

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Decision No: [2011] NZREADT 32

Reference No: READT 010/11

**IN THE MATTER OF**

an appeal under s.111 of the Real Estate Agents Act 2008

**BETWEEN**

**MARTIN PERKINSON AND ANNE PERKINSON**

Appellants

**AND**

**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10040)**

First respondent

**AND**

**MARTIN COOPER AND CAROLYNN LE MAC**

Second respondents

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Ms J Robson - Member  
Mr J Gaukrodger - Member

**HEARD** at AUCKLAND on 4 November 2011

**DATE OF DECISION:** 22 November 2011

**APPEARANCES**

The appellants on their own behalf  
Mr M J Hodge, counsel for first respondent  
Mr M Pinkney, advocate for second respondents

**RESERVED DECISION OF THE TRIBUNAL**

***The Issue***

[1] Have the second respondents (the licensees) been guilty of unsatisfactory conduct under s.72 of the Real Estate Agents Act 2008 ("the Act") in terms of the facts set out below? Essentially, the complaint is that the licensee, Ms Le Mac, inappropriately organised that her employer receive a share of commission from a sole agent on the sale of an apartment.

## **Background Facts**

[2] Although we shall add to them a little, we set out the facts as found by the first respondent Committee:

### **“2. Background**

- 2.1 *In late November 2009 Mr and Mrs Perkinson met with Carolyn Le Mac from Harcourts Milford to discuss the selling of six apartments they owned. At that meeting they say they made it clear that their properties were under a sole agency with Bayleys North Shore and also advised that the next morning they were meeting with one of their tenants who had showed an interest in purchasing the unit they were renting.*
- 2.2 *Mr Perkinson advised they met with the tenant as planned and negotiated and agreed a price for the purchase of the unit. They also made it clear to the tenant that the apartment was under a sole agency and he said he had in fact met the agents on separate occasions. The tenant asked for the weekend to discuss the details with his wife before he got back to them regarding purchase.*
- 2.3 *Mr Perkinson then informed their sole agent of this sale and asked them to prepare a sale and purchase agreement, and also phoned Carolyn Le Mac explaining they now only had five units to sell.*
- 2.4 *Mr Perkinson was then concerned to find out later on that day that the sole agent had received a phone call from the manager of Harcourts Milford saying that Carolyn Le Mac would be presenting a sale and purchase agreement to them and had then negotiated to receive a share of the commission. Mr Perkinson advises that his sole agents were confused about this, but in the interest of completing a sale reluctantly agreed to share the commission. Mr Perkinson is concerned about the ethics of the transaction as Ms Lee Mac had not advised him of her association with his tenant.*
- 2.5 *The agreement was finalised the following day but at that stage it was discovered that it required more signatures and Mr Perkinson was also concerned that Ms Le Mac was then not available, and didn't return calls to assist in this process.*
- 2.6 *Mr Perkinson makes it clear that he has lodged this complaint independently of Bayleys North Shore and asks for repayment of the commission earned by Miss Le Mac back to Bayleys North Shore and not to them [i.e. Mr and Mrs Perkinson] personally.*
- 2.7 *Mr Cooper responded to the CAC by letter of the 19<sup>th</sup> July 2010. He advised he had initial discussions with the complainants in which a refund of the commission was discussed but that following his investigation into the matter he discovered the complainants had not been as disadvantaged as they had made out.*
- 2.8 *Mr Cooper provided to the CAC a letter from Mr John Vincent the tenant who ultimately purchased the unit who advises that following leasing the apartment in May 2009 they engaged Carolyn Le Mac to find them a*

*suitable apartment to purchase. They knew that the apartment they were renting was for sale but believed its purchase price to be at a level beyond what they could afford. Mr Vincent advises that he initially approached Bayleys the sole agents to ask if they would present an offer at less than the asking price to which they declined and because of this he approached the owner directly. A suitable price was negotiated and following discussion with his wife he instructed Carolyn Le Mac who had been helping them to prepare the contract and present it to the owners for their signatures.*

2.9 *Mr Vincent advises from his point of view Miss Le Mac acted honestly and professionally in all her dealings with them and her integrity is beyond reproach.*

2.10 *He is confused by the fairness of this complaint and the fact that it is coming from the owner of the property as the owner received the price they agreed to and he believes the fact that his agent who had done plenty of work in trying to find the purchasers a suitable property presented a contract and received a portion of the commission which does not affect the owner at all, as the commission the owner was required to pay did not change.*

2.11 *Miss Le Mac has also supplied a letter dated 26<sup>th</sup> April 2010 which she sent to Mr and Mrs Perkinson explaining her version of the events. ...”*

[3] In terms of the above facts we emphasise as follows.

