

Decision No: [2012] NZREADT 15

Reference No: READT 037/11, 044/11 &
045/11

IN THE MATTER OF an appeal under s 111 of the Real Estate
Agents Act 2008

BETWEEN **DELAWER HOOSAIN KUMANDAN**

Appellant

AND **REAL ESTATE AGENTS AUTHORITY
(CAC 10003)**

First Respondent

AND **SHIV PAUL**

Second Respondent

AND

IN THE MATTER OF two charges laid under s 91 of the Real
Estate Agents Act 2008

BETWEEN **REAL ESTATE AGENTS AUTHORITY
(CAC 10003)**

AND **DELAWER HOOSAIN KUMANDAN**

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport – Chairperson
Mr J Gaukrodger – Member
Ms J Robson – Member

APPEARANCES

Appellant in person
Mr M Hodge for the first respondent

Summary of Complaints

[1] In August 2009 Mr Delawer Kumandan was employed as an agent with Harcourts, Howick (Eastzone Realty Limited). Complaints have been made about two of the transactions that he undertook during this time. The first complaint is from a Shiv Paul.

[2] Mr Paul claims that a Mr Shah of First National, Papatoetoe had been engaged by him as an agent to sell three properties he owned at 109 Wordsworth Road, Manurewa, 149 Coxhead Road, Manurewa and 49 Countryhaven Road, Hawera. Mr Shah contacted Mr Paul to tell him that Mr Kumandan had suggested that he could swap these three properties for one property situated at 41 Maungarei Road, Remuera. This property was listed for sale by Mr Kumandan on behalf of a Sophia Khan. After discussions on 23 July 2009 Mr Shah signed an agreement to purchase the Remuera property for \$880,000 with a deposit of \$50,000 payable to Harcourts in acceptance of the agreement. This agreement was subject to the proviso that it was to settle contemporaneously with the second agreement Mr Paul signed. In this second agreement he agreed to sell the three properties to S K Estates Limited (Sophia Khan) for \$830,000 with no deposit payable. Again the agreement provided that it was to settle contemporaneously with the Remuera agreement. Mr Kumandan was the selling agent in the first agreement [Remuera]. Mr Paul paid the \$50,000 deposit by two cheques to Harcourts. In August 2009 Mr Paul's solicitors received a request from Harcourts that the \$50,000 deposit be released to Ms Khan early. Mr Paul says that his solicitor advised Harcourts that the deposit was not to be released early. In late August a meeting was held with Mr Kumandan, Mr Shah, and Mr Paul at 139 Dominion Road. Mr Shiv complains Mr Kumandan told him that Ms Khan wanted to settle the agreement early and needed the \$50,000 deposit to be released to enable her to settle another unrelated property transaction first. Mr Paul claimed that Mr Kumandan told him that Ms Khan had a lot of properties and could be relied upon to settle the purchase of his three properties.

[3] Mr Paul took advice from his solicitor who advised him not to release the deposit until the agreement was settled. Ms Khan then came to see Mr Paul and spoke to him in Hindi. She told him that she was a real estate agent and owned a lot of property. She said that would give him a personal guarantee if he agreed to the release of the deposit to her. Mr Paul then instructed his lawyer to prepare a loan agreement for the deposit. A loan agreement was prepared with an agreement to mortgage. This was signed by all parties on 3 September 2009 and witnessed by Mr Shah and Mr Kumandan. Mr Paul claimed that at the time this agreement was signed, Mr Kumandan gave his personal guarantee that he should not worry and he would not lose any money and that if anything happened he would be able to claim this money back 'straight away'. The deposit was released to Ms Khan but she did not settle on the agreed date and the two agreements have still not settled. Mr Paul received a refund of \$12,000 from Harcourts (their commission) but the balance of the \$38,000 remains unpaid. He is pursuing Ms Khan.

[4] On the basis of this complaint, the Complaints Assessment Committee determined pursuant to s 89(2)(a) to lay a charge against Mr Kumandan.

[5] This charged Mr Kumandan with misconduct under s 73(b) of the Real Estate Agents Act.

Particulars

- Assurances given by the defendant to the complainant that if he released the deposit early to Sophia Khan, the vendor of the property he was purchasing at 41 Maungarei Road, Remuera, Sophia Khan would have no difficulty in settling the sale of the property to the complainant.

[6] Mr Kumandan lodged a Notice of Appeal immediately against the decision of the Complaints Assessment Committee. Accordingly the Tribunal has before it Mr Kumandans appeal and the charge.

