeal

165 An appeal by the respondent to the Court of Appeal of the Supreme Court of Queensland (de Jersey CJ and Chesterman J; McPherson J dissenting) was upheld. It was accepted that to make out its case the appellant needed to show these matters: that the respondent had agreed to pay commission to the appellant; that the appellant had done what was required to be done to earn the commission; and that there was a sufficient memorandum for the purposes of s 76(1)(c) of the *Auctioneers and Agents Act* 1971 (Q) ("the Act"), which provides as follows:

> "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 an auctioneer, a real estate agent, a commercial agent, or a motor dealer, unless –
>
> …
>
> (c) the engagement or appointment to act as auctioneer, real estate agent, commercial agent, or motor dealer in respect of such transaction is in writing signed by the person to be charged with such fees, charges, commission, reward, or remuneration, or the person's agent or representative".

166 The Court of Appeal was in agreement on the first two matters, dividing on the third only, that is, as to compliance or otherwise with the Act.

167 As Chesterman J (with whom de Jersey CJ agreed) put it[164]:

> "The short point [was] whether, as a matter of construction, the appointment found in condition 30 of the first contract is limited to that transaction, i.e. that particular sale on the specific terms and conditions found in that contract, or whether the appointment is more general in effect evidencing an appointment in respect of other sales of the appellant's land."

168 Both the majority and the minority referred to the leading Queensland case of *Canniffe v Howie*[165]. There, after an option procured by an agent, and in respect of which there had been a written appointment of the agent which had expired, the vendor recommenced negotiations, for the sale of the property to the purchaser named in the option, which matured into a completed contract. McCawley CJ in the Full Court of the Supreme Court of Queensland said[166]:

> "Here it is established that the negotiations set on foot by the document were continuous and resulted in the sale on the 25th July, and that the time limit mentioned in the document had been verbally extended until the end of July. It seems to me that there was evidence from which the Magistrate could reasonably conclude that the transaction completed on 25th July was a transaction in which the document was a material and substantial step; that the transaction so arose out of and was so intimately connected with the agency appointment conferred or evidenced by Exhibit 4 that that document constituted 'in respect of such transaction' an appointment in writing sufficient to satisfy the section. I am therefore of opinion that even if the written appointment is to be construed as limited, the Magistrate's decision was right, and that the appeal should be dismissed."

169 Lukin J said[167]:

> "Similarly, in my opinion, any document signed by the principal at any time before action brought which evidences the essential fact, the existence of the relationship in respect of the transaction in question, is

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164 *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* [1998] QCA 440 at [27].

165 [1925] St R Qd 121.

166 [1925] St R Qd 121 at 124.

167 [1925] St R Qd 121 at 127.

> sufficient to comply with the statute. Here, although intended to secure a binding option to the prospective buyer the document incidentally states 'for you to sell on my behalf' the property in question, indicating in writing the existence of the relationship, in my opinion, sufficiently to comply with the section."

170 The judgments in that case have since been applied in all jurisdictions in Queensland and have been cited in this case in this Court. In his judgment in the Court of Appeal in this case McPherson JA traced the history of the section and *Canniffe v Howie*[168]. I quote and adopt what his Honour said of them[169]:

> "It [the section] is one that is not devoid of authority. In *Canniffe v Howie*[170] McCawley CJ thought it arguable that the option document 'evidences a general appointment as agent for the sale of the property'. In addition to what he and Lukin J said there in relation to the facts of that case, the relevant statutory provision has a lengthy legislative and judicial history. It originated in New Zealand as s 13 of the *Land Agents Act* 1913, which provided that a land agent was 'not entitled to sue for or recover any commission for or in respect of the sale or other disposition of land unless ... (b) his engagement or appointment to act as agent in respect of such sale or disposition is in writing signed by the person to be charged ...'. The New Zealand provision was plainly narrower than s 76(1)(c) in that the former referred to a 'sale' and to the agent acting in respect of 'such sale', whereas the Queensland provision refers more broadly to a 'transaction'. In one of the earliest decisions on s 13 of the New Zealand Act, Cooper J in *Thornes v Eyre*[171] said that only two matters were required to be in writing; namely, 'the appointment to act as agent, and the specific property which the agent is authorised to sell'. His Honour explained[172] that the 'mischief' at which the statutory provisions was directed was the potential for perjury, on the part of either the agent or the vendor, arising from a purely oral authority to sell. Although comparable with the provision in the Statute of Frauds, his Honour observed that s 13 differed from it in that the Statute required every term of the contract to be in writing, whereas s 13 required no more than the appointment and the property to be recorded. The same distinction was

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168 [1925] St R Qd 121.