[4] In November 2009 the appellants had appointed Bayleys, North Shore, as their sole agent to sell six of their properties including the said apartment which was being rented by Mr and Mrs Vincent the purchasers referred to above. The licensees work for Harcourts. The licensee Ms Le Mac had known the Vincents for 10 to 15 years and Mr Vincent was her accountant. The Vincents had approached her in May 2009 to help them find an apartment for purchase.

[5] On Wednesday 25 November 2009 Ms Le Mac contacted the appellants to discuss the properties they were selling which included the apartment. She met with them that day and was told that Bayleys had a sole agency for all six properties but that Bayleys might be open to entering into a conjunctual agreement over sharing commission. We accept that the appellants also then told Ms Le Mac that they were meeting with the Vincents the next day with a view to negotiating a sale of the apartment to the Vincents. At that time Ms Le Mac knew that the tenants of the appellants' apartment were the Vincents but she did not tell the appellants that she knew the Vincents or was assisting them seek a property to buy. There is evidence from Ms Le Mac that that Vincents had asked her not to disclose their identities to the appellants during their negotiations to purchase the apartment. Indeed, the substance of a “*To Whom It May Concern*” letter from her dated 30 March 2011 explains as follows:

- “• a) *as addressed previously the purchasers had specifically requested I keep their names/involvement confidential from the landlord/vendor. Part of their reasoning was because they had me arrange viewings of several other apartments in the ‘block’ – and, in fact, did actually make two offers*

*on other apartments. They also did not want to disadvantage themselves in regard to the selling price.*

- *The prospective (actual) buyers were introduced by the Sentinel Management as tenants not by either Bayleys or Harcourts.*
- *I was keeping a confidence in respect to the buyers. I was advised that Bayleys were the sole agents and that they were happy to do 'conjunctural sales' and I specifically ascertained that the Perkinsons did not have an agreement with Bayleys to sell privately.*
- *I was present prior to and during, and provided input to the details of the sale and the sale and purchase agreement was signed correctly until the tenants needed to change their possession date at which time the Bayleys agent insisted that she was 'just across the road' from the purchasers when I happily offered to come down the Shore to get the final initial to the amendment. I was completely available and willing to complete the agreement and it was only at the insistence of the Bayleys agent that had them go across the road and get the final initial. Up until then I had dealt with the purchasers in completing the agreement forms.*
- *A conjunctural Authority form was faxed to Bayleys on 1<sup>st</sup> December 2009 (as evidenced by the attached fax) and then further agreed to verbally by the Bayleys agent as she advised that the manager? (Hayden Stanaway) would not be available to sign the actual form until 7<sup>th</sup> December and she said there was no-one else who could sign. I specifically asked her will this be honoured and she said I could trust her word.*
- *It could not have "come as a complete surprise" to Bayleys as there were several conversations effected between agents and management (Harcourts) as to actual per centage split.*
- *Unfortunately it did take several months to return Mr and Mrs Perkinsons' folder as I was not approached and asked for it at any time by them and only became aware of the request the day before I returned to it."*

[6] On the next day, Thursday 26 November 2009, the appellants met with the Vincents and felt they agreed that the Vincents could buy the apartment for \$1.075 million and told them that Bayleys had the sole agency for the sale of the apartment. The Vincents told the appellants they would discuss the appellants' offer to sell them the apartment on that basis and respond the next Monday 30 November 2009.

[7] Ms Le Mac says that on 26 November 2009 she telephoned Bayleys to request a conjunctural agreement with regard to commission on any sale of the apartment and they agreed to that orally on a 60/40 basis; but this is challenged by the appellants.