Second Complaint

[7] A similar situation arose in respect of the second complaint made by David Clifton. Mr Clifton's complaint was that in late August 2009 he discovered that Mr Kumandan had prepared a false document. The allegation was that in respect of a sale at 3207 Great North Road, New Lynn he had altered a document sent to the solicitor acting for all parties (or two documents) to make it appear as if these transactions had settled when in fact neither had settled.

[8] Mr Clifton who was a director of Eastzone Realty Limited made the complaint in November 2009. The Complaints Assessment Committee 10003 decided pursuant to s 89(2)(a) of the Real Estate Agents Act 2008 to lay a charge before the Tribunal.

[9] In April 2011 the Committee "*charged Mr Kumandan with misconduct under s 73(a)*" of the Real Estate Agents Act in that his conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.

Particulars

- On or about 18 August 2009 the defendant created a false document, namely a Settlement Notice being either the settlement notice 3 August 2009 in respect of the sale of 3207 Great North Road by A Prasad to D Riedel, or the settlement notice dated 18 August 2009 in respect of the sale of 3207 Great North Road by D Riedel to G M Chetty or nominee.

[10] Mr Kumandan advised the Tribunal that he had appealed this but the Tribunal records show no appeal from this decision. However the Tribunal will proceed on the basis that Mr Kumanden has appealed both the Clifton and Paul decisions by the CAC.

The Tribunal's Issues

There are a number of issues for the Tribunal as follows:

- (i) What is the proper procedure for dealing with the two appeals and two charges?
- (ii) The complaint by Paul Shiv – should Mr Kumandans appeal be upheld or has the charge been established by the Complaints Assessment Committee on the balance of probabilities?
- (iii) The complaint by Mr Clifton – should Mr Kumandans appeal be upheld or has the charge been established by the Complaints Assessment Committee?

Issue 1 – Proper Procedure for dealing with appeals

In the READT decision of *Brown v CAC* [2011] READT 42 the Tribunal determined that the appropriate way of dealing with an appeal from a decision to lay a charge where a charge had already been laid was to treat the appeal as requiring the Tribunal to determine whether there was a *prima facie* to answer. If the Complaints Assessment

Committee can cross this threshold or alternatively Mr Kumandan show that this threshold ought not to have been crossed then the appeal will succeed. If the *prima facie* case is established then the Tribunal will go on to consider the charge. The Complaints Assessment Committee has the burden of proof to establish the charge on the balance of probabilities. However as the Supreme Court said in *Z v CAC* [2008] NZSC 55 the Tribunal needs to be satisfied that there is more evidence for more serious allegations.

[11] The Complaints Assessment Committee filed all of its evidence in respect of both charges prior to the hearing. The Tribunal had an opportunity of reading these papers before the hearing. At the commencement of the hearing the Tribunal advised Mr Kumandan that the Complaints Assessment Committee had established that there was a *prima facie* case to show that both charges should have been laid. The Tribunal invited Mr Kumandan to make submissions as to why he considered that there was no arguable case. Mr Kumandan advanced a number of procedural defects that he asserted had happened in the way that the Complaints Assessment Committee had dealt with the two complaints. He said that the Complaints Assessment Committee had not properly looked at the evidence he had presented and had not considered charges potentially against other persons complained of.

[12] The Tribunal advised him that they did not have jurisdiction to consider these procedural errors and the only way that they would be cured would be by the hearing progressing with Mr Kumandan having the opportunity to put before the Tribunal all evidence that he thought was relevant. On that basis the Tribunal dismissed the appeals. It upholds the decisions of Complaints Assessment Committee 10003 in respect of both the complaint by Mr Shah and by Mr Clifton. We now turn to consider each charge in turn.

Issue 2 – The complaint of Shiv Paul

[13] We set out above the claims of Mr Paul. The Complaints Assessment Committee called evidence from Mr Paul, Dymple Shah, the other real estate agent involved in the transactions and Ms Sylvia Whitney an administrator then working for Harcourts. Mr Kumandan called Sophia Khan, and then gave evidence himself. Mr Shah confirmed the transaction as outlined by Mr Paul and that the deposit was released after an agreement was reached between the solicitors for Mr Paul and Ms Khan about a loan agreement and mortgage documents.

