

**[J-14A&B-2019][M.O. - Todd, J.]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

BINSWANGER OF PENNSYLVANIA, INC.,	:	Nos. 30 and 31 EAP 2018
	:	
Appellee	:	Appeal from the Judgment of Superior
	:	Court entered on 12/26/17 at Nos. 2372
v.	:	and 2524 EDA 2015 affirming the order
	:	entered on 6/11/15 in the Court of
	:	Common Pleas, Philadelphia County,
TSG REAL ESTATE LLC,	:	Civil Division at No. 000901, February
	:	Term 2014
	:	
Appellant	:	ARGUED: March 6, 2019

***DISSENTING OPINION***

**CHIEF JUSTICE SAYLOR**

**DECIDED: September 26, 2019**

As the majority relates, the question presented for review is:

[w]here an agreement of sale for Pennsylvania real estate is final and binding as to the seller, but contains typical and routine buyer-friendly conditions, is the centuries-old doctrine of equitable conversion rendered inapplicable?

Majority Opinion, slip op. at 7 n.2 (quoting *Binswanger of Pa., Inc. v. TSG Real Estate LLC*, \_\_\_ Pa. \_\_\_, 192 A.3d 1112 (2018) (*per curiam*)). I would answer this question consistent with the analysis of the Supreme Court of Connecticut in *Southport Congregational Church -- United Church of Christ v. Hadley*, 128 A.3d 478 (Conn. 2016).

*Hadley* concerned whether a mortgage contingency clause in an agreement of sale necessarily thwarted application of the doctrine of equitable conversion. The

Connecticut Supreme Court found that it did not, because “the key inquiry in an equitable conversion analysis is whether the contract is specifically enforceable against the *seller*.” *Id.* at 489 (emphasis in original; citations omitted).

As reflected in its name, the doctrine of equitable conversion is an equitable construct to be applied in the interests of justice. In my view, it would unduly dilute those interests for the doctrine to necessarily be made unavailable solely on account of conditions -- such as a mortgage contingency clause -- which are designed to afford a conventional degree of protection to buyers. In this respect, I observe that a mortgage contingency clause is one of the most common of conditions applicable to agreements for the sale of real property.

Since the intermediate and common pleas courts rested their decisions on what I would find to be an overly constrained approach to equitable conversion, I would vacate and remand for further proceedings consistent with my present reasoning.

The majority, on the other hand, proceeds to address a different issue entailing a full-blown contractual analysis of the Broker Agreement. In this regard, I would emphasize that the present situation is unusual, since a broker who did not procure the purchaser is nevertheless claiming a commission. I find it important to maintain this frame of reference, because there are a number of general, default rules that are typically applied to broker agreements that are being displaced here. See, e.g., *Williamson v. United Farm Agency of Alabama, Inc.*, 401 So.2d 759 (Ala. 1981) (discussing the precept of constructive consummation of sales for purposes of determining when a broker’s right to a commission is perfected);<sup>1</sup> 2A C.J.S. AGENCY

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<sup>1</sup> Notably, were this Court to adopt the doctrine reflected in *Williamson*, there would be no need to consider the effect of equitable conversion, which ordinarily pertains to buyers and sellers, in the context of broker agreements. Additionally, none of the discrete principles discussed above are well developed in the modern Pennsylvania (continued...)

§336 (2019) (discussing the “procuring cause doctrine” in the context of broker agreements); 23 WILLISTON ON CONTRACTS §62:18 (4th ed. 2019) (emphasizing that broker agreements are analyzed, consistent with general rules of contract interpretation, in the light most favorable to the non-drafting party). Prominent among these is the potential admissibility of parol evidence in cases where there are material contractual ambiguities. *See generally* ALI, *Applicability of Parol Evidence Rule to Written Listing Agreement of Real Estate Broker*, 38 A.L.R.2d 542 (1954 & Supp.).

Particularly because I believe that the intentions underlying the Broker Agreement may not be as straightforwardly discerned as portrayed by the majority, I respectfully differ with the majority’s decision to proceed beyond the issue accepted for the Court’s review. In all events, I would stress that the present focus by the litigants upon equitable conversion, as opposed to the general principles of law typically applicable in the context of broker agreements, is a result of the discrete manner in which the case was decided in the intermediate and common pleas courts and has been presented to this Court. As such, it would be preferable, in my view, to adhere to the question presented for review rather than issuing an opinion that could be taken as having some broader relevance to broker agreements at large beyond the recognition that ordinary principles of contractual interpretation are of substantial relevance.

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(...continued)

jurisprudence, which is another reason why I believe that some circumspection is due here in terms of proceeding beyond the issue accepted for review.