169 *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* [1998] QCA 440 at [19]-[20].

170 [1925] St R Qd 121 at 124.

171 (1915) 34 NZLR 651 at 659.

172 (1915) 34 NZLR 651 at 660.

made by Lukin J in *Canniffe v Howie*[173]. The notion that no departure from the terms of the original authority is permitted may have received some approval from Connolly J in *Bradley v Adams*[174]; but Thomas J deliberately refrained from deciding the point, and Andrews CJ agreed with his reasons as well as with those of Connolly J.

Cooper J in effect repeated what he had said in *Thornes v Eyre* in his later decision in *Looney v Pratt*[175]. It was, he said:

> 'a sufficient appointment if it is founded on a writing signed by the principal before the transaction is completed, or if it can be gathered from any written document afterwards signed by the principal.'

The written admission by the vendor to the agent in that case was contained in a letter written after the contract was made, which Cooper J described as 'a recognition' by the vendor of the plaintiff as his agent. The decision in *Looney v Pratt* has since been followed in New Zealand on occasions too numerous to mention. It was referred to with approval by Lukin J in *Canniffe v Howie*[176], where his Honour and the other members of the Full Court accepted that the document (the option) in that case sufficiently indicated in writing 'the existence of the relationship' of principal and agent. It was from that source and the many subsequent decisions in Queensland that have since followed it that the High Court in *Anderson v Densley*[177] derived the proposition that it is sufficient for the purposes of s 76(1)(c), or its statutory predecessor, which was s 23(1)(b) of *The Auctioneers and Commission Agents Acts*, 1922 to 1951, 'if some writing or connected writings exist evidencing the creation of the relationship of principal and agent in respect of the transaction pursuant to an oral contract'."

171 The section is different from the Statute of Frauds. It does not require a memorandum in writing setting out the essential terms, and, as the cases to which McPherson JA referred made clear, no particular form of writing is necessary. The appointment will often be made before any terms of sale are agreed, and

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173 [1925] St R Qd 121 at 127.

174 [1989] 1 Qd R 256 at 261.

175 [1919] GLR 231 at 232.

176 [1925] St R Qd 121 at 127.

177 (1953) 90 CLR 460 at 468.

even before a particular purchaser has been found or is in view. So long as the writing evidences an engagement or appointment as agent it will, subject to what I say below, suffice.

172 The respondent fixes upon two matters in particular. First, it is submitted that the words, "in respect of such transaction" in s 76(1)(c), indicate that the entitlement to commission is an entitlement in respect of one transaction only, and that the second contract with BMD was not a transaction in respect of which any engagement or appointment in writing was obtained. But the answer to that proposition is the use in the section of the very broad phrase "in respect of". That the second contract with BMD was in respect of the transaction recorded in the first contract is in my opinion, inescapable. The respondent insisted on keeping the first contract on foot until the two replacement contracts were executed. In a letter from the respondent to the purchaser, the former wrote, among other things:

> "I refer to our telephone conversation of today strictly in settlement of the outstanding issues re the above contract the following was agreed.
>
> 1. That you are in agreement for the Redland Shire Council to purchase 16.06 ha of land from either BMD construction or SN on the following basis.
>
> 2. The contract price of the land is reduced from $6,825,000 to $6,725,000 and the reason that Redland Shire Council is also purchasing portion of the above land as per [a plan] to which representative of BMD constructions fully agreed."

173 That letter serves to show how closely related each of the relevant transactions and contracts was to the other. Paragraph one of the letter which I have quoted also provides evidence that it really was the decision of the purchaser BMD that the local authority purchase the land proposed for the "Koala corridor" from the respondent rather than from the purchaser. Nothing could be clearer from the letter than that the purchaser and the respondent regarded the contracts as related ones. The second of the relevant contracts would have been highly unlikely to have come into existence but for the first of them and the events leading up to it. The parties were the same, the second and third of the contracts related to exactly the same land as was covered by the first, and the prices were in very much the same proportions as the areas of the lands conveyed by the respective contracts. It was because the parties were in a binding contractual relationship that they negotiated the two replacement contracts, the combined effect of which was to place the respondent in virtually the identical position it would have been in had the first contract been completed.

174 Some notice should also be taken of standard condition 21.1(e) of the first contract. It provided as follows:

"Should it be established that at the date of this Contract:

…

(e) there is current in respect of the whole or part of the Land, a notice to treat or notice of intention to resume issued by a competent authority;

…

and any such facts are not disclosed in the special conditions or elsewhere herein the purchaser may … terminate the contract".