[14] Mr Shah said that he did not know of any discussion with Mr Paul about the ability of Ms Khan to complete the transaction. He claimed that the only discussion about Ms Khan and her financial position was at the beginning of the deal when Mr Paul was introduced to the agreements. He said that there was no discussion at the time the loan agreement was signed. Ms Khan disputed that she had signed the agreement (to lend at all). She also disputed the reason for the transaction not settling claiming that it was Mr Paul's fault that it had not settled. She said no assurance was given to Mr Paul. Mr Paul's oral evidence was equivocal on the time when this assurance was given and the way. Mr Kumandan denied that he made any statement to Mr Paul.

[15] We have considered all of the evidence and we determine that the Complaints Assessment Committee has not established this charge to the requisite level of proof i.e. balance of probabilities. There was insufficient evidence to establish the statements in the charge were made, and when. At the time Mr Paul was represented by a solicitor and after discussion with his solicitor made the decision to enter into a loan agreement

which Ms Khan duly signed. Therefore the charge against Mr Kumandan in respect of the complaint by Mr Paul is dismissed.

Issue 3 – The complaint by David Clifton

[16] Mr Clifton's evidence was in relation to a transaction at 3207 Great North Road, New Lynn, Auckland. In May 2009 Great North Road Investments (NZ Limited) listed the property for sale with Mr Kumandan as sole agent. The agreed commission was \$12,000.

[17] On 10 June 2009 Great North Road Investments entered into an agreement to sell this property to Desray Riedel for \$580,000 with a \$12,000 deposit payable upon the agreement being declared unconditional. This agreement was somewhat unusual in that Clause 9.4 (a clause that gives the vendor remedies to cancel or sue if the agreement does not settle) had been crossed out and initialled. The deposit was paid to Mr Kumandan, who took his commission.

[18] On 22 June Mr Kumandan on-sold the property with Ms Riedel selling the property for exactly the same price to a G M Chetty or nominee. The deposit and commission were again \$12,000. The possession date was 31 July 2009. Ms Whitney, then the administrator at Harcourts told the Tribunal that in August she began to chase up the solicitor acting for all parties on all transactions (Mr Naidu) as to whether or not the two agreements had settled. She faxed to Newton Law two documents called "*Confirmation of Settlement*", one dated 3 August 2009 for the sale from Prasad to Riedel and one dated 18 August 2009 for Riedel to Chetty or nominee. Both these documents she told the Tribunal had a blank space at the bottom where the vendor's solicitor would sign, date and return them to Harcourts.

[19] Ms Whitney told the Tribunal that she did not hear from Mr Naidu and asked Mr Kumandan to get the confirmation forms signed. She said "*he told me that he was going to see Mr Naidu and so would get them signed*". She said that one or two days later Mr Kumandan returned the two files to her with the signed acknowledgements – these documents are Exhibits 3 and 4. They are both dated as being signed 18 August 2009 and with a signature and the name "*V Naidu*" on them.

[20] Later on the day that the files were returned to her or sometime the next day she went to the photocopier and discovered a "*confirmation of a settlement*" fax on the table next to the photocopier. Stuck onto the fax with a piece of sellotape it was a smaller cut out piece of paper with the date, name and signature of V Naidu on it. She showed Ms Fowler (the sales manager) and two other staff. Later in August she received a fax relating to this property from a Mr Ram, a barrister. He claimed that the agreement was never going to settle and that the vendor had been "*misled, deceived and misrepresented*" by Harcourts.

[21] Ms Whitney took this letter to Mr Clifton and told him about the document that she had found by the photocopier. She later attended a meeting with Mr Clifton and Mr Viall, [another director of Eastzone] and Mr Kumandan in which she relayed this story again. In cross examination Mr Kumandan challenged Ms Whitney and suggested that she had created the document herself to cover up her own shortcomings. She denied this and she also denied that it was not she who had found the document.

[22] The Tribunal heard from Sherie Bird another former Harcourts employee who confirmed that in late August 2009 Ms Whitney had approached her and shown her a

document, which in her opinion looked like someone had stuck one document on top of another.

[23] Christine Fowler, the branch manager of Eastzone denied that she was aware of the significance of the document when Ms Whitney showed it to her and said that she was on holiday when Mr Kumandan was seen and then dismissed. She told the Tribunal however that Mr Kumandan came back into the office after she returned from leave and said that "*it had just been one silly mistake*" Ms Fowler said she knew what that meant (i.e. the forgery). Mr Kumandan's evidence was that the silly mistake related to the letter from Mr Ram.

