

Decision No: [2013] NZREADT 111

Reference No: READT 069/12 &
READT 070/12

IN THE MATTER OF

appeals under s 111 of the Real Estate
Agents Act 2008

BETWEEN

MR K

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 20002)**

First respondent

AND

MR N

Second respondent

AND

BETWEEN

MR N

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 20002)**

First respondent

AND

MR K

Second respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport QC – Chairperson
Ms N Dangen – Member
Ms C Sandelin – Member

APPEARANCES

Mr C Gudsell QC, Counsel for Mr K
Mr L Clancy for the Real Estate Agents Authority
Mr G Wilkin, Counsel for Mr N

HEARD at HAMILTON on 1 & 2 October 2013

Introduction

[1] This case concerns a commercial development in X, X. Mr N is the sole director of X X Limited (XXL), and in 2010 and 2011 was trying to put together a shopping centre development. Mr K became involved in the development, at the request of Mr N, to offer advice on the development and to assist generally. During 2010 the National Bank initiated mortgagee sale proceedings against X X Limited. Mr K then assisted Mr N further by arranging for substitute finance to be provided to XXL to replace the National Bank by three lenders; one lender was Mr K own Family Trust. The mortgage was for a six month term and due to be repaid on 24 May 2011. The interest rate was quite high, providing the lenders with a return of 20%. The total amount borrowed was \$1,250,000 plus an application and facility fee of \$28,750.

[2] Shortly after the mortgage was signed (17 November 2010) XXL and Mr N entered into a formal Commission Agreement. The commission arrangement was between X X Limited and X and X X Limited (XXL), a company which was run and controlled by Mr K. This Commission Agreement provided that Mr K would become entitled to commission of \$40,000 in certain circumstances, including the sale of the property and the signing of lease documents between XXL and X X or any other person. At this time XXL and Mr N were attempting to complete a lease agreement with X X Limited. In 20 December 2010 XXL entered into a document called "*Outline of Principle Commercial Terms*" with a subsidiary of X X which provided for an annual base rent. After further negotiations a formal lease was signed in March 2011.

[3] Mr N told the Tribunal that he always wanted to sell a part or all of the development and that he made this perfectly clear to Mr K.

[4] In late 2010 and early 2011 discussions also took place between Mr E from E Construction and Mr N as to whether a joint venture could be entered into to complete the X development. However the joint venture did not proceed. Mr E was one of XXL's other mortgagees. The evidence showed that the early part of 2011 was a difficult time for the potential development. In February 2011 the three financiers/mortgagees met with a representative of X in Auckland. This was initially unknown to Mr N but he subsequently discovered it. Mr N considered this was contrary to XXL's interests. Mr N's solicitor subsequently e-mailed X stating that they were only to deal with her. Mr N gave evidence that at this time he was pressing Mr K to help him find a buyer for the development, or part of the development and Mr K was, in his words, obstructive and unwilling. He said that Mr K kept insisting that there were no available buyers except for Mr E (E Construction Limited). Mr N says that Mr K advised him that the best Mr N could hope for would be a sale of approximately \$1.5 million for the entire site to Mr E. The Tribunal have seen a copy of a preliminary estimate prepared by Mr E showing that he estimated the land value to be worth \$1.5 million. Mr N claims that Mr K was not putting any effort into selling or considering any other form of sale for the property other than the proposed sale to Mr E. Mr K says that the E sale also involved an "*upside*" for Mr N in that he would be receiving a percentage of the profits generated by any successful development. Mr N gave evidence of a conversation on 17 March 2011 with Mr K. He kept a file note of this conversation. He records Mr K as saying he could find no "*other buyers, there were other X now on the market and that he needed to progress the development with Mr E*". Mr E, he said, was only prepared to pay \$1.5 million for the entire piece of land and no more.

[5] It was also made clear to Mr N that the mortgage would need to be repaid in May 2011. Mr N says that this fact and Mr Ks unwillingness to help made it clear that Mr K was conflicted.

[6] Mr N says he became disillusioned with Mr Ks lack of assistance and he thus went to try and find a buyer for the property himself. In March 2011 he eventually confirmed a sale to a Mr P who agreed to purchase Lot 6 (which is 4,500 square metres) for \$1.8 million. In the agreement Mr P agreed to hold the balance of the land on trust for XXL until the completion of the subdivision plans.

[7] On 17 May 2011 Mr K sent an invoice through to Mr N for his claimed fee of \$40,000 plus GST. This was disputed and Mr K brought liquidation proceedings in the High Court. XXL eventually paid this money under protest.