175 The parties were agreed that no notice to treat or any intention to resume by the local authority was current in respect of the whole, or any part of the land, at the date of the first contract. The significance of this is that the desire and intention of the local authority to acquire the "Koala corridor" would probably not, on that account alone, have entitled the purchaser to terminate the contract. Until the local authority as the planning authority under the *Local Government (Planning and Environment) Act* 1990 (Q) resolved to acquire the land for the "Koala corridor" and otherwise complied with the *Acquisition of Land Act* 1967 (Q), it would have been bound to treat the application for planning approval contemplated by the first contract on its merits, and not in such a way as to enable the authority to acquire the land for less, or more easily, by obstructing the purchaser's planning application[178].

176 The respondent relies on the holding of the majority in the Court of Appeal that the language of standard condition 30 of the contract directs attention to "this Contract" and confirms the appointment as the agent for the purposes of that contract only: that the condition is intended to operate as a specific appointment for a specific transaction, in the absence of a separate, and, perhaps, more general written appointment.

177 The appellant argues that the condition should not be read so narrowly. An indication that this is so appears from the use of the word "buyer" in the condition and not the word "purchaser" which is a term defined by the contract to mean the particular purchaser under it.

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178 cf *Municipal Council of Sydney v Campbell* [1925] AC 338; *Werribee Council v Kerr* (1928) 42 CLR 1; *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 105-107 per Williams, Webb and Kitto JJ; *Prentice v Brisbane City Council* [1966] Qd R 394.

178 I would accept the appellant's submission in this regard. There can be no question that the appellant did introduce the buyer under the second relevant contract. The buyer's interest was always in the land the subject of the latter contract. It was entirely fortuitous that there were second and third contracts for the sale of the land rather than completion of the first contract and a subsequent resumption or purchase of a portion of it by the local authority from BMD.

179 As a matter of construction therefore I have formed the opinion that standard condition 30 of the first contract does contain an engagement or appointment of the appellant within the meaning of, and sufficient for the purposes of s 76(1)(c) of the Act. The section does not require, as the majority in the Court of Appeal held, "documentary evidence" which has specific reference to the very transaction out of which the claim for commission arises. If the section were to operate so narrowly, an agent might be obliged to obtain a fresh appointment every time a different contract or a new term were agreed. As McPherson JA said of standard condition 30[179]:

> "[T]he language is proleptic. Rather than referring to an event that has already taken place, it is as readily capable of being understood to refer to sales or introductions of buyers that may yet take place as to those that have already done so."

180 By its notice of contention, the respondent challenges the concurrent findings of fact in the courts below, that the appellant was an effective cause of the sale of the land. I have already, to some extent, anticipated what I would say about this contention, including that, as far as possible the parties to the new contract agreed upon a range of measures which were very much reflections of the earlier arrangements between them and the contract into which they had entered. The appellant's introduction of the buyer was critical in this case. As Barwick CJ said in *L J Hooker Ltd v W J Adams Estates Pty Ltd*[180]:

> "But the commission is not fully earned unless there is a sale which has resulted wholly or partially from the efforts of the agent. The most common way of performing the agent's task is to introduce to the principal a person who becomes the purchaser under a binding contract of sale. In terms of causation, the agent has thus been an effective cause of the sale. It is nothing to the point in such a case that that person would have become the purchaser without the intervention of the agent: or that the principal's own efforts were also an effective cause of the sale."

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179 *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* [1998] QCA 440 at [18].

180 (1977) 138 CLR 52 at 58. See also Jacobs J at 86.

181 In the same case Barwick CJ also pointed out[181] that an agent employed to find a buyer is entitled to a commission "rateable to the value of the land sold" if the principal sells only a portion of the land to a purchaser whom the agent introduced.

182 I do not think that anything turns upon the matter relied upon by the respondent that the appellant took no part in the negotiations for rezoning and other matters with the local authority. The appellant was not obliged to do so. It was not part of the appellant's retainer to do so. It is not something that would ordinarily be done by an agent in Queensland. No matter which contract were to proceed, having regard to the various conditions in each of them, the respondent and the purchaser were inevitably going to have to negotiate with the local authority. The agent did not have to be the sole cause of the sale to qualify for commission. Here, on the facts found, and rightly so in my opinion, it is beyond question that the appellant was an effective cause of the sale.

183 I would allow the appeal with costs, restore the judgment of the trial judge and order that the respondent pay the costs of the trial and of the appeal to the Court of Appeal of Queensland.

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181 (1977) 138 CLR 52 at 59.