BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision no: [2012] NZREADT 39

Reference no: READT 55/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**ROBERT JAMES McLACHLAN**
	Applicant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10048)**
	First respondent
AND	**GRAEME HEGAN**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at INVERCARGILL on 4 July 2012

DATE OF THIS DECISION: 20 July 2012

REPRESENTATION

The appellant on his own behalf with Mr P J Francis, as a McKenzie friend
Mr M R Walker, counsel for the Authority
Mr D J Pine and Ms Ashley-Jane Lodge, counsel for second respondent licensee

DECISION OF THE TRIBUNAL

The Nature of this Case

[1] This is an appeal by a vendor complainant, Robert James McLachlan (the appellant), against the decision of Complaints Assessment Committee 10048 (the Committee) to take no further action on his complaint against licensed salesperson, Graeme Hegan, (the licensee). Essentially, the appellant maintains that the licensee

failed to properly brief a replacement real estate firm on existing prospective purchasers so that the appellant was placed in double commission jeopardy. Accordingly, the appellant seeks that we find the licensee guilty of misconduct from the facts we set out below.

Background

[2] The appellant owned a property for sale at 35 Tiwai Road, Woodend, Invercargill. The licensee, as an employee of MacPherson Realty Ltd (MacPherson) was the agent for the property under an exclusive 90 day listing agreement of 7 January 2010. At Mr and Mrs Fisher, who were the eventual purchasers, showed an interest in the property and made an offer through MacPherson in March 2010, but their offer was not accepted.

[3] The exclusive 90 day agency period expired in early April 2010 and the listing became a general agency with MacPherson. While this was operating, MacPherson received a notice of cancellation from the appellant and his wife through PGG Wrightson Real Estate Ltd (Wrightson) on 20 May 2010. This was to take effect seven days after receipt i.e. on 28 May 2010. The cancellation notice required MacPherson to give Wrightson the names and current state of negotiation of any prospective purchaser MacPherson was then dealing with. MacPherson did not provide Wrightson with any such information.

[4] A new sole and exclusive agency listing was entered by the appellant (and his wife) with Wrightson on 20 May 2010. The Fishers approached Wrightson on 21 May 2010 about the property and made an offer which led to them and the vendors signing a sale and purchase agreement on 1 June 2010 apparently at $330,000.

[5] MacPherson's barrister wrote to the appellant on 25 August 2010 claiming that, as vendor, he owed MacPherson commission of $16,425 because the Fishers had been introduced to the property by MacPherson. The appellant also alleges that, in sending such a letter via his barrister, the licensee did not follow REINZ prescribed protocol.

[6] The appellant further alleges that the licensee entrapped him into breaching the terms and conditions of the agency agreement of the appellant and his wife with MacPherson (dated 1 October 2009) given that the licensee, allegedly, explained to the appellant in May 2010 that he was then free to sell the property to whomever he pleased. The appellant further alleges that the licensee breached several REINZ rules, the Real Estate Agents Act 2008 (the Act), and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the Rules).

The Committee's Decision

[7] The Committee found that the appellant had sufficient time to *"thoroughly"* read the listing agreement of 1 October 2009 with MacPherson. It did not consider that there was enough evidence to substantiate allegations that the licensee's direct advice to the appellant conflicted with the Act and the Rules.

[8] Also, the Committee noted that *"in essence this complaint is about the payment of a commission"* so that it was a *"contractual issue of a commercial nature"* and was not a disciplinary action which could be dealt with under either ss.72 or 73 of the Act which respectively define *"unsatisfactory conduct"* and *"misconduct"* by a licensee.

[9] The Committee concluded that the appellant's allegations did not meet the test for unsatisfactory conduct and determined under s.89(2)(c) to take no further action.

Issues

[10] We accept that the licensee's conduct in charging for his commission after the property had been sold by Wrightson is a contractual issue to be determined on the basis of the licensee's agency agreement with the appellant. However, the issue of the licensee's legal entitlement to commission does not preclude us from considering whether, in all the circumstances, any disciplinary issues arise out of the licensee's related conduct.

[11] If we decide on the facts that the licensee told the appellant that he was free to sell the property to whomever he wanted, without clarifying that commission would still be sought in respect of any introduction during the exclusive agency period, then the licensee's conduct raises disciplinary issues.

