BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 58

READT 57/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**GORDON ALEXANDER STEWART**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10064)**
	First respondent
AND	**ROSS (MURRAY) COOPER**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Mr J Gaukrodger - Member

HEARD at AUCKLAND on 30 April and 12 June 2013

DATE OF DECISION 12 July 2013

COUNSEL

Mr J Waymouth, Barrister, for appellant
Mr R M A McCoubrey for the Authority
No appearance by or on behalf of the second respondent

DECISION OF THE TRIBUNAL

The Issue

[1] Did Mr G A Stewart (the appellant), as the branch manager for Eves Realty Ltd (Eves), Tauranga, and a licensee, place vendors of a Tauranga residential property in a position of being liable to pay two commissions?

[2] In decisions of 10 February 2012 and 29 August 2012, respectively dealing with a conduct decision and a penalty decision regarding that conduct, a Committee of the Authority found that the appellant had engaged in unsatisfactory conduct and directed that $12,680 (plus GST), being the commission paid to the appellant by the vendors and referred to further below, be refunded to the vendors on the basis that the complainant second respondent could then seek payment of the commission from the vendors.

[3] At material times, the second respondent complainant owned and operated the former Coopers Real Estate Ltd, Rotorua. He now resides in Sydney. Australia, and takes no part in this appeal.

Factual Background

[4] The said vendors were Mr and Mrs Broad and their property was 2/17 Selwyn Street, Tauranga.

[5] On 8 December 2009 the vendors signed a sole agency agreement with Coopers for the sale of the property. The Coopers agency was an exclusive/sole agency and (inter alia) provided that a commission was payable to Coopers if the property was sold during the period of the agency. The agency had no expiry date, but was to continue until cancelled by either party with five (5) days' notice. It also provides that if, after the agency has been cancelled, the property is sold to anyone introduced by an agent appointed under it, then commission is payable to Coopers.

[6] Coopers effected an agreement for the sale of the property to the ultimate purchasers on 8 July 2010 (the first contract); but the first contract was cancelled on 9 August 2010 due to a cross lease title defect.

[7] The purchasers had listed their own home for sale with Coopers on 5 July 2010 but cancelled this agency on 13 August 2010. Coopers continued to maintain some contact with the purchasers during the period following the collapse of the first contract and before the execution of the second contract.

[8] The vendors signed a general agency agreement with Eves in August 2010 and a sole agency with it on 15 September 2010.

[9] The purchasers signed a second contract to purchase the property on 8 February 2011 (the second contract), and it was confirmed later in February 2011, and settled so that the purchasers are now the owners of the property. Eves was paid the full commission on the second contract.

[10] Coopers believed that because the vendors had a subsisting agency agreement with it as at 8 December 2011, and the purchasers were initially introduced to the property by Coopers, this entitled Coopers to commission from the eventual sale of the property to the purchasers, which was effected by Eves. Coopers alleged that Eves knew of the subsistence of the Coopers agency, but went ahead and completed the sale to the purchasers regardless, and then claimed and received the commission from the vendors.

The 10 February 2012 Committee Decision

[11] The CAC considered that Coopers had a valid agency agreement signed on 8 December 2009; no evidence had been put before it to suggest that the Coopers agency agreement had been cancelled; and its terms were that it was to continue until cancelled by the giving of five days' notice and it was, otherwise, silent as to expiration. Section 131 of the Act provides a right of immediate cancellation by any party of a sole agency agreement after 90 days, regardless of the term of the agreement. It appears that right of cancellation was not exercised by either party to the Coopers agency at any time. The cancellation is to be written notice to the other party or parties.

[12] Prior to the hearing before us, neither Coopers, nor the appellant licensee, nor the vendors had said that the Coopers agency agreement was ever cancelled. However, in his evidence to us, the appellant recalled that shortly after the vendors listed with Eves, the latter would have cancelled the Cooper agency. We asked that the relevant Eves file be located and checked in that respect and adjourned the case for that to be done. The position now seems to be that the experienced salesperson handling the sale at Eves could be relied on to have cancelled the Cooper agency but there is no evidence available that he or she did so. It also seems that the husband vendor, a retired solicitor, had himself cancelled the Cooper agency and that the Eves' salesperson knew that. In any case, Eves now accepts that any such cancellation would not bar Cooper's claim for commission.

[13] The CAC determined that the Coopers agency agreement still subsisted at the time of the execution of the second contract on 8 February 2011.