[8] Mr N complained to the Real Estate Agents Authority claiming that in negotiations with X Mr K had misrepresented and undermined XXL to Mr Ks advantage as mortgagee and to XXL's detriment, and he had a conflict of interest as both mortgagee and agent which he sought to take advantage of to his own benefit. The Committee dismissed the allegation that Mr K had undermined XXL's negotiating position. However it held that the complainant was aware of the licensee's involvement as both agent and mortgagee but nonetheless Mr K was in breach of s 136 of the Real Estate Agents Act. Mr K was found guilty of unsatisfactory conduct.

[9] Mr K appeals that decision. His appeal document states that there could be no finding of a breach of s 136 as it was not one of the grounds of the initial complaint. The notice also says that s 136 had never been triggered as the time for making written disclosure was never reached as the licensee did not provide any prospective party with any contractual documents as Mr K of course not being involved in the subsequent sale to Mr P.

[10] Mr K further states that the work that he was doing and the subject of the Committee's findings was not 'real estate agency' work as defined by the Act. He denies any conflict of interest.

Mr Ks evidence:

[11] Mr Ks evidence is that it was impossible to progress the development when Mr N was not helping by completing the resource consent and working with E Construction to finalise the draft estimate of costs.

[12] Mr K details in his Brief of Evidence the steps he took to find a purchaser. He said however that because the construction costs and rental income were unknown it was difficult to complete or conclude any sale. He said he asked Mr N and his solicitor in early 2011 to prepare a Sale and Purchase Agreement to present to prospective purchasers but they had failed to do this. He denies that there was any conflict of interest. He says that the amount of his own investment in the mortgage was small (about \$50,000). Mr E had advanced a little more money but it was the third mortgagee who was insisting that the whole of the mortgage be repaid in May 2011.

[13] Mr K says he would have allowed the mortgage to roll over. Mr K claims that the development was not progressing because there were a number of issues relating to

resource consent, parking, geotechnical reports, boundary adjustments, all of which were not resolved. This made the sale very difficult. Further Mr K says that Mr N never made it clear that he could simply sell the land, it was always, he understood, a sale on the basis that there was going to be the land and the X with a lease to be sold. Mr K said that there was simply nothing to sell so he could not assist Mr N at all. Mr K also said that he was not acting as an agent at the time that the mortgage was entered into. Mr K denies any conflict of interest.

[14] Mr E gave similar evidence saying that he had been happy to roll over the mortgage but it was the other mortgagee that would not. He said that he was frustrated about the lack of progress with the subdivision because it was difficult to pull the whole project together with Mr N being unwilling to commit to the building/development proposal.

The Issues

[15] Mr Gudsell QC did not actively pursue the argument that Mr K's work was not 'real estate agency' work. We agree that he was involved in the project as an agent and do not further consider this part of the appeal.

[16] The issues for the Tribunal therefore are:

Issue 1

Was there evidence to show that Mr K was acting against the interests of Mr N and XXL in his negotiations with XXL?

Issue 2

Did Mr K have a conflict of interest?

Issue 3

Does s 136 apply in the circumstances of the case?

Issue 4

During the course of the hearing it became clear that Mr K had not provided Mr N with a marketing appraisal of the property or a written appraisal of value. The parties agreed to make further submissions upon these points to assist the Tribunal as to whether any findings on these omissions could be made by the Tribunal.

Discussion

Issue 1:

[17] Having heard all of the evidence of all the parties the Tribunal cannot conclude on the balance of probabilities that Mr K acted against the interests of Mr N and XXL in seeing XXL. We therefore dismiss this ground of appeal.

Issues 2 & 3:

[18] From the time of the commencement of the written agency agreement, [3 December 2010], until 24 May 2011 when the mortgage was to be repaid there was potentially a conflict between Mr K's role as mortgagee and his role as agent. Whilst his Family Trust were owed a relatively small percentage of the total amount loaned, the loan was at a high interest rate with an even higher penalty rate. It is possible to see that, [notwithstanding his ability to earn a commission on a sale] Mr K could potentially have received more money by allowing the mortgage to run over or become a mortgagee in possession. Mr Gudsell QC has submitted that this is unlikely. However, when the Tribunal consider a conflict of interest they must consider the potential for a conflict rather than the reality. This is because the Act and the rules are designed to prevent an agent putting him or herself in a situation where there might be a conflict, and as his/her conduct is judged at the time of the potential conflict.

[19] But was this a breach of s 136? The Real Estate Agents Act 2008 is designed as consumer protection legislation. We agree with the Real Estate Agents Authority that we should interpret the legislation in light of that purpose. However we also have to take cognisance of the actual wording of the legislation. We therefore need to determine whether or not Mr K could potentially have been in breach of s 136 of the Real Estate Agents Act 2008.

[20] Section 136 provides that:

"A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee or any person relating to the licensee may benefit financially from the transaction."

