

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

SUSPENSIVE CONDITION FULLFILLED? ESTATE AGENCY SUCCESSFULLY CLAIMS COMMISSION

PG Sharedealing (Pty) Ltd v First Realty Randburg (Pty) Ltd t/a Chas Everitt International Property Group (A5058/2017) [2018] ZAGPJHC 645 (3 December 2018)

This judgment dealt, amongst other things, with the question whether an estate agent exercised a discretion afforded to it to extend a bond due date. The seller argued the wording of the bond clause in the Offer to Purchase did not constitute an 'automatic extension', or failing that and furthermore, that the estate agency was not entitled to commission due to alleged non-compliance with the Estate Agency Affairs Act's Fidelity Fund Certificate requirements. This is how things unfolded...

The Judgment can be viewed [here](#).

FACTS

First Realty Randburg (Pty) Ltd t/a Chas Everitt International Property Group (FRR) claimed payment of estate agent's commission from PG Sharedealing (Pty) Limited (PGS). This was in terms of a mandate given by PGS to FRR to bring about the sale of a property owned by PGS. The mandate was confirmed in the written agreement of sale that was entered into between PGS (as the seller) and Mr and Mrs Anderson.

The sale agreement deals specifically with the agent's commission and stated that "commission is earned and payable on transfer of the Property into the name of the Purchaser or upon cancellation of this agreement for any reason whatsoever (including any mutual cancellation)...". It was specifically stated further that the commission clause in the agreement "is intended as a contract for the benefit of the Agent and may be enforced by the Agent, who accepts the benefits conferred upon it in terms thereof."

Also relevant to this matter is the bond clause which recorded that the offer was "subject to the suspensive condition that the Purchaser (or the Seller or the Agent on the Purchaser's behalf) is able to raise a loan upon the security of a mortgage bond within 30 days of acceptance of this agreement (which time may be extended by the Agent at the Agent's sole discretion for a further period not exceeding 10 days). The parties hereto specifically agree that such extension will be of full force and effect and binding on both the Purchaser and the Seller irrespective of whether such extension is communicated to either the Purchaser or the Seller."

The 30 day period expired on 30 July 2015. The Andersons were unable to raise the loan by this time. PGS argued that the agreement had therefore lapsed as there was no formal

confirmation that the agent exercised its discretion to extend the period. It entered into a written "CANCELLATION OF SALE AGREEMENT" in terms of which, *inter alia*, the agreement was cancelled and PGS indemnified the Purchaser in respect of any claim for commission by FRR.

FRR however argued that the agreement had not lapsed. This was because it was common cause that 4 days after expiry of the 30 day period, bond approval was indeed obtained. The Purchaser and conveyancers proceeded with the transaction on the assumption that the suspensive condition was met and FRR argued that it understood the bond clause in the present matter to mean, practically, that there was a period of 40 days in which bond approval had to be obtained.

PGS alleged, amongst other things, that it was not liable for commission as the suspensive condition was never fulfilled. In addition thereto:

- it argued that there was no proof that the agent had exercised the discretion to extend the time in which bond approval had to be obtained with a further 10 days; that it was not an automatic extension but provided for a contractual exercise of a discretion.
- PGS further argued that the agent was in any event not even entitled to commission as the estate agent had failed to prove due compliance with the provisions of Section 34A(1)(b) of the Estate Agency Affairs Act (the Act) in that it had submitted in their papers a Fidelity Fund Certificate (FFC) in respect of the agency, but not in respect of each director of the agency.

The court *a quo* found in favour of FRR and ordered PGS to pay the agent's commission. PGS appealed.

HELD:

Was the condition fulfilled, i.e. was the period for fulfilment extended?

- The provisions of the bond clause - particularly the provision that the estate agent could, at its sole discretion, extend the period for the fulfilment of the suspensive condition for a further period of 10 days, and which extension would be binding on both the purchaser and seller irrespective if this was communicated to them - constitutes a *stipulatio alteri* (a benefit for a third party) in the truest sense.
- It was therefore necessary for the agency to show that it had both accepted the benefit and exercised its discretion to extend the requisite period.
- There was no indication that the agent had waived the right to rely on this benefit. It

was in fact clear that the agency had accepted the benefit, in that the sale agreement containing this provision, was co-signed by the estate agent on behalf of the agency.

- Was it shown that the agent had exercised its discretion to extend the requisite period by a further 10 days? On this point PGS submitted that the agreement did not provide for an “automatic extension” but provided for the exercise of “a contractual discretion”, and that there was no evidence that the latter discretion was exercised.
- However, on the facts presented, there was no reason to conclude that the discretion had not been exercised. The agency’s case was clear that it viewed the effect of the clause to be that the purchaser practically had 40 days in which to obtain a loan. No communication to either the seller or purchaser was required for this to come into play, as per the specific wording of the bond clause. It was also not disputed that the conveyancing attorneys proceeded with the transaction on this understanding.
- It had to be concluded therefore that the suspensive condition had been fulfilled.

Fidelity Fund certificate

- The suspensive condition having been fulfilled, the agent would be entitled to receive payment of commission on cancellation, as provided for in the agreement.
- Of course, the liability of PGS to pay the said commission to the agent is dependent upon whether or not the agent had complied with all relevant statutory provisions, with particular reference to section 34A(1)(b) of the Act, which requires an agent to be in possession of a valid FFC at the time of entering into the agreement.
- The relevant Fidelity Fund certificate (FFC) was issued to “FIRST REALTY (RANDBURG) (PTY) LTD”. PGS argued that this did not comply with section 34A(1)(b) of the Act in that the agent in the present matter was a company and there was no evidence that a valid FFC had been issued to every director of the estate agent company.
- The agency was the entity identified in the agreement as the entity that was entitled to estate agent’s commission. It was never contemplated by any of the parties to the

agreement that the agency would not be entitled to receive that commission on the basis that the agency had a valid fidelity fund certificate issued to it by the board in terms of the Act following compliance by it of all of the relevant provisions of the Act but may not be in possession of such certificates for every director.

- Taking all of the foregoing into account, section 34A of the Act should be construed, as far as possible, not to interfere with the agency's established rights, both in terms of the Act and the agreement.

On this premise, the appeal was dismissed.

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