[14] The CAC considered that it was unable to place any weight on the vendors' disappointment about Coopers' actions and their view that Coopers were not entitled to any commission because it was outside the issue in relation to the breach of the Rules 5.1 and 5.2 by the licensee set out below.

[15] The CAC considered that even if the Coopers agency agreement had been validly cancelled prior to the execution of the second contract, the terms of the agreement provided that, if the property was sold to anyone introduced by the agency, a commission was payable to Coopers. We agree.

[16] At 4.16 of its decision, the CAC said:

> *"Coopers certainly introduced the purchasers, and indeed effected the first contract selling the property to them. All parties accept that there was some ongoing contact between Coopers and the vendors. Eves admits that Coopers continued to contact the vendors directly."*

[17] Finally, the CAC said:

> "*4.17 ... and in its defence [Eves] has said that its policy was not to enforce any double commission. This is not the same as taking care to ensure that no legal obligation to pay two commissions arises, and Eves has provided no rebuttal of the allegation that they reassured the vendors that there was no risk, rather than taking steps to obtain the relevant information. It was Eves' duty to contact Coopers and work in with them, not the other way around.*

4.18 Eves should not have pursued the sale as it no prior relationship existed. This showed lack of care and skill in terms of their obligation to the vendors. Nothing in the material before the Committee suggests that Eves took adequate care to protect the vendors. It appears that Eves felt justified by the dissatisfaction of the vendors with Coopers and the vendors' evident support for Coopers not gaining anything by the sale."

[18] The CAC determined that Eves was in breach of Rules 5.1 and 5.2 and that it had been proved, on the balance of probabilities, that the appellant engaged in unsatisfactory conduct.

[19] In its 14 September 2012 decision on penalty, the CAC considered that Coopers was entitled to the commission it would have received under the sale, and that the only way to achieve this was by ordering a refund of the fee paid by the vendors to the licensee/appellant so that Coopers may then seek payment of their fee from the client. The CAC directed that the appellant refund $12,680.00 plus GST to the client within 10 working days of the date of the decision. That Order was not complied with by the appellant pending his appeal to us. In fact, the commission would have been received by Eves rather than by the appellant.

A Summary of the Evidence of the Appellant

[20] The appellant is a very experienced real estate agent and branch manager with about 16 years experience. At material times, his focus seemed to be on managing the Tauranga branch at Eves and he did not engage in selling properties. He is still a branch manager for Eves. Inter alia, in his career, he has been national training manager at Harcourts. We understand that he has never acted as a listing salesperson nor as a selling salesperson so that he has never earned commissions.

[21] With regard to the subject property, he was not the listing or selling salesperson nor the licensed agent which invoiced the vendors for commission. He was branch manager.

[22] One of his agents came to him, as branch manager, to advise that she was about to prepare an agreement for sale and purchase of the property. She advised him that the purchasers had told her they had previously been introduced to the property through Coopers some considerable time previously. That was about eight months previously. The buyers had advised the agent that they had previously entered into an agreement for sale and purchase of the property but it had *"fallen over"*. The agent flagged that aspect as something to be investigated by Eves.

[23] The appellant then, immediately, made contact with the son of the vendors who was their solicitor. The appellant discussed with that solicitor the fact of the prior introduction, and that was felt to be about eight months previously and that the appellant was going to investigate the matter further and obtain a formal opinion regarding the law. In that telephone conversation the appellant categorically stated to the son that even if there was an issue regarding two commissions, which seemed to the appellant at that time to be extremely unlikely *"because of the time frames involved"* he put it, that Eves would ensure that the vendors were not placed in the position of paying two commissions and that Eves would either negotiate with Coopers if necessary or come to some alternate resolution. In due course, Eves invoiced the vendors for commission on the sale.

[24] The appellant then contacted the wife purchaser to ascertain further background and found that no attempt had been made by Mr Cooper to reintroduce the purchasers to the property over the previous 8 months following the failure of their prior offer, which had been cancelled on 9 August 2010. It appeared that a salesman from Coopers had contacted the purchasers not about purchasing the property but, rather, to become involved in the selling of their then own home.

[25] This led the appellant to conclude that no further introduction had been effected by Mr Cooper and that *"in effect his introduction ceased on or about August 9th 2010 when the initial contract 'fell over'"*. At law, that was a surprising conclusion.

