BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 53

READT 125/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**WILLIAM HUME**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10054)**
	First respondent
AND	**MICHAEL JACKSON AND LANEE WONDERGEM**
	Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at WANGANUI on 17 June 2013

DATE OF DECISION 4 July 2013

APPEARANCES

The appellant on his own behalf
Ms S Locke, counsel for the Authority
No appearance for the second respondents (who have moved to Australia and wish to take no further part in this case)

DECISION OF THE TRIBUNAL

Introduction

[1] William Hume (the appellant) appeals against a 21 July 2011 decision of Complaints Assessment Committee 10054 that he engaged in unsatisfactory conduct. The complainants were the second respondents and vendors of 23 Brassey Road, Wanganui. By a further (penalty) decision dated 6 December 2011, the Committee reprimanded the appellant and fined him $3,000.

Background

[2] In December 2009, the complainants listed their property for sale with Wanganui First National ("First National"). The agency agreement, which was renewed, was

exclusive until 8 June 2010, when it became a general agency. During that First National exclusive agency period, potential purchasers (Blair and Loren Symes) viewed the property and made an offer which was not accepted by the complainant vendors.

[3] On 21 June 2010, the complainants signed a general agency agreement with Re/Max Results ("Re/Max"), the real estate agency firm for which the appellant then worked. The appellant was the listing agent and, on the same day, presented an offer for the property to the vendors from the purchasers, which was accepted by them. The sale price was $485,000 and the commission was $19,900 plus $2487.50 GST to total $22,387.50.

[4] First National soon became aware of the sale and claimed commission as the agency which had introduced the purchasers to the property and to the vendors.

[5] In its 21 July 2011 decision, the Committee found that the appellant had failed to properly explain to the complainants, when inviting their signatures on the Re/Max listing agreement and sale and purchase agreement, that they might be liable to pay commission both to Re/Max and to First National.

[6] The Committee held that the appellant's conduct breached rules 6.4, 9.1 and 9.9 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules) and amounted to unsatisfactory conduct as defined under s.72(a), (b), (c) and (d) of the Act. Section 72 reads:

> *"**72 Unsatisfactory conduct***
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
> *(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
> *(c) is incompetent or negligent; or*
> *(d) would reasonably be regarded by agents of good standing as being unacceptable."*

[7] The said Rules read:

> *"6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.*
>
> *9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.*
>
> *9.9 When inviting signature of an agency agreement or a sale and purchase agreement, or other contractual document, a licensee must ensure that a prospective client, client, and/or customer is aware that he or she can, and may need to, seek legal, technical, or other advice and information, and allow the prospective client, client, and/or customer a reasonable opportunity to do so."*

[8] We also set out Rule 9.11.

> *"9.11 A licensee must not invite a prospective client to sign a sole agency agreement without informing the prospective client that if he or' she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded"*

The Stance of the Appellant

[9] In his notice of appeal, the appellant states (among other things):

[a] He was approached by the purchasers, and was aware that they had previously made an offer for the property through First National. They stated that they wanted to make a further offer for the property, but did not want to deal with First National again.

[b] He explained the situation to his principal, Mr Dale Vanderhoof, who advised him that First National *"would have no claim on the purchaser or vendor as they had not been in contact over a certain period of time"*.

[c] He met the complainants at their home to present the new offer from the purchasers and have the complainants sign a Re/Max listing agreement.

[d] The question of two commissions was raised and *"[he] gave [the complainants] what I thought was a genuine guarantee that we would not allow them to be put in a position where they would be liable for two commissions ... [he] was personally adamant that that would not happen"*.

[e] The subsequent commission dispute between First National and Re/Max was dealt with by his principal, Dale Vanderhoof, and he had no input.

[f] He received his portion of the commission on the sale.

A Summary of the Evidence for the Appellant

The Evidence of the Appellant

[10] In a typed brief of evidence the appellant, inter alia, emphasised that, while he was the salesperson who sold the property of the second respondents, at material times he was acting under the full instructions and guidance of his then principal Mr D Vanderhoof who was one of two owners of Re/Max.

[11] The appellant emphasised that the second respondents had complained to the Authority because both the said real estate agencies had sought commission from them on the said sale and they and their solicitor seemed to have expected the Authority to determine which of those two agencies was entitled to commission upon the complaint being made.

