Decision No: [2012] NZREADT 46

Reference No: READT 016/12

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

BETWEEN **GRANT CAMPBELL TUCKER**

Appellant

AND **REAL ESTATE AGENTS AUTHORITY (CAC 20006)**

First Respondent

AND **GLENIS CLAYDON**

Second Respondent

AND **BRYAN RICHARDSON**

Third Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mr Bigio for the appellant
Mr S Wimsett for the First Respondent
Mr Waymouth for the Second and Third Respondents

HEARD at AUCKLAND on 18 July 2012

DECISION

1. ***Preliminary Issue - Disqualification of Mr Denley*.**

[1] Mr Waymouth had raised the issue when he was appointed counsel on 10 July 2012 that he would be objecting to Mr Denley being a member of the Tribunal. Mr Denley is the former father in law of Mr Waymouth. Mr Denley has never met and has no connection with any of the parties.

[2] The test for bias is set out in the decision of the Supreme Court in *Saxmere Company Ltd v The Wool Board Disestablishment Company* Ltd [2011] 1 NZLR 36. The question is whether there would be any real apprehension of bias by Mr Waymouth's clients if Mr Denley continued to remain on the panel. Mr Waymouth acknowledges that there is no ill feeling between himself and Mr Denley.

[3] There was a discussion between the Tribunal and counsel concerning this matter at the commencement of the hearing and counsel went to consult with their clients. After this consultation process and being fully informed Mr Waymouth on behalf of his clients made the following acknowledgement:

- He acknowledged that there was no bias or acknowledgement of bias against the Tribunal in connection with Mr Denley remaining a part of the Tribunal. His clients agreed that they would waive all claims of bias against the Tribunal in this matter. The Tribunal therefore records this acknowledgement and on that basis agreed to proceed.

The Appeal

[4] This appeal arises from a complaint by one agent against the second and third respondents who succeeded to a sole agency previously held by the appellant. The sole agency was cancelled by Ponsonby Real Estate. At that time Mr Tucker was a licensed agent employed by Custom Residential Limited (CRL). He e had listed a property for sale at 159 Balmoral Road. This had a sole agency which expired on 25 April 2011. Ponsonby Real Estate Agents Limited (PEAL) trading as L J Hooker signed a sole agency with the vendors on 26 April 2011. Ms Claydon was a licensed salesperson engaged by PEAL and Mr Richardson the Business Development Manager for PEAL. Under s 130 of the Act the cooling off period for a new agency expired at 5 pm on 27 April 2011. The vendor issued a Notice of Cancellation of the CRL General Agency to take effect at midnight on 27 April. This Notice was issued prior to the expiry of the cooling off period. The Notice of Cancellation purported to be immediate, notwithstanding the provisions of the Agency Agreement between CRL and the vendor (which required 7 days notice).

[5] There arose a dispute over the agencies between the validity of the agency held by PEAL as on 11 May 2011 the vendor sold the property to a purchaser who had been introduced to the property during the current CRL's Agency Agreement. The agreement was executed on a form bearing CRL's stamp in which it is named as agent.

[6] A dispute arose between the parties as to commission. This was eventually resolved in favour of a commission split – 60% to CRL and 40% to PEAL. The complaints arise out of two matters:-

(i) Whether Ms Claydon had breached Rule 9.11 of the Client Care Rules in relation to the execution of the PEAL sole agency agreement; and

(ii) Over the actions of Mr Richardson and the manner in which he negotiated the settlement of the commission argument and whether these actions breached R 7.3 Client Care Rules.

Rule 9.11

[7] Rule 9.11 provides that when entering into a sole agency the agent must advise the client that if he or she has or does enter into another agency agreement they could be liable to full commission to more than one agent. The appellant asserts that Ms Claydon failed to ensure that the vendor was aware that she could be responsible for two commissions by reason of signing the sole agent with PEAL. The evidence on this comes only from Ms Claydon. Ms Claydon says (Statement to the CAC dated 13 October 2011):-

> *"At no point was there ever a comment made to the vendor with regard to there being two commissions payable. I advised her throughout this process it would be one commission and that the splitting of it was entirely up to the two agencies concerned."*

[8] Mr Bigio for Mr Tucker submits that this clearly illustrated a breach of Rule 9.11. He submitted further that the agency form prepared by PEAL also was misleading because Clause 7 provided that if the vendor:

> *"(Immediately) cancels all other current agency appointments and hereby acknowledge they have been advised of the need to so cancel any other agency appointments and that failure to do so would result in a client being liable for payment of more than one commission."*

[9] Mr Bigio submitted that this gave the client the impression that all that was needed to avoid the payment of two commissions was cancellation of the earlier agency agreement when in fact cancellation could quite often not be effective to ensure that two commissions were not paid. Mr Bigio submitted that in order to comply with Rule 9.11 the licensee simply needed to make clear to the vendor that they could be liable on a double commission. He submitted the fact that the vendor did not have to pay two commissions is irrelevant as to whether or not there was a breach of the rule. Mr Bigio submitted that an assurance (such as Ms Claydon gave) to the client that they would not pay two commissions was insufficient. He said what an agent needed to do was to undertake a two-step process:-

(i) Tell them of the risk; and

(ii) Tell them of the company's own policies to minimise such a risk.

[10] Mr Bigio made further submissions which are not necessary for us to determine to answer the question of whether there has been a breach of Rule 9.11. He did submit that a vendor should not cancel a sole agency until <u>after</u> the cooling off period had ended to ensure that an agency was in place during the 24 hour cancellation period. Further he submitted that any cancellation agreement must reflect the terms of the cancellation provisions in the agency being cancelled rather than of the new agency. While these comments are not necessary for us to reach a conclusion we agree that Mr Bigio's statements do seem to us to be sensible statements of the appropriate manner in which a cancellation should be handled.