[12] We agree with counsel for the Authority (Mr Walker) that clear communication is essential in relation to liability for commission when arranging for or terminating agency agreements, because of the risk to the consumer of liability for a double commission.

[13] Mr Walker referred us to *Robyn Cruickshank and Ken Walker*, a 4 November 2011 decision of Committee 10044, that a licensee is under an obligation to explain the obligations and liabilities a vendor has when engaging two agents from separate firms under different listings with each firm. Inter alia, the Committee said:

> *"While Rule 9.11 is directed at sole agency agreements, we note that Rule 3.3 provides that the Rules set minimum standards, and that they are meant to be a point of reference."*

[14] And further:

> *"4.21 The Committee has seen a number of cases where customers have got caught up in commission disputes. Licensees, who have a monopoly to sell real estate, can be expected to have a good knowledge of the principles of instrumentality of sale. Laypeople are unlikely to have such a knowledge. That puts them at a decided disadvantage. This is consumer protection legislation, which is designed to provide clients and customers with a degree of protection in such circumstances."*

[15] While this case can be distinguished on the facts, these general statements of that Committee are correct and are relevant in the present case.

[16] It is a matter for us whether to confirm the Committee's decision to take no further action or whether the licensee's conduct, as proven, falls within any of the provisions of ss.72 (unsatisfactory conduct) or 73 (misconduct).

A Summary of Relevant Evidence of the Appellant

[17] By consent, the appellant gave evidence by telephone from Iceland but had filed written evidence also.

[18] On 1 October 2009 the appellant signed a listing agreement with the licensee's firm MacPherson Realty Ltd. The licensee was then on leave and Ms Sally Cooke of MacPherson dealt with the listing agreement as the licensee's assistant and seems to have done that in a thorough manner.

[19] The appellant did not seem to properly read the listing agreement and relied on Ms Cooke explaining it to him in layman's terms. There was quite some discussion about the commission rate because the appellant was concerned at its quantum, but he understood it was subject to negotiation when a purchaser was found. The appellant believed that the listing agreement was in standard form which seems to have been the case. The appellant emphasised that, at that meeting to deal with listing, it was not brought to his attention that he could be obliged to pay commission, merely, if any person introduced during the sole agency purchased the property.

[20] The licensee marketed the property in the usual way and seems to have gone to much effort. The ultimate purchasers, Mr and Mrs Fisher, first viewed the property on 15 February 2010 and seemed to remain extremely interested thereafter, but their offers and counter-offers were far too low from the appellant's point of view and the parties were relatively well apart over price.

[21] After a while, a registered valuation was obtained by the appellant as at 29 April 2010 and that assessed a value on the property of $345,000. The vendor had wanted $365,000 and, at one stage, seemed to be saying that the licensee refused to list the property at such a fixed price, but the licensee is sure there was no such direction given to him.

[22] In any case, as at April 2010 the Fishers would not offer more than $320,000.

[23] The appellant and his wife had become tired of the whole sale process and decided to take the property off the market and cancel the agency with MacPherson. That had expired as a sole agency in early April 2010 and was simply continuing as a general agency.

[24] There were various discussions between the appellant and his wife and the licensee. In particular, there was meeting between them on about 8 May 2010 by which time the appellant was thinking of placing the property on the market in late August 2010 either with the licensee, or privately, or with another agent. The appellant asserts that the licensee's response to that was that the appellant could now sell to anyone he chose. The appellant put it to the licensee that the appellant would like to pay him for his efforts to date and was very pleasantly surprised to find that no money was owing to the licensee at that point. The meeting terminated with the appellant being under the impression that he and his wife were free to sell the

property to anyone without any further obligation to the licensee, and the possibility that an obligation could arise if anyone introduced by the licensee *"ended up purchasing at a later date"*, as the appellant put it, never occurred to the appellant.

[25] There was a dramatic change to the plans of the appellant (and his wife) on 12 May 2010 because the appellant then received an important job offer to work in Iceland, decided to accept it, and so needed to sell the property very quickly. Apparently, on that day the licensee came, unsolicited, to endeavour to persuade the appellant's wife to make a counteroffer closer to the offer from the Fishers. The licensee was then told that the appellant and his wife were thinking of moving to Iceland.