[8] In any case, on Monday 30 November 2009 the Vincents rang the appellants to advise they accepted the appellants' proposal for sale of the apartment to them as put at the meeting between those parties on 26 November 2010. Accordingly, the appellants telephoned Bayleys to advise them of this and instructing Bayleys to prepare a written contract. Then, as a matter of courtesy, the appellants

(Mr Perkinson himself I understood) telephoned Ms Le Mac to advise that the apartment was to be sold to the Vincents so that the Perkinsons only had the five remaining properties for sale. They say, and this is not disputed, that at no stage did Ms Le Mac tell the appellants that she knew the Vincents or that she would be the licensee presenting their offer and be requesting a commission split with Bayleys. It does not seem to be disputed that, after the Vincents had confirmed the deal orally with the appellants, the Vincents asked Ms Le Mac to prepare a written offer from them to purchase the apartment from the appellants. Ms Le Mac did that and presented the offer from the Vincents to Bayleys and a few days later that agreement was completed in binding and enforceable form. That seems to have been on Wednesday 2 December 2009.

[9] On Tuesday 1 December 2009 Ms Le Mac had faxed a copy of a conjunctional agreement form to Bayleys who signed it on 7 December 2009 as she explained in the above extract from her letter of 30 March 2011. Certainly, it is dated 7 December 2009. Under its terms Bayleys agreed with Harcourts that Ms Le Mac would liaise with Bayleys' agent on a conjunctional sale of the apartment with commission being split 70/30 so that 30% of the total commission would be sent by Bayleys to Harcourts.

[10] There is evidence that because the appellants advised Ms Le Mac on Thursday 26 November 2009 that Bayleys would cooperate with other agencies regarding any sales of the six apartments in the particular block, Ms Le Mac called a person at Bayleys that day seeking to arrange the sharing of commission should she find a buyer for an apartment. She sought a 50/50 split but was told the split would be 60% to Bayleys and 40% to her. Apparently Bayleys do not recollect that telephone call which was of a general nature from Ms Le Mac.

[11] It seems that upon being instructed by the Vincents to prepare an offer on Monday 30 November 2009, Ms Le Mac called back the lady with whom she had spoken at Bayleys to advise that she had a buyer and to confirm the conjunctional agreement, and she was then told that the split would be 70% Bayleys and 30% to her but only Bayleys' manager could confirm that and he was unavailable. Ms Le Mac had her manager endeavour to get the split back to 60/40 but he could not achieve agreement and was told that the Bayleys' manager was unavailable. The next morning (Tuesday 1 December 2009) the Harcourts manager sent the exhibited conjunctional sale agreement to Bayleys at 8.25 am. Although it was not returned to Harcourts until 7 December 2009, there is evidence that it was signed by someone at Bayleys and faxed back to Ms Le Mac's office at 10.56 am on that Tuesday morning 1 December 2009.

[12] The evidence is a little confusing as to when the offer from the Vincents, which had been prepared by Ms Le Mac, was actually delivered to Bayleys. It seems to have been signed by vendors and purchasers on Monday 30 November 2009 but, possibly, not delivered to Bayleys by Ms Le Mac until later on Tuesday 1 December 2009. In any case, various minor changes needed to be made to the contract and they do not seem to have been completed until some time on Wednesday 2 December, or, possibly, Thursday 3 December 2009.

### ***Relevant Legislation***

[13] The relevant provisions of the Real Estate Agents Act 2008 are ss.72 and 73 which read as follows:

**“72 Unsatisfactory conduct**

*For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) is incompetent or negligent; or*
- (d) would reasonably be regarded by agents of good standing as being unacceptable.*

**73 Misconduct**

*For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—*

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
- (c) consists of a wilful or reckless contravention of—*
  - (i) this Act; or*
  - (ii) other Acts that apply to the conduct of licensees; or*
  - (iii) regulations or rules made under this Act; or*
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.”*

[14] We also note Rule 6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which reads:

*“Rule 6 Standards of professional conduct*

*6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.*

*6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided by a customer or client”*

**The Decision of the Committee**

[15] The Committee found that the appellants' complaint of unsatisfactory conduct by the licensees, particularly by Ms Le Mac, could not be upheld on the available evidence and determined to take no further action on the complaint in terms of s.89(2)(c) of the Act. Helpfully the Committee put it:

*“4.6 The CAC does not feel that the conduct complained of amounts to unsatisfactory conduct but feels that as a matter of best practice the relationship and transaction could have been handled in a better way.*

