

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision No: [2013] NZREADT 73

Reference No: READT 099/12

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

BETWEEN **KEVIN MURDOCH**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC20002)**

First Respondent

AND **GREGORY POWELL, ANDREW
FREEMAN AND NATALIE SMITH
(FIRMEDOW)**

Second Respondents

MEMBERS OF TRIBUNAL

Ms K Davenport QC - Chairperson
Ms N Dangen - Member
Mr J Gaukrodger - Member

HEARD at Christchurch on 19 August 2013

DATE OF THIS DECISION 30 August 2013

APPEARANCES

Mr Murdoch in person (accompanied by his son John Murdoch)
Ms MacGibbon for the First Respondent
Mr Hair for the Second Respondents

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Keith Murdoch appeals the decision of the Complaints Assessment Committee (CAC) to take no further steps in respect of his complaint against the three second respondents. The CAC did not actually make a finding against Ms Smith (Firmedow) as it considered that Mr Murdoch had withdrawn his complaint against her but all parties accepted that an appeal could proceed on his complaint relating to Ms Smith.

[2] In 2010 Mr Murdoch owned a property at 256C Main Road, Moncks Bay, Christchurch. Mr Murdoch and his wife made the decision to list the property for sale

with Grenadier Real Estate Limited which was part of the Harcourts Group. Ms Smith was the salesperson who listed the property and sold it. Mr Powell was the manager of the branch office and Mr Freeman is part owner of the business.

[3] The property was listed for sale with the Listing Agreement dated 2nd September 2010. This was just prior to the first earthquake in Christchurch. Mr Murdoch says that at the time of listing the property for sale he discussed with Ms Smith what would happen if the contract became frustrated (his words). He says that Ms Smith said that Harcourts only took a commission on the completion of a successful sale and purchase. Mr Murdoch asserts that this meant that if the sale did not settle, there would be no commission payable.

[4] An Agreement for Sale and Purchase was entered into with Mr and Mrs Staff into on 6th January 2011 and possession date was to be 23rd March 2011. The sale to Mr and Mrs Staff became unconditional on 20th January 2011. Unfortunately before the sale could complete, Christchurch suffered its second and much more damaging earthquake. As a result of this, the property was "red stickered" and was subsequently red zoned.

[5] After a meeting on site with Mr Murdoch and exchange of correspondence between lawyers, Mr and Mrs Staff refused to settle the purchase. Mr and Mrs Murdoch eventually cancelled the agreement for non completion of the sale and sought to retain the deposit. Some months later Mr Murdoch refunded the deposit to the Staffs. The property at Main Road was subsequently declared to be in the red zone. Mr Murdoch has sold the property to the Government under the compulsory purchase scheme.

[6] Mr Murdoch's complaints about the second respondents are:

- [a] Ms Smith's words and his own lack of understanding about the meaning of the word "sale". He says that he understood that it was a sale only when the purchase was completed and money changed hands rather than when the contract became unconditional. He says Ms Smith assured him that if the contract was frustrated no commission would be paid until the sale was completed.
- [b] A failure by Ms Smith to carry out other representations that she made to Mr Murdoch, ie
 - [i] Carrying out the inspection of the property prior to the settlement; and
 - [ii] Continuing to liaise with the Staffs; and
- [c] Mr Powell and Mr Freeman were in breach of s 50 of the Real Estate Agents Act by failing to properly supervise Ms Smith and ensure that her undertakings were honoured.

[7] Ms Smith denies that that there was any discussion at all about frustration of the contract or any discussion that the commission would not be payable until the purchase had settled. She said that the agreement provided (and her understanding was) that the agency became entitled to commission once the contract became unconditional.

She said in this case Mr Murdoch's solicitor had authorised the release of the deposit after deduction of the commission.

[8] She confirmed that she had said that she would liaise with the purchasers. She said that she had done that. She also confirmed she agreed that she would undertake the final inspection. She said however that this became impossible to do after the earthquake as the property was red stickered. No-one was allowed to visit the property. She said that she did not consider that it was her job to liaise with the purchasers once they had refused to settle as both Mr Murdoch and the Staffs had their solicitors involved. She said it did not occur to her that she should try to negotiate a solution, nor would this have been part of her normal role.

[9] Mr Powell and Mr Freeman had little to add to this story. Mr Powell, as manager, accepted that he had a duty to supervise Ms Smith but denied that this extended to an obligation to ensure that she met her representations to Mr Murdoch. He said that he did not consider that Ms Smith had done anything wrong. He said she would have inspected the property had the property settled in the normal course of events but the earthquake and the "red stickering" made this impossible. He also said that he did not consider that once the solicitors for Mr Murdoch and the Staffs were involved in a dispute that his real estate agency had any role to play in trying to negotiate the resolution of the dispute.

