

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 29

READT 083/12

IN THE MATTER OF

an appeal under s.112 of the Real Estate Agents Act 2008

BETWEEN

STEPHEN GOUMENT

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 20005)**

First Respondent

AND

LARRY SEWELL

Second Respondent

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 14 March 2013

APPEARANCES

Mr Goument in person
Julia MacGibbon for the Real Estate Agents Authority
R J Latton and P Couldwell – Kennedys (Solicitors) for Mr Sewell

Introduction

[1] In late 2011/early 2012 Mr Goument tried to buy a property being sold at mortgagee sale. This property was situated at 2 Upper Orewa Road, Upper Orewa, North Auckland and it was a large property consisting of 10 bedrooms. Mr Sewell

was the real estate agent acting for the mortgagee vendors. Mr Goument made an offer to purchase the property which was accepted. The purchase price was \$1,050,000 and the agreement was dated 15 December 2011. The agreement was subject to conditions as to finance, a LIM and a building report as to the building's weathertightness.

[2] Mr Goument had been aware that the incumbent tenants of the property had previously made an offer to purchase the property but says that from about the middle of December he had been told by Mr Sewell that "*he was the only player in the game*". On or about 9 January 2012 (the extended date on which the agreement was to become unconditional), Mr Goument called Mr Sewell and then his solicitors and advised the vendors that there were a number of problems with the property and that they needed to reduce the purchase price by \$100,000 to allow urgent repairs to be done on the property. He made a counter offer for the property rejecting these concerns. The vendor promptly cancelled the agreement and sold the property to the tenants who had signed a (unknown to Mr Goument) backup agreement on 29 December 2011 to purchase the property for \$1,060,000.

[3] Mr Goument was very surprised and distressed to have his offer rejected. He says that Mr Sewell told him that he was the only party interested in the property. He says he would not have made a counter offer if he had known that there had been ongoing interest (and indeed a backup offer) from the tenants. He says that in a conversation on 9 January 2012, Mr Sewell told him that there was no one else interested in the property. Mr Sewell denies this. He admits that he did not tell Mr Goument that there was a backup offer on the property but says he never told Mr Goument that there was no one else interested in the property. He said that he knew that was patently untrue and would not have done so.

[4] Mr Sewell's counsel acknowledged that it would be a breach of the Client Care Rules if Mr Sewell had lied to Mr Goument about whether or not there was a backup offer. However he denies that Mr Sewell had lied.

[5] The issues for the Tribunal are therefore:

- (a) Whether or not Mr Sewell did tell Mr Goument that there was no other interest in the property on 9 January? If he did does this amount to misconduct or unsatisfactory conduct under ss 72 or 73 of the Act? and
- (b) If we find he did not tell Mr Goument this did Mr Sewell owe any other duty to Mr Goument in the circumstances set out above?

Issue No. 1

[6] Mr Goument gave the evidence set out in the introduction. He also called his brother in law Mr Smith (on the telephone). Mr Smith was somewhat vague about the dates and the timing of the calls but he said that on several occasions Mr Sewell said Mr Goument was "*the only guy in the deal*". He said he heard these conversations either by having them relayed to him or hearing them on speaker phone.

[7] Mr Sewell confirmed that he did not tell Mr Goument that there was another backup offer on the property. He said that he had a direct instruction from the vendor mortgagee not to do that, but also said that he would not have done it in any event because his obligation was to the vendor. He said he could not recall whether or not he said that there was no interest or other interest in the property when he spoke to Mr Goument on 9 January.

[8] Mr Goument produced his brother in law's Telecom records, which he said showed the conversation he referred to on 9 January 2012, to Mr Sewell's Auckland office which lasted for a total of 13 minutes.

[9] The Tribunal has to determine on the balance of probabilities whether it believes that Mr Sewell told Mr Goument that there was no other interest in the property.

[10] In his closing submissions Mr Goument submitted that the key issue for him was that he was not given an opportunity to make a decision on the 9th as to whether or not he wished to proceed with the original agreement or (as they did) to try to renegotiate the agreement. He said had he known that there was a backup offer he would have made the original agreement unconditional.

[11] Mr Latton for Mr Sewell submitted that the issue was simple. He submitted that Mr Sewell had no obligation to tell Mr Goument about the backup offer as his obligation was to the vendor. He agreed however that it would be unsatisfactory conduct if Mr Sewell told Mr Goument an untruth, or if he deliberately misled Mr Goument.

[12] This case is very fact specific. We agree with the comments by counsel for Mr Sewell that if Mr Sewell lied or actively misled Mr Goument into believing that there was no other interest in the property when there clearly was, then this would amount to unsatisfactory conduct. The key for the Tribunal hinges around the conversation that took place on 9 January 2012. That conversation lasted for 13 minutes and was followed up by an e-mail. The e-mail does not refer to any assurance that there was nobody else interested in the property but does refer to the weathertight issues which Mr Goument's solicitor later referred to when making a counter offer to the mortgagees. These issues included significant concerns about the weathertightness of the house and obtaining a mortgage from a bank given the concerns about the weathertightness.

[13] The fact that Mr Sewell cannot remember whether or not he said that there was no interest in the property is of concern to the Tribunal, because it raises the possibility that Mr Sewell might have said this. We conclude that we think it is possible that Mr Sewell may have made a statement to the effect that there was no other interested party. However we cannot be satisfied on the balance of probabilities that he did do this. We remain uncertain about this critical fact. We are therefore not satisfied on the balance of probabilities that the call was made. Given we are uncertain we are required to resolve that uncertainty in favour of the

defendant. Accordingly there is insufficient evidence to uphold the appeal. We confirm the decision of the Complaints Assessment Committee and dismiss the appeal.

[14] We draw the parties' attention to the appeal provisions contained in s.116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 18th day of April 2013

Ms K Davenport
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member