[26] This led the appellant to seek independent legal advice from the principal of a Tauranga law firm retained to generally advise Eves. It seems that the appellant gave that lawyer the brief facts by telephone and was advised that Coopers had no right of commission because the prior introduction had been lost through effluxion of time and that *"therefore Coopers had ceased to be effective cause of the sale and therefore an effective agent"*. That advice reinforced the appellant's own views. However, he also consulted his own management team at Eves. He also reabsorbed some legal advice on a similar issue which had arisen in another case and that legal advice confirmed that which he had already received.

[27] The appellant put it that after he had undertaken these extensive enquiries, he was satisfied that the sale and purchase should proceed. He had not permitted execution of the agreement until then.

[28] He emphasised that he was very conscious of his legal obligations under the Real Estate Agents Act 2008 and felt he had been very careful and thorough to ensure that a double commission situation could not possibly arise. Even then, he met with the vendors' solicitor son and with the vendors to advise them of the advices he had obtained. He confirmed to them that the policy of Eves was that, even so, the vendors would not be placed in a double commission claim situation either by Eves negotiating the situation or not making any commission claim. The appellant noted that both the vendors and the vendors' son were satisfied with this assurance.

[29] However, the agreement was dated 8 February 2011 and settlement took place on 11 March 2011 but, from 15 February 2011, Mr Cooper sought commission for originally introducing the purchasers to the property. Mr Cooper telephoned the appellant in mid February 2011 and made a claim for commission in relation to his prior introduction of June 2010. Otherwise, Messrs Cooper and the appellant have not met nor communicated.

[30] Mr Cooper made a formal complaint to the Authority on 2 March 2011. The appellant considers that Mr Cooper's claim has no legal substance and, apparently, subsequently he obtained separate legal advice for Eves to that effect. The appellant considers that, at all times, he has exercised the requisite skill, care, competence, and diligence necessary to discharge his duties at material times.

[31] He also seemed to assume that Eves' listing agent would have arranged formal cancellation by the vendors of Coopers Agency shortly after Eves listed the property. Apparently, it is Eves' policy that be done automatically by a listing agent so that Eves would have the sole agency.

[32] The appellant was carefully cross-examined by Mr McCoubrey and seemed to be familiar with the risks of double commission arising and to honestly believe there was no prospect of that, at law, on the facts of this particular case.

[33] It is puzzling that those involved seemed to think that although there had been an introduction by the agent at Coopers of the purchasers to the property, then the liability for commission from the vendors normally arising from such introduction could be obliterated on the facts of this case. Why would the effect of the introduction lapse over a period of seven or eight months?

Relevant Legislation

[34] We now set out s.72 of the Act which defines *"unsatisfactory conduct"* and Rules 5.1 and 5.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which were referred to by the parties, namely:

> *"**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.*
>
> *5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.*
>
> *5.2 A licensee must have a sound knowledge of the Act, regulations made pursuant to the Act, rules issued by the Authority (including these rules) and other legislation relevant to real estate agency work."*

DISCUSSION

[35] At one stage Mr Waymouth seemed to be questioning the appellant along the lines that if there has been unsatisfactory conduct by exposing the vendors to a double commission possibility, it was that of the listing agent, or of Eves, but not that of the appellant. That seemed a curious stance to us in that the appellant was the branch manager of Eves, a licensee, clearly in charge of the situation, and doing his best, as he saw it, to check matters out. If Mr Waymouth was putting it that the appellant could stand back and maintain that this issue had nothing to do with him, we could not possibly agree with that approach. Indeed, as well as being branch manager and clearly in charge of this issue, the appellant's name is shown on the back of the agreement for sale and purchase under 'Real Estate Agent' in the following manner:

> *"REAL ESTATE AGENT:*

Eves Realty Limited
Agents Name:
Manager: Gordon Alexander Stewart
Salesperson: Sue Parkinson
Contact Details:
Cnr Willow & Wharf Street
Tauranga 3112
Tel: 07 578 2059
Fax: 07 578 2259

Licensed Real Estate Agents REAA 2008"

[36] At the end of the hearing the appellant addressed us (with our leave) to emphasise how seriously he takes the issues and allegations arising in this case about his conduct and the distress which the Committee's decision has caused him. He emphasised that he is always concerned to apply the principles of the Act and believes that he went to much trouble in this case to protect the vendors. He asserts that he is a person of principle and we inferred that, at all times, he was of the sincere view that any entitlement of Mr Cooper to commission for introducing the purchasers to the property had expired by the time the purchasers were treating with Eves.