[12] The appellant stated that the purchaser of the property had sought the appellant's help in selling their own home in Wanganui after it had been on the market for about seven months with another real estate company and the appellant listed that property and sold it within 48 hours. This led these purchasers to approach the appellant a few

days later for assistance to purchase the said Brassey Road property using a family trust.

[13] These purchasers explained to the appellant that they had previously put in an offer on the same property seven months earlier through First National but it had not been accepted and they did not want to deal with that company further. Accordingly, the appellant together with that male prospective purchaser approached Mr Vanderhoof and explained the situation in detail. There seemed to be emphasis that the first agent had not been in touch with the prospective purchasers for seven months. The appellant says that he was advised by Mr Vanderhoof that First National would have no claim on the second respondent vendors for commission should the prospective purchasers purchase it because, as Mr Vanderhoof apparently put it, they had not been in contact over a long period of time with the prospective purchasers so that Mr Vanderhoof would have Re/Max prepare an offer for the prospective purchasers together with a general listing agreement and appraisal.

[14] Accordingly, Mr Vanderhoof directed the appellant to contact the second respondent vendors to list their property and present them with an offer from the prospective purchasers. The appellant then took his personal assistant, who was also a licensed salesperson, and dealt with the normal procedures and paperwork. The appellant is dyslexic so that it was helpful to have the PA's assistance. In fact, it seems that the appellant overlooked signing or initialling a page of the listing agreement.

[15] All this led to the appellant and his PA attending the second respondents (as vendors) at their home and explaining to them in full all usual matters but, in particular, covering the question of two commissions becoming an issue. The appellant gave the vendors *"what I thought was a genuine guarantee that we would not allow them to be put in a position where they would be liable for two commissions and I was personally adamant that that would not happen on moral grounds if nothing else"*.

[16] It seemed that the vendors did not recall the prospective purchasers because their previous offer had been too low for them to take much note of it. The appellant said he explained that the new offer was from the family trust of the previous offerors. A contract was signed in the usual way and a $20,000 deposit collected from the purchaser family trust and deposited in the Re/Max trust account which seemed to have been controlled by Mr Vanderhoof.

[17] Some days later, the appellant was made aware that First National were making a claim for commission on the transaction from the second respondent vendors to the said family trust purchaser. The appellant raised the situation with Mr Vanderhoof and was assured that he would sort the matter out and to leave it to him to do that and that the personal guarantee which the appellant had given to the vendor second respondents would be honoured. This made the appellant feel comfortable because he knew that there was a deposit in his firm's trust account. He understood that if, at law, First National were entitled to commission then it would receive the commission. He knew that Mr Vanderhoof was to meet with the then principal of First National, a Mr Steve Carkeek who gave evidence before us on behalf of the appellant.

[18] The appellant was not permitted to be involved in negotiations between Re/Max and First National over the commission issue, but was told by Mr Vanderhoof that First National were no longer seeking commission and it therefore belonged to Re/Max. In fact that was not at all true but, about 10 days later, the appellant was paid his share of the commission and thought no more about the matter. He was not informed that the

solicitor for the second respondent vendors had on at least two occasions, asked Mr Vanderhoof to pay the commission into their trust account until the dispute was settled.

[19] The appellant did not know about the dispute over commission for some months and has been annoyed and embarrassed that the vendors, as very nice people, have been so troubled. He added that First National sought through Mr Vanderhoof of Re/Max Results that the matter go to arbitration but Mr Vanderhoof would not cooperate with that.

[20] The appellant maintains that the vendors and their solicitor were very happy with the service he provided as a salesperson but approached the Authority in an attempt to force the two real estate agencies to arbitration over entitlement to the commission. He feels that Mr Vanderhoof and his business partner have deliberately endeavoured to put the blame for this dispute onto him, the appellant. He no longer works for Re/Max Results but works for a Ray White agency where, as it happens, Mr Carkeek now also works. He says he is extremely regretful about this issue which has greatly embarrassed and stressed him.