*4.7 When the purchasers instructed Ms Le Mac to draw up an offer, knowing the property was under sole agency she should have advised her clients that as she did not hold an agency she would not be able to act for them as purchasers unless Bayleys the sole agents allowed her to work in with them. She should have then properly directed her initial inquiry to*

*Bayleys. This would be regarded as good agency practice. Instead she continued to work with an obtained signed offer from the vendors before requesting a work in with Bayleys. While we make this recommendation we do not believe that the conduct can amount to unsatisfactory conduct in all the circumstances.*

- 4.8 *Miss Le Mac knowing that the vendors had been negotiating with a tenant didn't disclose that they were also her buyers where a professional person would have done so if they had been aware that her buyers and the vendors tenants were one and the same person. We are not convinced that there is evidence that Ms Le Mac was aware of this but if she had been so and had advised the vendors we believe the complaint would have been avoided."*

### ***The Stance of Mr and Mrs Perkinson the Complainants/Appellants***

[16] The appellants put it that after the agreement was entered into they were very surprised to learn that Ms Le Mac had entered into a conjunctual agreement for commission with Bayleys for the sale of the apartment and, simply put, regarded her conduct as most unethical. They particularly put it that at no time did she divulge to them her association with their tenants and that she did not participate in the negotiation process for the sale of the apartment. Accordingly, they ask how could it be that after they had informed her as a matter of courtesy that one of the six properties had been sold, she suddenly got herself involved in that sale transaction and achieved a commission split with Bayleys.

[17] The appellants' grievance about Mr Cooper seemed to be that he was Ms Le Mac's supervising agent and, after pressure from them, agreed to refund the commission which Harcourts received from Bayleys; but then later suggested that the funds be donated to a charity of the appellants' choice; and when they disagreed with that and requested that the commission be refunded to Bayleys, the commission remained with Harcourts.

[18] The appellants consider that the licensees have acted in an unprofessional and unsatisfactory manner and were not entitled to any commission. They dispute some of the fact sequence set out above including that Ms Le Mac effected a conjunctual arrangement with Bayleys on 26 November 2009.

### ***Discussion***

[19] Mr and Mrs Perkinson (as appellants) seem to be acting on a most commendable altruistic basis to endeavour to deal with what they regard as unprofessional conduct. While they accept that Ms Le Mac had worked to assist the Vincents find a suitable apartment, their view is that Bayleys, as sole agent, had done much work to sell the apartment including talking to Mr Vincent over a long time and that, ultimately, the sale arrangement was negotiated between the appellants and the Vincents. The appellants say that Bayleys were faced with a demand from Ms Le Mac for a share of commission, felt under pressure to see the sale concluded, and reluctantly and professionally were rather generous in sharing the commission.

[20] Although the appellants have detailed their concerns, essentially, they seem to be outraged that even on Monday 30 November 2009 when they advised Ms Le Mac as a matter of courtesy that the apartment had been sold, she did not disclose her

association with the purchasers. They believe there could not have been any need for confidentiality from her to the Vincents at that stage “*because the deal had been finalised*” as Mr Perkinson put it. In fact, the deal had not been finalised then. It may have been in principle but there did not seem to be an enforceable agreement until about 2 December 2009.

[21] Mr Hodge, helpfully, submitted that the key issue for us is whether we consider the licensees failed to act in good faith or fairly in their dealings with the appellants. As Mr Hodge also put it, it appears that the particular conduct at issue in respect of Ms Le Mac is:

- “(a) *when the appellants told Ms Le Mac at the meeting on 25 November 2010 that they were intending to negotiate a sale directly with the Vincents, Ms Le Mac did not tell the appellants that she was assisting the Vincents to make an offer on the apartment;*
- (b) *when the appellants telephoned Ms Le Mac on 30 November 2010 to tell her that the Vincents were going to make an offer on the property, Ms Le Mac did not tell the appellants that she was assisting the Vincents to make the offer;*
- (c) *that she did not negotiate a conjunctural agreement with Bayleys before the Vincents sale and purchase agreement was concluded;*
- (d) *that she did not return the appellants’ file in a timely fashion.*

6.10 *In relation to (a) and (b) above, the first question is whether fairness required the information be provided to the appellants. There is then the question of whether Ms Le Mac was correct to keep the purchasers’ confidence. It does not seem right to say she was the purchaser’s agent, as they were not paying her commission, and, as set out above, it would be contrary to a sole agent’s fiduciary obligations to contract with another agent who is free to act contrary to the sole agent’s client’s interests.*