[21] As the Tribunal has said before the elements of s 136 are:

- (i) A licensee. (Who is)
- (ii) Carrying out real estate agency work.
- (iii) In respect of a transaction.
- (iv) Must disclose in writing to every prospective party that they benefit financially from the transaction.

[22] Mr Gudsell QC submits that the fact that the disclosure must be made in writing to every prospective party to the transaction requires there to be a transaction other than the agency agreement. The Real Estate Agents Authority submits that this is not required, rather the Tribunal should give s 136 a more liberal interpretation so that a licensee must notify any party where a potential conflict arises, rather than only in circumstances where a transaction is about to be entered into.

[23] The Tribunal have considered this carefully. It is certainly true that the Tribunal should not give an unduly restrictive interpretation to the Act. However s 136 clearly sets out the steps required of an agent and it specifies that there must be some transaction which triggers the obligation to disclose. Usually this is an Agreement for Sale and Purchase. In this case the only document entered into by the parties was the Commission Agreement. Did s 136 oblige Mr K to disclose the potential conflict at that time? There was some attempt in the recitals of the document to carry out some disclosure but it was not sufficient to discharge the requirements of s 136. However we do not consider that the Commission Agreement was a transaction within the meaning of s 136. Section 136 therefore did not apply and the Complaints Assessment Committee were incorrect in finding that it did. This ground of appeal is upheld.

[24] However the Tribunal must also consider whether Mr K had a professional obligation to Mr N which did require him to disclose the potential conflict? Rule 9.20 of the Real Estate Agents Act (Professional Conduct and Client Care Rules) 2009 provides:

“A licensee must not engage in business or professional activity other than real estate agency work where the business or activity would or could reasonably be expected to compromise the discharge of the licensee’s obligations.”

We must consider whether the business activity of being a mortgagee could potentially compromise Mr Ks obligations to XXL as an agent.

[25] Each case is fact specific. In this case Mr K assisted Mr N, when, to avert a mortgagee sale, he facilitated the agreement to mortgage. However he also benefited from this assistance with his Trust receiving a high interest rate significantly in excess of that which he would have obtained at the bank and for a very short term.

[26] There was potential for conflict as the six month term came to an end and the property was not sold as his interests as mortgagee may have put him in a situation where he preferred not to push or present an offer but rather to keep the mortgage on foot. Further he could have seen potential profit in allowing a mortgagee sale to proceed and being able to acquire the land more cheaply. These are all hypotheticals but illustrate that being a lender and an agent could potentially compromise his obligations as a licensee. We therefore find Mr K breached Rule 9.20. This conduct amounts to unsatisfactory conduct as an agent.

Issue 4:

[27] Can the Tribunal make any other findings relating to the breaches of Rule 9.5 (obligation to provide an appraisal)?

[28] Having considered the careful submissions of counsel we consider that we are bound by the dicta in the decision of the Court of Appeal in *CAC v R*¹. The decision in *Wyatt v REAA and Barfoot & Thompson Ltd*² provides that the Tribunal can consider the overall “*question of Mr Ks obligations to disclose*” in a wider context than just s 136. We have adopted this dicta in our finding under Rule 9.20. However we do not read *Wyatt* as enabling the Tribunal to consider a completely new breach of the Rules. In his complaint Mr N identified conflict of interest, nothing else. Therefore we make no finding on any other potential breaches of the Code of Conduct (Professional Client Care Rules).

Summary of Conclusions

[29] In conclusion therefore the Tribunal finds:

- (i) That the Complaints Assessment Committee was incorrect to find that Mr K was in breach of s 136. Mr Ks appeal on this point is upheld.

¹ CA 282/01, 20 June 2002

² [2012] NZHC 2250

- (ii) In respect of Mr N's appeal we find Mr K breached Rule 9.20 of the (Professional Conduct and Client Care Rules) 2009. To this extent we allow the appeal.
- (iii) As set out above the decision of the Complaints Assessment Committee is modified by a finding that Mr K is in breach of Rule 9.20.
- (iv) The other appeals are dismissed.
- (v) The Tribunal makes a finding of unsatisfactory conduct against Mr K pursuant to s 72 of the Real Estate Agents Act 2008.

[30] Normally the Tribunal would invite further submissions on penalty. However it considers that in this case a small monetary fine would be the best penalty in respect of Mr K's conduct. It therefore imposes a fine of the sum of \$1,000 upon Mr K. The Tribunal also considers that in the context of this case and its facts it is proper that orders should be made under s.108 of the Real Estate Agents Act preventing the publication of the name of the appellant Mr K and any information that might identify him and Mr N.

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

DATED at AUCKLAND this 16th day of December 2013

Ms K Davenport QC
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member