[37] No credibility issue has arisen, and we accept the sincerity of Mr Stewart's evidence.

[38] Both counsel provided us with full and thoughtful typed and oral submissions. Since they relate mainly to interpreting the evidence we have set out above, we simply incorporate them into our reasoning.

[39] As Mr Waymouth pointed out inter alia, two commissions have not been charged and the appellant went to great lengths to investigate the issue of the claim of double commission in order to act on proper advice and in accordance with the law.

[40] It is not necessary for us to set out the full and helpful legal submissions from Mr Waymouth, but we particularly agree with him that misconduct is not an element present in this case; and that the only issue is whether the appellant's conduct was unsatisfactory in terms of the definition of that in s.72 of the Act.

[41] The key concern arising in this case is the extent to which the appellant's conduct as a licensee, and as Eves' branch manager, exposed the vendors to the risk of being pursued for two commissions. That risk is not abrogated by an agency adopting a policy of not enforcing a double commission.

[42] We have considered this issue in *Tucker v REAA and Claydon & Anor* [2012] NZREADT 46 (and in subsequent decisions) where a salesperson, Ms Claydon, signed an agency agreement with a vendor who had previously been party to a sole agency with Mr Tucker's agency which introduced the eventual purchaser. Notwithstanding that Mr Tucker's agency never sought to enforce its claim for commission against the vendor and ultimately agreed to share commission with the second agency, Mr Tucker asserted that Ms Claydon had failed to ensure that the vendor was aware that she could be liable to pay two commissions. However, Ms Claydon stated in evidence before the Tribunal:

> *"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."*

[43] Counsel for Mr Tucker submitted that giving such an assurance to a client was inappropriate and insufficient to meet the requirements of Rule 9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (rules). We agreed, finding: *"[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."*

[44] Rule 9.11 is in the following terms:

> *"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."*

[45] While Rule 9.11 is directed at disclosure at the point of entering in to a sole agency agreement, Rule 3.3 provides that the Rules set minimum standards, and that they are meant to be a point of reference. As the Authority submits, disclosure of the potential risk of liability for double commission is an important issue and a licensee's general duties to a vendor client mean the need for such disclosure is ongoing and applies in appropriate case (as here) at the point of presenting at offer. Refer to Rules 5.1 and 6.2 for example; Rule 5.1 is set out above and Rule 6.2 reads:

> *"6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction."*

[46] In the present case, the licensee gave the vendors a similar assurance to that given in *Tucker*. In his brief of evidence, the licensee states that he told the vendor's lawyer son that *"[Eves] would categorically ensure that his parents were not placed in the position of paying two commissions and that we would either negotiate with* [Coopers] *if that was applicable, or come to some alternative resolution"*. Later, in his brief the licensee states: *"[I] advised [the vendors] as a result of all those investigations the advices that I had obtained, and the policy of Eves, was that we were of the belief that there was no entitlement to a commission by Ross Cooper"*.

[47] However, the appellant was not in a position to advise the vendors as to what steps Coopers might take to enforce commission. Whatever advice he had received about the legal position, Coopers' entitlement to commission was a matter between Coopers and the vendors. Had Coopers chosen to pursue the vendors for commission, Eves would not have been in a position to prevent that. Further, it is by no means clear that, had Coopers chosen to pursue the vendors for commission, Eves would simply have walked away from its own claim to commission, particularly as it is clear that Eves considered it was the effective agent on the transaction and should therefore receive commission.

[48] There was, therefore, a clear risk that the vendors might be pursued for commission both by Coopers and by Eves. As in *Tucker*, an assurance from Eves

that the vendors would not be placed in that position was inconclusive and defeated the purpose of the rules requiring disclosure of such a risk.

[49] Eves was required to identify the risk to the vendors, advise the vendors of Eves' policy where a purchaser has been introduced by another agent, and advise the vendors to take independent advice. Instead, Eves appears to have undertaken to provide advice to the vendors on the contractual position between the vendors and Coopers. Whether or not that advice was correct is not particularly relevant. The appellant's duty was to disclose the risk of liability for a double commission, not advise on the merits of Coopers' potential claim.