[21] In cross-examination, the appellant admitted that he failed to amend the listing agreement with the vendor second respondents to record that Re/Max would not be pursuing commission if commission was claimed by Wanganui First National. With hindsight, he accepts that was a failure on his behalf but that he was *"foolishly guided by Mr Vanderhoof*".

[22] The appellant covered how, with the help of his PA, he filled out the listing agreement and carefully took the vendors through it. He then went through it again with Mr Vanderhoof. Accordingly, he felt that he had at all times acted *"above board"*. He said that, as it happens, Mr Vanderhoof only paid him part of the commission to which he was entitled (subject to there being entitlement for First National). Meanwhile, the latter company has been liquidated and has no legal status to litigate to recover commission on the transaction.

[23] The appellant emphasised that the vendors obtained their asking price and have only paid one lot of commission in that Mr Vanderhoof took it from the deposit.

The Evidence of Mr Carkeek (as a witness for the appellant)

[24] Mr Carkeek's evidence was consistent with that given by the appellant. Essentially, when he happened to be told that the second respondents had sold the property to the purchasers, he felt that Re/Max had overstepped the mark and had put the second respondents into a position of liability for double commission.

[25] Mr Carkeek therefore approached Mr Vanderhoof and put it that, in the interests of harmony, Re/Max should waive any claim to commission but there was no cooperation from Re/Max. At a later meeting with Mr Vanderhoof, Mr Carkeek proposed that the commission be split 50/50 between First National and Re/Max but Mr Vanderhoof would not accept that. A little later, Mr Carkeek told the solicitor for the vendors that he should hold the deposit until the commission dispute had been resolved. That lawyer apparently told Mr Vanderhoof to hold the deposit in his trust account until matters were resolved, but Mr Vanderhoof took the commission from the deposit.

[26] It seems the deposit should have been $48,000 but, for some reason or other, the amount paid into Mr Vanderhoof's trust account was $20,000; and commission with

GST) was about $23,000 so that Mr Vanderhoof took the $20,000 as commission for Re/Max on the transaction.

[27] Inter alia, Mr Carkeek added that Mr Vanderhoof would not have the matter of the commission dispute arbitrated.

[28] Mr Carkeek interpreted the complaint to the Authority from the solicitor for the vendors as being against Re/Max, rather than the appellant, but noted that the Committee had rather dealt with the matter as a complaint against the appellant. We note that the complaint put to the committee of the Authority was against the appellant only.

Discussion

[29] This is not the first disputed commission case where the second agent gave the vendors an assurance that they would not be put in a position where two commissions were claimed.

[30] In *Tucker v REAA & Clayton and Richardson* [2012] NZREADT 46, a licensee assured a client that, notwithstanding that purchasers had been introduced by a previous agent, the client would not be required to pay two commissions (on the basis that the commission would be split between the two agents). In making a finding of unsatisfactory conduct we held:

> *"[13] ... 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 ..."*

[31] An agent dealing with a prospective vendor who has previously signed a listing agreement with another agent is not able to give any guarantee to that vendor as to what steps the former agent might take to enforce an entitlement to commission, or as to whether or not the first agent will agree to split commission. Accordingly, any assurance that the vendor *"will not be placed in the position of having to pay two commissions"* can only mean that the second agent will not claim that agent's own commission should the former agent claim commission and an agreement to split the commission not be reached. In any case, there has been non-compliance with Rule 9.11.

[32] Also, any such undertaking is a variation of the terms of the second agency agreement and must be recorded in writing.

[33] In *Jolen & Ors v REAA & Ors* [2013] NZREADT 6, a salesperson agreed with vendor clients that her agency would not deduct commission from the purchaser's deposit in order to allow the vendors to use the full deposit as a deposit on their purchase of another property; and instead, the commission would be paid on settlement. We accepted submissions made for the Authority that good practice required that the change to the listing agreement regarding the timing of payment of commission be recorded either on the listing agreement with initialling or signing and dating, or in a separate document to be kept with the listing agreement.

[34] The importance of such a variation being recorded in writing is illustrated by the present case. Even if the appellant genuinely believed that his principal (Re/Max or Mr Vanderhoof) would not expose the second respondent vendors to the risk of paying two commissions, the fact is that commission was due to Re/Max, under the second

agency agreement. It was Re/Max, not the appellant personally, which would ultimately decide whether or not to pursue the vendors for commission should First National also try to enforce its claim. In fact we are told that latter agency is insolvent and unable to litigate over the issue.