[26] In that situation the appellant and his wife had discussions with his wife's father who is a real estate agent with the Wrightson group and the appellant's father-in-law suggested that the property be listed with Wrightson at a fixed price. Accordingly, on 16 May 2010 a Mr Jim Fortune of the local Wrightson branch listed the property. The listing agreement was formally signed on 20 May 2010 with Wrightson and a cancellation notice sent by Wrightson to the licensee that day. The appellant had gone to Wrightson as part of a change in strategy because he was desperate then to sell the property.

[27] In his oral evidence to us, the appellant emphasised that the licensee made it clear to him that he had no obligation to the licensee. He had put it to the licensee that he ought to pay him for all the marketing effort he had gone to but, he said, the licensee had made it clear that he was only entitled to remuneration if he sold the house.

[28] The appellant made it clear to us that, if he had understood that the part of the listing agreement or agency agreement dealing with fees had also covered that he was liable for commission if a person introduced by the licensee later purchased the property, he would never, he now says, have signed the initial agency agreement with MacPherson. He emphasised that in any case, with regard to the transition of the agency from MacPherson to Wrightson, he was led to believe by the licensee that no commission problems could arise.

[29] It seemed that the appellant has no complaints about the second respondent licensee or his marketing efforts except that they had not achieved the result of a sale at the time of Wrightson taking over, and that Wrightson were not briefed about the purchasing interest of the Fishers.

[30] The appellant emphasised that, throughout all his dealings with the licensee and his firm, it never occurred to him that he could be placed into a situation of liability for double commission; but he was surprised that he was not liable to reimburse the licensee in some way for his extensive marketing services. The appellant insists that the licensee told him he was free to list the property with anyone, or sell it privately, without the licensee being entitled to any commission.

A Summary of the Evidence of the Licensee

[31] In his evidence to us, the licensee covered the above basic facts.

[32] It seems that, at the time of listing with MacPherson, the licensee was away on holiday so that his personal assistant, Ms Cooke, actually attended on the appellant to list the property and provide the appellant with copies of the sole agency agreement.

[33] Matters then seemed to follow a normal course and the first formal offer from the Fishers' came at $310,000 on 31 March 2010 but the appellant rejected that. As at 22 April 2010, the Fishers had raised their offer to $320,000 but that was also rejected by the appellant. Due to the mismatch in the views of the appellant and the Fishers as to price, the licensee suggested the valuation referred to above which came in at $345,000 on 29 April 2010. Nevertheless, the Fishers would not increase their offer of $320,000.

[34] On about 18 May 2010, the licensee felt that the Fishers might increase their latest offer and went to the appellant's wife suggesting that she counter-offer at $335,000. He felt that, if she did, he could lever the Fishers up to $330,000. However, the licensee was told that the appellant (as vendor) would not consider an offer below $360,000 and that he was considering listing the property with Wrightson at an asking price of $365,000.

[35] The response of the licensee was to tell the appellant that he was free to list with another real estate company as the MacPherson exclusive listing authority had expired. The licensee then said in his evidence-in-chief:

> *"(34) I did not make any comment regarding fees or costs. I did not tell the appellant that there were no fees or obligations. I am fully aware that our listing agreements allow MacPhersons to claim commission when any buyer introduced by me ends up purchasing the property, even if the purchase is made through another real estate company or privately by the vendor."*

[36] Indeed, the licensee added that he was extremely conscious of his obligations as he had just undertaken an extensive refresher course in terms of the requirements of the Real Estate Agents Act 2008.

[37] The licensee said that he advised the Fishers that the appellant would not consider an offer below $360,000 and the Fishers indicated they were not prepared to take negotiations any further at that point in time. He then covered that he received a cancellation notice from PGG Wrightson Ltd. This must have been about 20 May 2010.

[38] Importantly and commendably, he added as follows:

> *"(40) In hindsight I should have contacted PGG Wrightson Ltd at that point to discuss matters with them. The reason I did not do so was that in my mind the chance of a sale occurring between the appellant and the purchasers was slight given the two parties were still streets apart.*

(41) The appellant indicated that he would not accept an offer less than $360,000 and the purchasers had offered $320,000 although I was confident I could get them to $330,000.

(42) Based on this I did not consider I was currently working with any prospective purchaser which required notification under the cancellation notice."

[39] Of course, that assessment proved to be an error of judgement by the licensee.

[40] The licensee then explained that in about July 2010 he heard the Fishers had purchased the property so he sought legal advice. That resulted in a barrister sending a letter to the appellant on behalf of MacPherson requiring payment of commission and the licensee seemed to then regard the matter as a contractual dispute. We observe that the barrister's letter was rather bullish in tone. In any case, the appellant not only refused to pay the commission but lodged a complaint with the Authority on 5 October 2010.