[50] At material times, the appellant was the branch manager of Eves, and an Eves salesperson licensee had organised a listing agreement with the vendors when those vendors still had a listing agreement with Coopers. Very soon, Eves had a prospective purchaser but that purchaser had been introduced to the property by Coopers. The appellant knew that and it clearly concerned him because he went to great lengths, as described above, to clarify the position and try to obtain proper advice. No doubt he hoped that Coopers could not become entitled to commission for their prior introduction.

[51] It is commendable that the appellant took those steps seeking to ensure that the vendors could not become liable for double commission and also gave an assurance on behalf of Eves that would not happen.

[52] The credibility of the appellant is not in issue. However, despite the legal advice he sought, he ought to have known that Coopers were very likely entitled to commission in the usual course because of their reasonably recent introduction of the purchaser to the property.

[53] This means that the appellant did expose the purchasers to the possibility of double commission. In terms of Rule 9.11, he did not inform the vendors that they were at risk of double commission by listing with Eves.

[54] We do not accept that the responsibility rests with another salesperson at Eves and not with the appellant branch manager. The latter (the appellant) took control and was in control of the situation.

[55] However we accept that the appellant was sincere in his efforts, clearly treasures his vocation as a real estate agent, and understands that the Act and its regulations must be meticulously complied with; and he sought to do that in this case.

[56] Under s.80(2) of the Act, in the course of its investigation a Committee may decide that in all the circumstances any further action against a licensee is unnecessary or inappropriate. Under s.89, after both inquiry and a hearing of a complaint, the Committee may make one or more of the following determinations, namely; lay a charge of misconduct, make a finding of unsatisfactory conduct, and/or to take no further action. Section 89(3) provides that s.89 does not limit the powers given by s.80. Section 111 allows an appeal to us from a decision of the Committee, as in this case, and provides in s.111(5) *"If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised."* However, the powers of a Committee to make Orders under s.93 require a determination under s.89(2)(b) i.e. of unsatisfactory conduct.

[57] It seems to us that there has been unsatisfactory conduct on the part of somebody in that the vendors have been exposed to the risk of a double commission, and responsibility for that lies with the appellant. His efforts to resolve matters could not cancel any liability of the vendors to the introducing agent at Coopers. It seems that the various legal advices obtained by the appellant were lacking.

[58] We consider that the reasoning of the Committee is sound. We have heard further evidence and accept that the appellant acted honestly and sincerely (perhaps, carelessly) at all times and that the offending is at the low end of the scale of unsatisfactory conduct. In many respects it might be appropriate to find that no action should be taken against the appellant, but (inter alia) that would be incongruous with the amendments and additions we wish to make to the findings of the Committee. A reason for our not quashing the Committee's finding of unsatisfactory conduct made against the appellant is that we wish to apply s.93.

[59] We understand that Coopers is no longer in business nor in a position to litigate. By the end of the resumed hearing before us, the appellant had arranged for Eves to pay 30% of the commission to Coopers' solicitor as a gesture. In any case, we Order that to be done immediately.

[60] We also Order that the appellant contribute $1,500 towards our costs and, similarly, $1,500 costs to the Authority.

[61] We observe that for all that has been said on behalf of Eves, there has been a type of slickness (perhaps unconsciously) aimed at depriving Coopers of commission. Also, as we have said recently in other cases about commission disputes, it would be better for any complaint to be accepted not only against the salesperson but also against the real estate agency company so that we can resolve matters in terms of contribution to the offending.

[62] By way of summary, we Order as follows:

[a] The Order of the Committee that the appellant refund $12,680 (plus GST) commission to the vendors is revoked;

[b] The appellant is to forthwith arrange for 30% of the commission to be paid to Mr Cooper (we understand this was done on 12 June 2013);

[c] The appellant is to contribute $1,500 towards the costs of the Authority to be paid to its Registrar at Wellington within 28 days of this decision.

[d] The appellant is to contribute $1,500 towards our costs payable to the Tribunals Unit, Ministry of Justice, 86 Customhouse Quay, Wellington, within 28 days of this decision;

[e] We confirm the Committee's finding of unsatisfactory conduct stands but emphasise that, in the particular circumstances of this case, the conduct is at the low end of the scale.

[63] We would not expect to grant the appellant name suppression if such an application were to be made.

[64] 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.

_____
Judge P F Barber
Chairperson

_____
Ms N Dangen
Member

_____
Mr J Gaukrodger
Member