[35] The appellant was simply not in a position to give the vendors the assurance that he did without formally varying the agency agreement to make clear that Re/Max would have no entitlement to commission should First National make a claim. Without such a variation, an assurance of the sort given by the appellant is meaningless and subverts the purpose of Rule 9.11, as we noted in *Tucker*.

[36] The Authority submits that its Committee was entitled to find, as it did, that the appellant's advice to the complainants was *"misleading, careless and ill-considered"*; so that the appeal should be dismissed. That is an understandable view but must now be considered in the context put before us.

[37] In her final oral submissions, Ms Locke added that the appellant, as an employee salesperson, was not in a position to guarantee how his employer agency would act with regard to seeking commission from the vendor second respondents. She pointed out that the Rule (R 9.11) is that an agent must not put a vendor in a position where the vendor could be liable for a double commission without carefully and clearly advising of that possibility. Ms Locke submitted that, in any case, if the agent or agency wished to give a guarantee that only one commission would result, that must be written into the listing agreement as a term of the agency. We agree.

[38] Ms Locke also submitted that even if an agent takes advice from a superior, as did Mr Hume, the latter was still at fault in assessing that First National had no entitlement to commission and in failing to cover the position in the listing agreement. We agree. From cases we have been hearing, we feel that both managers and salespersons need better education at assessing from the facts the possibility of a vendor being liable for more than one commission; and they need to realise that they do not solve matters by simply assuring the vendor that they will waive their commission if necessary. Also, generally speaking, if the first agent has introduced the purchaser to the property/vendor, then that first agent will be entitled to commission.

[39] Mr Hume seems to now accept the submissions put forward by Ms Locke for the Authority and puts as an explanation that, at material times, the vendors maintained they had had no service from First National for about seven months and did not want to deal further with First National, and that Mr Hume's manager (Mr Vanderhoof) was clear in his advice to Mr Hume that there could be no double commission possibility and, in any case, Mr Hume thought that his guarantee covered any problem.

[40] We note Mr Hume's evidence that his employment with Re/Max seems to have left him significantly out of pocket financially and that he has experienced much stress over the past two years due to the complaint leading to these proceedings.

[41] We find it surprising that the vendors' complaint to the Authority was confined to the appellant rather than also made against Re/Max and/or Mr Vanderhoof. Perhaps for practical reasons, it is too late for the Authority to proceed against Re/Max as Mr Hume's employer or against Mr Vanderhoof, but it would have been much more satisfactory from our point of view, in endeavouring to apply justice, if Re/Max had been a party to this appeal.

[42] Simply put, the vendors' first agency with First National was never cancelled and continued as a general agency during material times. In any case, the purchaser was introduced to the property and to the vendors through First National. Both the appellant and Mr Vanderhoof should have instantly known that this was a situation where liability for double commission would be created upon the vendors' also listing with Re/Max, as they did. The appellant was the listing agent and he did not make it clear to the vendors that they were making themselves liable for two commissions. No doubt his said oral guarantee to them was made in good faith but, as proved to be the case, it was ineffective at law. We take into account that Mr Vanderhoof seems to have misadvised the appellant and seems to have also broken his word to the appellant that Re/Max would not seek a commission from the vendors if First National did also.

[43] We also take into account that the facts of this case arose soon after the Real Estate Agents Act 2008 which considerably tightened the regime under which real estate agents operate.

[44] We are also conscious that we have heard more extensive evidence than did the Committee of the Authority. However, we agree with the approach and reasoning of that Committee and confirm its finding of unsatisfactory conduct on the part of Mr Hume and its penalty of a reprimand and $3,000 fine against him. We comment that, perhaps, in all the circumstances the fine was a little high. However, we do not reduce it because we shall not impose costs against the appellant in respect of this appeal to us; and we also allow that $3,000 fine to be paid by the appellant to the Authority in three equal six monthly instalments of $1,000 each commencing with a first payment six months from the date of this decision.

[45] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

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Judge P F Barber
Chairperson

_____
Mr G Denley
Member

_____
Ms N Dangen
Member