[24] Mr Graham Viall told the Tribunal that he attended the meeting with Mr Clifton and Mr Kumandan in late August 2009. He said that he looked at the Exhibits 3 and 4 and it appeared to him that the signatures and dates on both confirmations of settlement were identical. He said that he had a meeting with Mr Kumandan where he denied forging the documents. During this meeting Mr Clifton went out of the room and then Mr Kumandan nodded his head and accepted that he had forged the documents, saying that he had to do it as he had been unable to do real estate business with New Zealanders and had to do complicated business dealing with other recent New Zealand immigrants.

[25] Mr Clifton told a very similar story saying that he spoke to Mr Kumandan with Mr Viall. He said that Mr Kumandan denied the forgery while he was in the room but after he returned Mr Viall told him that Mr Kumandan had admitted to it. He said Mr Kumandan had been crying when he returned to the room. Mr Clifton said Mr Kumandan acknowledged that he had done this by nodding his head. He said that Mr Kumandan offered to have the letter from Mr Ram withdrawn immediately. Subsequently another letter was received from Great North Road Investments saying that no money was claimed from Harcourts and this was later confirmed by Mr Ram. Mr Kumandan's contract of employment was terminated on 2 September 2009.

[26] Mr Kumandan denies any wrongdoing in respect of these documents. He said that he puts the Complaints Assessment Committee to proof. He claims that it was not him that forged the documents and that he felt that the only explanation was that Ms Whitney was trying to frame him because she was facing administrative difficulties and was under pressure to perform her job at Harcourts. Under cross examination Mr Hodge put to Mr Kumandan a letter written by Mr Ram (an owner of the property) to their financiers. This said that mortgagee sale proceedings in respect of Great North Road could now be halted because they had entered into an unconditional Agreement for Sale and Purchase of the property with an independent agent which was an arms' length transaction. He referred to the first agreement to sell the property. It is interesting to the Tribunal that the same solicitor acts for both vendor and purchaser but there have been pains taken to disguise this fact. The solicitor for the vendor is shown on the agreement as "*Poonam Agaval*" at Box 27-353, Auckland. The purchaser's solicitor was shown as Newton Law (Mr Naidu) 666 Dominion Road, Mt Eden. In fact Ms Agaval was a legal executive in the office of Newton Law whose box number is shown on the agreement. Their physical address is as shown for the purchaser's solicitor. A similar notation is written on the second agreement, although Ms Agaval acts for the purchaser and Mr Naidu for the vendor. Mr Naidu is the only qualified lawyer at Newton Law.

[27] The investigator with the Real Estate Agents Authority said he spoke to Mr Naidu. He told the Tribunal that Mr Naidu eventually sent him an e-mail (Document 50). In this

e-mail Mr Naidu says he does not have copies of the confirmation of settlement with documents in his file and confirmed that both the sales had fallen through. He said *“when the sales had fallen I recall Delaware visited my office once, asked me to sign a few forms to say that the agreements must come to an end so that Harcourts can close their files. The forms seemed to be in my signature and my writing. Delaware must have slipped the wrong forms (Harcourts pre-printed) to me which I may have signed in error thinking I was signing to confirm that the sales had fallen. I thought at all material times Harcourts was aware that the sales did not proceed. I hope this clarifies the issue”*.

[28] The Tribunal also heard from a handwriting expert Linda Morrell. She is a forensic examiner and she looked at both acknowledgements. She took a transparency of one document and placed it on top of the other. She found that the documents were identical from the phrase *“could you please confirm”*, including the date, signature and name of the lawyer. She said the manipulation of the document in this way is commonly called a *“cut and paste”*. She said that there was a partial broken line at the bottom right hand side of the 3 August document which was not present on the 18 August document. She said that the overall quality of the 3 August document is slightly less and that the entries are slightly misaligned. She considered that the 3 August document is most likely to have been a manipulation of the original 18 August 2009 document. She felt that the broken line on the 3 August document was an indication that something had probably been placed on top of the document before it was photocopied again.

[29] The Tribunal needs to be satisfied on the balance of probabilities that Mr Kumandan did in fact forge the documents. That somebody forged them seems to be without doubt. The real issue in this case is who was it and more particularly has there been sufficient evidence to show that Mr Kumandan was the forger. Mr Kumandan suggested Ms Whitney did it.

