Decision No: [2011] NZREADT 35

Reference No: READT 064/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**JENNER REAL ESTATE LIMITED**
	Appellant
AND	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10163)**
	First respondent
AND	**QS**
	Second respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

APPEARANCES

Mr P Napier on behalf of appellant
Mr M Hodge on behalf of CAC
No appearance by or on behalf of second respondent

DECISION OF THE TRIBUNAL

Introduction

[1] On 8 September 2010 Jonathan King, QS and Vallant Hooker Trustees Limited entered into an agreement for the sale of Dell Avenue, Remuera for the sum of 1.8 million dollars. Jenner Real Estate were the agents who negotiated the sale. The vendors were trustees of a trust, and two of the trustees, Ms QS and Mr King had been in a relationship which had broken up.

[2] The agreement became unconditional on 10 September 2010. The vendors' solicitors advised Jenner of this fact. Jenner were paid a deposit.

[3] On 10 September 2010 Mr King (one of the trustees) provided an authority to Jenner to release the deposit prior to the 10 day statutory period provided in s.123 of the Real Estate Agents Act. This authority is at document 41 in the bundle of documents and is addressed to the manager at Harcourts, Jenner Real Estate and says: *"please accept our authority to release the deposit paid in connection with the above transaction prior to the mandatory 10 working days."*

[4] It was signed by:

> *"Vendor or duly authorised solicitor/agent*
> *name: Jonathan King and QS"*

[5] Mr King alone signed this.

[6] And then

> *"Purchaser or duly authorised solicitor or agent*
> *name Christian Nathaniel Whata. Signed by his solicitor."*

[7] The purchaser's solicitor signed the agreement.

[8] There is no information available to the Tribunal to show how and why the deposit release form was sent to Russell McVeagh, solicitors who acted for the purchaser and why it was also not sent to Vallant Hooker who acted for the vendor. On 9 September 2010 Jenner (document 55) sent to Vallant Hooker a letter recording that the contract had been signed, enclosed a copy and advised the deposit was held in their trust account and it would be held for 10 working days.

[9] When Mr King requested the deposit to be released he provided a deposit slip to the agent Ms Maloney. This was for Nova Construction an entity apparently unrelated to the vendors. Ms Maloney's evidence was that she did not have anything to do with the money, she simply passed the signed deposit release form and the deposit slip on to the administrative staff at Jenner Real Estate. Mr Tubman the sales manager for Jenner gave evidence that usually he or Mr Jenner checked the request for release of the deposit and authorised it but said that in this case for some reason the check was not done. On 13 September Jenner paid out the deposit to Nova Construction. Shortly thereafter a statement was sent to Vallant Hooker with a handwritten notation saying *"deposit paid directly to Nova Construction"*.

[10] Vallant Hooker later queried this and subsequently asserted that Mr King had no authority to obtain early release of the deposit and to pay it to Nova Construction. The Tribunal has been provided with letters between Vallant Hooker and Grove Darlow who acted for Mr King. Mr King asserts that the monies were paid to Blue Print Developments Limited trading as Nova Construction but that Blue Print had advanced to the trust well over $137,607 and the sum was in part payment of a debt owing to the company. Grove Darlow assert that the payment was validly made to the company.

[11] Vallant Hooker disagreed with this assertion. They claimed that the money needed to be repaid immediately to their trust account to be dealt with as part of the relationship property resolution between Mr King and Ms QS.

[12] In December 2010 Anderson Creagh Lai, solicitors for Ms QS complained to the REAA about the conduct of Jenner Real Estate. They claimed that the trust had lost the sum of $137,607.99 because of the agent's payment of this sum to an entity that was not lawfully entitled to any of the money.

[13] On 12 April 2011 the Complaints Assessment Committee decision was issued. In this decision the Complaints Assessment Committee found that Jenner Real Estate could not claim that it had paid the money out in accordance with Mr King's instructions simply because he had been their main point of contact with the vendors. Jenner Real Estate submitted that Mr King had both actual and ostensible authority to bind the trust. The Complaints Assessment Committee rejected this contention and said that s.122 of the Act required the agency to pay the money to the person entitled to the deposit. This was the vendor i.e. the three trustees. The Complaints Assessment Committee also found that Jenner Real Estate should have been on *"high alert"* when it was presented with a request to pay the deposit to a company nominated by Mr King given that it was well aware the sale was in the context of a relationship break up.