[10] Mr Murdoch asked Mr Powell about where in the agency contract it gave a definition of "sale". He said that nowhere did it say that the meaning of "sale" was when the contract become unconditional, rather than when it settled. Mr Powell said that this was clear from the contract and from Mr Murdoch's own ownership of many investment properties.

Discussion

[11] The Tribunal feel a great deal of sympathy for Mr Murdoch who, because of the devastating effects of the earthquake, is out of pocket to the extent of the commission that he paid to Harcourts. However, we understand that he appears to have recouped his loss in so far as he has recovered from CERA and his insurance company an amount equivalent to the CV on the property which was in excess of the amount of the sale to Mr and Mrs Staff.

[12] However, our obligation is to consider the facts of this appeal.

Claim against Ms Smith

[13] We do not consider that Ms Smith made any representations that commission would not be charged until the settlement of the sale if the contract was frustrated. At the time that the agency agreement was signed, Christchurch had not suffered any earthquakes, nor was it considered likely to suffer an earthquake. Mr Murdoch says he was familiar with the term because of his experience with tenancy agreements. We have considered this but consider it unlikely that Mr Murdoch would have had a discussion with Ms Smith about the possibility of the contract being frustrated. It is possible that he had a conversation with Ms Smith about when commission would be payable and she told him upon the completion of the sale, but Mr Murdoch has to establish that on the balance of probabilities that there was a representation that commission was not payable until settlement.

[14] We consider on the balance of probabilities that it is more likely than not that Mr Murdoch understood that commission was paid once the agency had been completed, that is when Harcourts had negotiated an unconditional sale and purchase for Mr and Mrs Murdoch. We therefore conclude that Mr Murdoch has not proved this representation on the balance of probabilities.

[15] We accept that Ms Smith said that she would carry out a pre-settlement inspection for Mr Murdoch and that she agreed that she would liaise with the purchasers between the signing of the agreement and settlement. Emails that we have seen showed that she continued to liaise with the Staffs after the agreement was signed.

[16] However, the intervention of the earthquake made the settlement of the contract impossible. We do not find that Ms Smith breached her obligations as an agent because she did not carry out the pre-purchase inspection. First, it was not part of her obligation as an agent to do so and she was offering to do it as an extra service for Mr Murdoch. Second, even if it had been part of her obligations as an agent, the intervention of the earthquake and the red zoning of the house made it impossible for her to carry this out. We do not consider that it would be appropriate to impose any disciplinary sanction upon Ms Smith for any failure in this regard. As Mr Murdoch fairly acknowledged, she carried out her obligations as an agent very well up until the point of the earthquake. We find that after the earthquake there was nothing more that Ms Smith was required to do as an agent. We think it is unrealistic of Mr Murdoch to have expected her to have become involved in the dispute between Mr Murdoch and the Staffs about whether or not they were obliged to settle the purchase. Mr Murdoch had a solicitor, as did the Staffs, and it was their role to offer advice to Mr Murdoch and to correspond with the solicitors for the other party. They did this. The Tribunal appreciate that this may have been at a significant cost to Mr Murdoch but that was sadly an inevitable consequence of the difficulties posed by the earthquake. Mr Murdoch's solicitors are likely to have firmly rebutted any attempt by the agents to become involved in the dispute.

What does sale mean?

[17] The agency agreement makes it clear that the obligation to pay commission arose if the property was sold by Grenadier Real Estate Limited (the exclusive and sole agency authority). Pursuant to clauses 2 and 12 of the Agreement for Sale and Purchase (8th Edition), once a sale becomes unconditional (and the purchaser is obliged to complete the sale), then the vendor is obliged to pay a commission to the agent. This is a well understood concept as the agency's job is done once they have negotiated a sale without any conditions.

Breach? Section 50 of the Real Estate Agents Act

[18] Section 50 of the Real Estate Agents Act requires a salesperson to be properly supervised and managed. "Properly supervised and managed" is defined as "agency work is carried out under such direction or control of either a branch manager or an agent as is sufficient to ensure (a) that the work is performed competently and (b) that the work complies with the requirements of this Act".

[19] We have found that Ms Smith carried out her work as a salesperson competently and in accordance with the requirements of the Act. Mr Freeman and Mr Powell did not fail in their obligations to supervise her by failing to ensure that she complied with the representations.

[20] It therefore follows that Mr Powell and Mr Freeman could not have been in breach of s 50.

[21] Accordingly, the Tribunal dismisses the appeal against all three of the second respondents.

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

DATED at AUCKLAND this 30th day of August 2013

Ms K Davenport QC
Chairperson

Ms N Dangen
Member

Mr Mr J Gaukrodger
Member