[30] This is clearly a case where credibility of Mr Kumandan is an important issue for the Tribunal. The Tribunal’s approach to credibility issues was summarised in a decision of another disciplinary Tribunal, the Health Practitioners Disciplinary Tribunal in *Dawson*, Decision 300/Nur09/139P to paras 19 – 21. There the Tribunal said:

“20. What is involved in any test for ‘credibility’ was articulated by a Canadian Appellate Court (in Farynia v Chorny [1952] 2 DLR 354 (BCCA) to be that the real test of the truth of the story of a witness must be at harmony with the preponderance of the probabilities which are practical and which an informed person would readily recognise as reasonable in that place in those conditions.

21. So, the Tribunal, where relevant, must consider such factors as:

21.1 The witness’ manner and demeanour when giving evidence.

21.2 Issues of potential bias – to what extent was evidence given from a position of self interest.

21.3 Internal consistency – in other words was the evidence of the witness consistent throughout, either during the hearing itself, or with regard to previous statements.

21.4 *External consistency – in other words, was the evidence of the witness consistent with that given by other witnesses.*

21.5 *Whether non advantageous concessions were freely tendered.”*

Discussion

[31] Taking into account all these matters we consider that two agreements do seem to have been put together for the purposes of convincing Great North Investment's bankers that there was a legitimate sale with a deposit paid for it and organised by a legitimate agent. It certainly seems as if these agreements, both of which purported to be unconditional, were in fact never intended to settle. The very unusual deletion of Clause 9.4 in the first agreement makes it unlikely that the agreements were ever intended to create binding legal obligations and certainly no one has advised the Tribunal of any attempt to enforce these agreements. The only person who seems to have financially benefited is Mr Kumandan who received two lots of commission.

[32] Mr Hodge submitted that there was no basis for a conclusion that anyone forged the documents other than Mr Kumandan. He submitted that Ms Whitney would have no reason to do so because she brought the documents to people's attention. He submitted that if she was a forger then she would simply have put them on the file and filed them away as closed. He submitted that Mr Kumandan had clear incentives to make the forgery. He said at the minimum there were enough oddities with the transactions for 3207 Great North Road that anyone would have questioned it. He said that Mr Kumandan would not have wanted this and his best method of dealing with this was to ensure closure of the files and an end to any enquiries about the transaction.

[33] It is important for the Tribunal to ensure that we assess the evidence as best we can to determine whether we are convinced (on the balance of probabilities) that this serious matter has been made out on the facts that are put before us. In *Z v CAC for Dental Council* [2008] NZSC 55, the Court rejected the concept of a sliding scale of proof but the Tribunal must still be satisfied that serious allegations are proved by sufficient evidence.

[34] From the evidence that we have heard that from late August 2009 the directors of Harcourts Howick were convinced that Mr Kumandan was the culprit. Both Ms Fowler (who supported Mr Kumandan) and Mr Viall claim that Mr Kumandan admitted the wrongdoing. There is documentary evidence to show that the documents were forged. What the Tribunal has to be satisfied is the link between the forgery and Mr Kumandan. We consider that there is sufficient evidence to make the causal link. We reach this conclusion because of our acceptance of Mr Viall and Mr Clifton's evidence. Mr Kumandan's statement to Ms Fowler ("*one silly mistake*"), the evidence of Mr Naidu and the very dubious nature of the two transactions. It is our view that Mr Kumandan did not want scrutiny for the two sales. The only person who received a financial gain was Mr Kumandan who (apparently) received \$24,000. The complaint of Mr Ram was immediately withdrawn after Mr Kumandan made calls to the owners, Mr Kumandan himself put in to the Tribunal the letter to the company's bankers about the ending of the mortgagee sale from the vendors. An agent would not normally have access to such correspondence. Further it is our view having heard Mr Kumandan that he was not strictly truthful with the Tribunal. We do not accept that Ms Whitney could have been the culprit – there was simply no reason why she would and her actions also do not support this assertion.

Conclusion

[35] After having considered all of the evidence and the submissions of the counsel and Mr Kumandan, together with our own assessment of the evidence we have concluded that on the balance of probabilities that we find this charge established.

[36] We now invite Mr Kumandan and the Complaints Assessment Committee to file submissions on the penalty. The submissions for the Complaints Assessment Committee to be filed within 10 days of the date of this decision, Mr Kumandans penalty submissions in reply 10 days thereafter and any comments that the Complaints Assessment Committee wish to make on Mr Kumandans submissions must be filed two days thereafter but *must be strictly in reply*.

[37] 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 AUCKLAND this 5 day of April 2012

Ms K Davenport

Ms K Davenport
Chairperson



Mr J Gaukrodger

Mr J Gaukrodger
Member

Ms J Robson

Ms J Robson
Member