[14] The Complaints Assessment Committee found that Jenner should have obtained Ms QS' agreement to the payment of the deposit to Mr King. It found the licensee guilty of unsatisfactory conduct pursuant to of s.72(b) and (c) of the Act. In its decision of 13 June 2011 it made comprehensive penalty orders. The orders were that:

[a] Jenner Real Estate apologise to the complainant (this has been done);

[b] Jenner Real Estate to pay the solicitors for the trust in the sum of $137,607.99 to be held on account of the QS Property Trust (This has been done);

[c] Order them to pay a fine in the sum of $7,500 (This has been paid);

[d] Order that the licensee resit the Real Estate Agent's training module unit standard 4700 – managing of trust account (The Tribunal are unaware whether this has been done);

[e] Pay to the complainant the sum of $2,000 as a contribution towards her legal costs (The Tribunal believes this has been paid);

[f] Publication of the decision omitting the names and any identifying details of the complainant and any third parties.

[15] Jenner Real Estate appealed from this decision. An interim order preventing a publication of the name of the agency was made by the Tribunal and remains in place until further order of this Tribunal.

The Issues

[16] The issues are:

[a] Does s.122 of the Real Estate Agents Act permit the doctrine of ostensible authority?

[b] Did Jenner Real Estate have actual or ostensible authority to release the monies at the direction of Mr King?

[c] Has there been a breach of s.122? If so then what penalty ought to be imposed upon Jenner Real Estate?

[d] Is the order of the Complaints Assessment Committee that Jenner pay $137,607 trust unjust enrichment of the trustees (the trust having no legal entity) and in particular is Mr King benefitting from his own wrongdoing?

[e] How should the appeal be determined?

Issue One – Can the ostensible Authority argument continue in the face of s.122

[17] The Tribunal must consider whether or not the doctrine of ostensible authority is still available in the context of the prescriptive statutory provisions contained in ss.122 and 123. These provide that the agent must pay the (deposit) money to the person lawfully entitled to it or in accordance with that person's directions. Thus the only way that money can be paid out is either to all of the owners jointly or on receipt of authority from all owners that the money can be paid in a different way.

[18] Mr Hodge submitted that the purpose of the Act was clearly both for consumer protection and for regulation of the industry. In his submission a clear rule on the payment of trust account monies was needed. He submitted that this should be that no payment could be made under s.122 unless there was payment to all of the owners (or their solicitor) or there was an actual agency agreement which was signed by all the owners.

[19] Mr Napier submitted that this would make the section unworkable and would fly in the face of common law rules which were not excluded by the provisions of the Real Estate Agents Act.

[20] The Tribunal considered that while there is a need for a clear rule, s.122 does not rule out the common law so that in certain clear cut cases ostensible authority could be argued by the agent. However there would need to be a compelling factual situation showing ostensible authority to overcome the clear words of the section.

Issue Two – Was there Ostensible Authority or Actual Authority?

[21] Jenner did not pursue the assertion that there was actual authority to proceed but relied on the ostensible authority argument.

[22] Jenner Real Estate submits that they were not in breach of s.122 of the Real Estate Agents Act because Mr King had ostensible authority from his co-owners to direct where the money went and therefore the appellant was bound to follow it. Section 122 provides:

> *"**122 Duty of agent with respect to money received in course of business***
> *(1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions."*

[23] It is common ground that the persons lawfully entitled to money were the joint owners of the property Jonathan King, QS and Vallant Hooker Trustees Limited.

[24] In *Arnagas Limited v Mundogas SA* [1986] 1 AC 717 at 777 the Court said:

> *"Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of the dealing and honoured transactions arising out of it."*

[25] Mr Napier submitted that in this case Mr King had been the person with whom Jenner had been dealing over a period of approximately eight months on the marketing and sale of the property. Mr King was the sole occupant of the house. Both Ms Maloney and Mr Tubman acknowledged that they were aware that the property was owned by a trust and that the sale was in the context of a relationship break up. However, they said that the other owners of the property acquiesced in Mr King giving instructions to the appellant.

[26] The areas of acquiescence that Mr Napier highlighted were:

[a] None of the other co-owners gave any instructions to the appellant;

[b] At no stage did any of the other co-owners seek to countermand any directions given by Mr King;

[c] Mr King signed both listing authorities (general and specific);

[d] Mr King negotiated the sale price;

[e] The other co-owners signed the agreement for sale and purchase at the price that had been negotiated by Mr King.