[41] We think it is also to the credit of the licensee that, in the course of his thorough cross examination, he added the following:

"In hindsight I should have dealt with the Fishers' situation when we handed over to Wrightson. The parties were $40,000 apart. I thought I could get that difference to $30,000"

[42] Inter alia, the licensee made it clear that MacPherson would have given the appellant ample time to read the agency agreement of 7 January 2010 and would have explained salient aspects of it to the appellant and his wife. He admitted that the appellant would not have been warned of the possibility of a double commission as it would not have occurred to him, the licensee, that situation could arise.

[43] The licensee emphasised that, at the time of handing the agency over to Wrightson, he was convinced that all negotiations with the Fishers were at an end and could not be resurrected.

[44] It was put to the licensee that even though the Fishers were *"streets apart"* over price they were still *"active"* and very interested purchasers. He responded *"true, but the appellant and the Fishers were all headstrong and I felt they could never reach a deal at that point"*. It was put to him that perhaps a gap between $320,000 (it was actually put as at $330,000) and $365,000 was not that large a gap in all the circumstances. The licensee responded *"I should have let Wrightson know regarding the interest of the Fishers"*. He then added, rather puzzlingly, that the appellant had no reason from him to believe that he was free to sell but was entitled to believe that he was free to list.

[45] It is also to the credit of the licensee that, towards the end of his cross examination, he stated: *"I should have told Wrightson that the Fishers were very interested prospective purchasers."*

Outcome

[46] Upon completion of the evidence, we put it to the parties that, in terms of the rather candid and sensible admissions from the licensee upon hindsight, it would seem proper and professional for the parties to reach an agreed outcome in terms of the views we had come to. Very simply put, we consider that there has been a failure, or oversight, or error of judgement by the appellant in not advising Wrightson of the very real interest of the Fishers at all material times. Had Wrightson been properly briefed, we would like to think that a double commission situation would never have arisen as either Wrightson would have accepted that, if the Fishers purchased the appellant's property, there would only be one lot of commission and MacPherson would be entitled to it; or, one lot of commission would, sensibly and fairly, be shared between MacPherson and Wrightson.

[47] We think that failure of the licensee to properly and sensibly brief Wrightson led to this contractual commission issue. Although we can understand the assessment of the licensee that the Fishers' interest had terminated at material times, we think that a professional approach required that the licensee disclose the Fisher situation to Wrightson. Had that been done, this very stressful situation to all concerned would have been avoided.

[48] Accordingly at the completion of the rather detailed evidence (which had been preceded by very full and helpful opening typed submissions from the parties), we put it to the parties that there could only be one realistic issue, namely, whether the licensee had failed to properly brief Wrightson in a professional manner about the Fishers; and he had candidly and sensibly now admitted such a failure when viewing the situation with hindsight. We also advised that, in any case, such is our finding. We felt however, that penalty needed to be put in the above context.

[49] Accordingly, the licensee now pleads guilty to unsatisfactory conduct and Consent Orders are made as follows:

[a] We make an order under s.93(1)(a) of the Act *"censuring or reprimanding the licensee"*; and

[b] Also, we fine the licensee $1,000 payable forthwith by him to the Authority;

[c] The licensee is to formally confirm his undertaking to the Authority, to the appellant, and to us that neither he nor the said MacPherson Realty Ltd (nor any person on their behalf) will seek to recover commission from the appellant and/or his wife in any way or in any forum, and that he and MacPherson hereby waive any right to commission on the transaction referred to above.

[50] We do not consider that any suppression order is appropriate as we have taken quite some trouble to set out the context in which we have found the licensee guilty of unsatisfactory conduct in terms of s.72 of the Act. While, to a significant extent, we can understand the licensee's failure in this particular case, we emphasise that real estate agents cannot be acting professionally if they place vendors in a situation of liability for double commission – unless there is a particular arrangement between parties to that effect, or to agreed extra commission due to special circumstances.

[51] We wonder whether it would be useful for the REINZ and/or the Authority to facilitate the establishment of an arbitration process or system for disputes about commission entitlements of real estate agents.

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Judge P F Barber
Chairperson

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Mr J Gaukrodger
Member

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Mr G Denley
Member