6.11 *In relation to (c) above the question may be whether it was appropriate for Ms Le Mac to take steps on the transaction (including talking with the appellants) without clarity as to the role she was permitted to play on the transaction and clear communication with the appellants to that effect.*

6.12 *In relation to Mr Cooper, it appears the conduct in issue is that following an internal complaint by the appellants about Ms Le Mac, Mr Cooper initially agreed that Harcourts would pay back to Bayleys the amount it received under the conjunctural agreement but later refused to do so.”*

[22] It needs to be recorded that the Vincents had approached Bayleys to make an offer for the apartment some time prior to 25 November 2009 at, we understood, a price of 1.1 million dollars but (they allege) were treated dismissively by Bayleys who would only take an offer at 1.25 million dollars. There is evidence that because of this the Vincents declined to treat further with Bayleys and were using Ms Le Mac to resolve that aspect. As it worked out, the appellants seem content at selling the apartment to the Vincents for \$1.075 million.



[23] The view of the appellants is that Ms Le Mac forced or injected herself into this transaction when she was not needed and after agreement had been reached. However, we consider that, on the balance of probabilities, her work and influence for the Vincents caused the sale deal to gel and she could have easily deterred the Vincents from proceeding to purchase.

[24] There was quite some reference as to the likely legal status of Ms Le Mac under agency law pursuant to the conjunctional agreement, but that is not particularly relevant to the issues as we deal with them. It would seem that she became a subagent to Bayleys and would be required to fulfil obligations and duties to the appellants as vendors in a manner similar to Bayleys. However, that situation would only have come about at the point of time when there was a conjunctional agreement between her and Bayleys. The conjunctional agreement is rather laconic and does not deal with the obligations of one party to another.

[25] For all that has been put before us, we see this situation as rather straightforward. We emphasise that the agreement for sale and purchase of the apartment did not seem to become final and enforceable until the Wednesday morning of 2 December 2009 or possibly the Tuesday afternoon of 1 December 2009 whereas the conjunction agreement seemed to have been made orally on 30 November 2009. Of course, an agreement for the sale of realty is not enforceable until it is completed in writing, but a conjunction agreement can be effected orally.

[26] Whereas the appellants regarded themselves as having sold the apartment to the Vincents on Monday, 30 November 2009, that was not achieved as binding in writing until two or three days later. We also wonder whether they thought they had effected the deal at their meeting with the Vincents on Thursday 26 November 2010. Accordingly, as adviser to the Vincents, Ms Le Mac was in a position of influence as to whether the sale took place. There may have been a perception of her being a little slick in managing to obtain a commission sharing deal with Bayleys at the very latest hour in the deal, but that does not constitute misconduct on the particular facts of this case. Perhaps, one can describe Ms Le Mac as having shown initiative to try and achieve a fair remuneration for her efforts on the basis of neither the Vincents nor the appellants needing to pay more.

[27] Although the appellants seem to suggest that they had achieved a sale to the Vincents on Thursday 26 November 2009 that was subject to Mr Vincent conferring with his wife and, in reality, to the advice of Ms Le Mac. In any case, there was no binding arrangement at that point or as at Monday 30 November 2009 when Mr Perkinson, as a matter of courtesy, advised Ms Le Mac of the situation. We consider that there was nothing improper in Ms Le Mac, at that point, agreeing to help the Vincents achieve finality for the purchase by completing a form of offer and taking it to Bayleys.

[28] One can understand Ms Le Mac leaping into action as soon as she received the courtesy telephone call from Mr Perkinson because, unknown to him, she had quite some involvement in the Vincents getting to the point of completing a deal with the appellants. Bayleys could have refused to give her a share of the commission on the transaction, but they did grant her a share; and that did not bring about any loss to the appellants.

[29] It follows from our views that Mr Cooper is not involved in any misconduct. There was no reason at law for him to repay the commission nor give it to charity as sought by the appellants.

[30] Simply put, we agree with the approach of the Committee and confirm its decision. We find no misconduct on the part of the licensees in this case. The decision to take no further action on the complaint must stand. This appeal is hereby dismissed.

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Judge P F Barber  
Chairperson

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Ms J Robson  
Member

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Mr J Gaukrodger  
Member