[27] For the Complaints Assessment Committee Mr Hodge submitted that as a matter of fact there was no ostensible authority in this case. He agreed that none of the other co-owners gave any instructions to the appellant or took any steps to sign the listing authority or be involved in the marketing of the property. However he submitted that the obtaining of only Mr King's signature on the listing authorities was not acquiescence by the co-owners but rather an indication of a practice from Jenner that they were prepared to accept only Mr King's authority on forms. Further, he submitted that all three owners signed the agreement for the sale and purchase and thus it could not be argued that for the critical transaction (the sale) there was any ostensible authority given by the other trustees to Mr King to sign the agreement. Moreover there had been no previous history of dealings between Jenner Real Estate and Mr King or the other trustees. He submitted that this was the only property that Jenner had ever sold for the trustees and it was perfectly legitimate for the other trustees to allow Mr King to undertake the work in listing and marketing without in any way acquiescing to the payment of the deposit monies directly to a third party. In his submission this was especially so circumstances where Jenner were aware that this was a relationship break up. He argued that this should have made Jenner aware that Mr King did not have ostensible authority to act on the trustees' behalf.

Discussion

[28] Ostensible authority is essentially a question of fact to be determined from the circumstances of the transaction and the parties dealing with each other. Jenner did deal with Mr King over the listing of the property, the marketing of the property and the negotiating of the sale price. However this is not unusual in many real estate transactions. The successful conclusion to a real estate transaction is when the property is sold and the monies are paid out. It is at this time when the utmost care needs to be taken by an agent. When dealing with money which belongs to all the vendors an agent has an obligation to ensure that the utmost care is taken. It is not, in the Tribunal's opinion sufficient to argue the facts outlined above amount to a course of dealing where the owners have acquiesced to Mr King being the sole contact and giving all directions. There was nothing in the dealings between Jenner and Mr King that in any way indicated that the other owners of the property would acquiesce to a payment out of monies to Mr King or a third party directly. Indeed the payment was made in circumstances where Jenner knew that it was a relationship break up and where all three trustees had signed the agreement for sale and purchase. Further the request for payment out was made immediately that the sale became unconditional and to an unrelated party. In these circumstances we find that there was no ostensible authority given to Mr King which could be relied upon by Jenner.

[29] The Tribunal however does not have a completely full evidential picture of the circumstances surrounding the involvement of Ms QS in the sale process. In a letter that her solicitor wrote to the REAA she claims that she asked Ms Maloney to keep her advised of the details of the sale. She says she joked with Ms Maloney that Mr King had made out that he was the owner of the property. Ms Maloney cannot remember the latter part of the conversation or really the transaction at all. However Mr Napier informed the Tribunal that the evidence that Ms QS had asked to be kept informed of the details of the sale was contested by Jenner.

[30] However even without this evidence the Tribunal still do not find there was ostensible authority in accordance with the principles enunciated by the Court of Appeal in *Savill v Chase Holdings (Wellington) Limited* [1989] 1 NZLR 257305.

Issue Three – Has there been a breach of s.122?

[31] The Tribunal finds that there has been a clear breach of s.122 by Jenner. The evidence before the Tribunal shows a very casual approach to ensuring payment was made to those properly entitled to it. Why did Jenner have the purchaser's solicitor consent to payment but not the vendor's solicitor? Why did Jenner not have all vendors sign the consent to release payment especially in circumstances where the deposit was sought almost immediately the agreement became unconditional? The only conclusion which the Tribunal can draw from the answer to these questions is that Jenner failed to take the appropriate steps to comply with ss.122 and 123.

Issue Four – Penalty

[32] Mr Napier argues that the Complaints Assessment Committee erred ordering payment to that trust. He submitted that the payment of $137,607.99 did not rectify Jenner's omission but rather enriched the joint owners by $137,607.99. He argued that Ms QS was clearly in a property dispute with Mr King. He submitted that if the arguments advanced by Mr King's solicitors were correct then the monies were paid to an entity that was owed $137,607.99 by the joint owners of the property thereby discharging the joint owners' obligation. Thus he submitted their debt was

discharged and the trustees received a windfall of $137,607.99. In the alternative he submitted that the payment would be treated as monies paid for Mr King's benefit under the Property Relationships Act and thus the wrongful payment would reduce Mr King's share of the relationship property. Thus any further payment would be another windfall for the trustees.

[33] Both parties referred to the decision of *Ellison v Scott* (CIV 2009-470-1153, 19 August 2010 Tauranga High Court, Potter J) in which the High Court pointed out that a trust has no separate legal entity, and it can only act through the offices of its trustees who are themselves liable for the transactions entered into by the trust (although this liability can be limited to the assets of the trust).

[34] It is correct that the trust has no separate legal entity and that the trustees own the property. However while legal owners, they hold it for the benefit of the beneficiaries, and must account for the proceeds of the sale to the ultimate beneficiaries. Therefore payment of $137,607.99 to the trustees is not unduly enriching them personally but rather putting them in the position that they would have been in had there been no breach of s.122 by Jenner.