[11] Mr Waymouth for Ms Claydon submitted that there had been compliance with the Rules. First he pointed to the fact that only one commission had been paid, second he said that the Notice of Cancellation was entirely consistent with the obligations of the agent and did not operate as an immediate Notice of Cancellation but was simply the start of the 7 day Notice of Cancellation period. He submitted that there were no consequences of the breach as the vendor did not in fact have to pay more than one commission and it was entirely possible for Ms Claydon to assure her that there would be no double commission. She could do this because she was able to control the commission sought by PEAL.

Discussion

[12] We accept that there is limited evidence on this point but neither party chose to adduce further evidence and therefore we accept the written statement that Ms Claydon made to the CAC.

[13] On this basis we consider that there has been a breach of Rule 9.11. Rule 9.11 makes it clear that clients are to be warned of the risk of double commission. Telling a client that there was no risk of a double commission seems to defeat the purpose of the rule. We consider that Clause 7 of the Sole Agency Agreement between the PEAL and the vendor also does not correctly state the Rule and should not be relied upon by PEAL. We consider that a breach of this rule does amount to professional misconduct. Accordingly we reverse the decision of the CAC and find that in the facts of this case Ms Claydon's actions amount to unsatisfactory conduct under s 72(b) of the Act. We substitute this finding against Ms Claydon for the decision of the CAC.

Mr Richardson

[14] We now come to consider the allegation that Mr Richardson breached Rule 7.3:–

> a licensee must not use or threaten to use the complaints or disciplinary process for an improper purpose.

[15] This allegation stems from a series of e-mails which took place between Mr Richardson and the CRL. No evidence was called. These e-mails can be found between pages 52 and 62 of the bundle of documents. The allegation is that Mr Richardson threatened to make a complaint to the REAA about the conduct of CRL if the commission was not paid. Mr Waymouth submits that in fact there was no allegation of a threat to make a complaint, it was simply that Mr Richardson misunderstood the ability of the REAA to determine the commission dispute. Mr Waymouth said he was simply intending to refer the commission dispute to the REAA if it could not be resolved between the parties. Mr Bigio disagrees and asserts a clear breach of the Rule.

[16] We have read all of the e-mails because this is a very serious allegation. If Mr Richardson truly believed that the commission dispute process was available through the REAA then his references to referral of the matter to the REAA would not amount to an improper threat to use for complaints purpose. We have therefore carefully reviewed the

e-mail exchange and we have carefully considered the submissions of counsel. In our view Mr Richardson's threats were more than simply a reference to a resolution of a commission dispute. We take this from the e-mail sent by CRL to Mr Richardson on 21 June where CRL suggests that the dispute is not a matter for the REAA but suggests that as both companies are members of the REINZ the matter should be *"treated as a commission dispute and have it treated through arbitration".*

[17] Mr Richardson replied on 22 June:-

> *"Please be assured a complaint will be made to the REAA, our patience is at an end. Arbitration is not an option, Ponsonby Real Estate Agents Limited is not a member of the REINZ. Our documentation in this matter is absolutely correct and your claim of serious concerns around the validity of our (sic) is completely unfounded. As I have pointed out in a previous e-mail your actions on receipt of the notice cancelling Custom Residential Limited's agency and those of your salesperson in attempting to discredit our company and salesperson are totally unacceptable. Your 'without prejudice' offer of 30% is rejected. I will give you until 5 pm today to meet our very reasonable demand of 50% of the fee (without any deductions) before making a formal complaint to the REAA."*

[18] Agents have a positive obligation under Rule 7.2 to report to the REAA if they have reasonable grounds to suspect that another agent has been guilty of misconduct under s 73. They may report unsatisfactory conduct (Rule 7.1). If Mr Richardson truly had believed that the actions of CRL were either unsatisfactory conduct or misconduct then he should have reported them to the REAA. He did not do so as the commission dispute was settled. This and the content and tone of the e-mails (which suggests serious misconduct – ie conduct which should be reported) leads us to the conclusion that his e-mails are in breach of Rule 7.3 as they were designed to bring about a resolution of the commission dispute rather than a proper concern about the actions of CRL. If they were in fact proper concerns about the actions of CRL then he should have reported them under either 7.1 or 7.2 and he has failed in that obligation.

We therefore conclude that the actions of Mr Richardson in this respect are a breach of Rule 7.3 of the Act and amount to misconduct. Threatening behaviour is very serious. Agents are to be discouraged from using the complaints process for the purposes of affecting a civil resolution. We consider that Mr Richardson did do that. Accordingly we reverse the decision of the Complaints Assessment Committee to take no action against Mr Richardson and consider that a charge should be laid against Mr Richardson for misconduct under s.73. We accordingly modify the decision of the CAC by substituting an order that under s.89(a) the allegation against Mr Richardson be considered by the Tribunal. The Complaints Assessment committee may draft the appropriate charge.

[19] Given that we have reversed the decisions of the CAC and modified them by imposing our own findings of unsatisfactory conduct against Ms Claydon we accordingly invite submissions from counsel as to penalty.

[20] The submissions from the appellant and the Complaints Assessment Committee should be filed within 10 days of the date of this decision.

[21] Counsel for the second respondents will have a further 10 days to respond to those submissions. The counsel for the appellant will have a further three

days to make any comments strictly in response to anything said by the second and third respondents.

[22] The Tribunal draws the parties' attention to the provisions of s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 3rd day of August 2012

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Ms K Davenport
Chairperson

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Ms J Robson
Member

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Mr G Denley
Member