[35] There is initially some attraction in Mr Napier's argument that as Mr King (or one of his entities) was paid the $137,607.99 a payment to all three trustees including Mr King would unduly enrich him. However it is far too simplistic to treat the proceeds of sale as part of the couple's relationship property in a global sense and to assume that the trust property will be treated globally with all other relationship property when resolving matters. The provisions of the Property Relationships Act make it clear that a property owned by a trust is not relationship property unless s.44 applies. Compensation may be paid under s.44 for property transferred to a trust but it is still trust property. We have no knowledge of the way in which parties have resolved their relationship property and whether the $137,607.99 was or will be deducted from any share of relationship property that Mr King might receive.

[36] It is the trustees jointly who suffered a loss. Mr King's beneficial share of that trust, if any, cannot be determined by the Tribunal and must be determined by the trustees and/or the High Court. Clearly any wrongful diversion of trust money by a trustee is a breach of trust and can lead to the removal of Mr King as a trustee. Further it is not possible to say that by ordering payment of $137,607.99 Mr King personally will be benefitting from his wrongdoing. Mr King, the trustee will benefit but as set out above, we are uncertain as to what his beneficial interest in the trust property might be and whether he is a discretionary or final beneficiary. Further, in the Tribunal's view the emphasis by the Complaints Assessment Committee was correctly focused on the issue of rectification by Jenner of its mistake not on compensation. But even if it had been, the order that the money be paid to the trustees it would have been an appropriate order. This part of the appeal must fail.

[37] Further the alternative argument that only half the sum ordered should be paid to Ms QS must fail. The trust (via the trustees) has suffered loss, not Ms QS personally. A payment of half would treat the trust monies as relationship funds and this is not the correct legal position.

Issue Five – How should the appeal be resolved?

[38] Having considered all of the evidence the Tribunal considers that there is prima facie evidence of misconduct pursuant to s.73 by Jenner Real Estate. The Tribunal

were not impressed by the evidence given by Ms Maloney who appeared to have forgotten the entire transaction and seemed unconcerned at the problems which arose in this case. Real Estate agents and agencies cannot be so laissez-faire with trust money. Further trust account monies should not be vulnerable to the type of careless behaviour that Mr Tubman acknowledges went on. There appears to be an error in supervisory oversight of the agency by the manager of the office. In the Tribunal's view the seriousness of these issues possibly extend beyond unsatisfactory conduct.

[39] In the Tribunal's view the appropriate decision for the Complaints Assessment Committee was to determine to lay a charge so that the Tribunal could consider all of the available evidence including hearing properly from Ms QS and understanding better the chain of events that took place between 8 and 12 September which led to the payment out of the monies.

[40] Pursuant to s.111 Real Estate Agents Act the Tribunal may modify, reserve or uphold the decision on the Complaints Assessment Committee. The Tribunal can exercise any power that the Complaints Assessment Committee could exercise (s.111(4) and s.111(5)). The Committee may only make findings and orders under s. 72. Thus the Tribunal cannot itself impose an order that findings of misconduct be made under s.73 in the absence of a charge. The Tribunal considers that it is very important to the proper and efficient running of the real estate businesses that agents understand their trust account obligations and be seen to be maintaining the highest appropriate standards in management of clients' money. By analogy lawyers' mishandling or carelessness with trust account has always been a serious matter.

[41] Accordingly the Tribunal modify the decision of the Complaints Assessment Committee by determining that the Complaints Assessment Committee should have referred a charge to the Tribunal. Pursuant to s.89 the Committee may determine that the complaint be determined by the Tribunal and then under s.91 frame an appropriate charge. Thus the Tribunal may exercise these powers to draft an appropriate charge.

[42] The charge that the Tribunal considers appropriate is:

[a] That in breach of ss.122 and 123 Jenner Real Estate paid out to a third party monies held on behalf of the trustees Mr King, Ms QS and Vallant Hooker Trustees Limited without authority to do so;

[b] That the trust account management and control of the trust account Jenner Real Estate was inappropriate or inadequate in that it enabled payment of trust monies to be made without appropriate authority;

[c] And/or that Jenner Real Estate was careless and/or negligent in the carrying out of its duty in that having written to the solicitors acting for the vendor it paid out monies to a third party without taking reasonable steps to ascertain from the solicitors for the vendor or the vendors that the payment was appropriate.

[43] The Tribunal refers this matter back to the Complaints Assessment Committee for this charge to be submitted in writing and filed and served in accordance with s. 91.

[44] The interim suppression orders are discharged. The Tribunal orders publication of this case and the name of the agency (but not the complainant) pursuant to s.108.

Rights of Appeal

[45] Pursuant to s.113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s.116 of the Act.

DATED at WELLINGTON this 22nd day of November 2011

_____
Ms K Davenport
Chairperson

_____
Mr G Denley
Member

_____
Mr J Gaukrodger
Member