

Decision No: [2014] NZREADT 40

Reference No: READT 043/13

IN THE MATTER OF

an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

ROBERT GARLICK

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC20003)**

First Respondent

AND

**ACTIVE REAL ESTATE LIMITED
(TRADING AS HARCOURTS
JOHNSONVILLE)**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport QC - Chairperson
Ms C Sandelin - Member
Mr G Denley - Member

APPEARANCES

Mr C Matsis (Gault Mitchell Law) for the appellant
Mr M Hodge (Meredith Connell, Solicitors) for the first respondent
Mr P McDonald, Solicitor, Auckland for the second respondent

HEARD at WELLINGTON on 9 April 2014

Introduction

[1] Mr Garlick appeals against a decision of the Complaints Assessment Committee (“the Committee”) to take no action in respect of the complaint that he had made against a number of salespersons with Active Real Estate Limited (Mr Walter Smith, Mr Anthony Quayle, Mr Paul Ellis and Mr Rodney Leitch). The Committee also dismissed a complaint brought by Active Real Estate Limited against Mr Garlick. They do not appeal this decision.

The facts of the case

[2] The complaints arose out of the sale of 33/1 Halswater Drive, Churton Park, Wellington on 28 October 2011. Ms Gunn, the vendor of the property had initially

listed it for sale with Mr Garlick's company Leaders Limited, trading under the Remax brand. The sole agency was cancelled in April 2012. Ms Gunn subsequently listed it with Harcourts, trading as Active Real Estate Limited (the second respondents) and it was sold to a Ms Slight. Difficulties arose when it became apparent that Ms Slight, had made an offer four months earlier (through Leaders) which had not been accepted. Leaders claimed all of the commission saying that the purchaser had been introduced to the property by Leaders. Mr Garlick in his initial complaint sought a determination by the Committee that the full commission be paid to Leaders.

[3] Mr Garlick complained that the Harcourts licensees did not give a clear warning to the vendor of the possibility of a double commission under Rules 5.1 and 9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. Against Mr Ellis he also complained that he had not adequately supervised Mr Smith pursuant to s 50 of the Real Estate Agents Act 2008. The Complaints Assessment Committee dismissed the complaint against Mr Smith, the listing agent with Harcourts, finding that he was not in breach of R 9.11, as he did not have any direct dealings with the vendor.

[4] As against Mr Leitch, the listing agent, the Committee found that the vendor had been verbally advised that after the sale was completed she would not have to pay a double commission. Mr Leitch stated in his response that he explained the potential risks to the commission to the vendor but he also stated that if there was any commission dispute it would be sorted out between the agencies.

[5] The Committee found that they were bound by the *Tucker v REAA* [2012] NZREADT 46, decision where the Real Estate Agents Disciplinary Tribunal held that it was not sufficient to say that a double commission would not be charged. An agent must first advise the client that there was a risk of double commission. The Committee distinguished this case on its facts as Mr Leitch said that he did advise the vendor of this risk. The Committee found that the nature of the evidence was unclear enough to warrant a finding that no further action against Mr Leitch would be taken.

[6] Against Mr Ellis the Committee found there was no breach of Rule 9.11 and that there was appropriate supervision of Mr Smith.

[7] As against Mr Garlick, Harcourts had alleged that Mr Garlick threatened to make a complaint if Harcourts did not agree to pay 100% commission to Leaders which would be a breach of Rule 7.3. The Committee took the view that the e-mail statement of Mr Garlick saying that he did not agree to a mediation or arbitration was not a breach of the Rule.

[8] A complaint was also made against Mr Quayle of Leaders. This complaint was that he also made a threat concerning (R 7.3) "taking it to the Committee" if there was no agreement on commission and this was also dismissed.

[9] The Committee determined that it would take no further action with regard to the complaint or any issue involved in the complaint. An appeal was lodged by Mr Garlick against this decision. There is no appeal with respect to Mr Quayle's conduct.

[10] The Tribunal must now consider this appeal by Mr Garlick.

The Facts

[11] The appellant's points on appeal were:

- (a) That the Complaints Assessment Committee erred in finding that there was insufficient evidence of misconduct by Rod Leitch;
- (b) The Complaints Assessment Committee erred in finding that there was no misconduct by Mr Ellis as there was inappropriate supervision as a matter in fact and law; and
- (c) The decision that there was no misconduct by Mr Smith was wrong as a matter in fact and in law.

[12] Mr Matsis, counsel for the appellant, further refined the points on appeal by giving notice of the issues as set out in paragraph 2 of his memorandum received on 26 February 2014 as follows:

"Notice of Issues

- 2. In my submission, the following issues arise for determination by the Tribunal:
 - 2.1 Is there sufficient evidence of a breach by Rod Leitch of Rules 5.1, 6.4, 9.10 and 9.11?
 - 2.2 Did Rod Leitch's statements meet the legal requirements set out in *Tucker v REAA & Ors* [2012] NZREADT 46 and *Johnston v Vining Realty Group Ltd & Ors* [2013] NZREADT 67?
 - 2.3 Is there sufficient evidence of a breach by Paul Ellis of Rules 5.1 and 6.4?
 - " 2.4 Is there sufficient evidence of proper supervision and management of Rod Leitch by Paul Ellis in light of the legal requirements set out in *Tucker v REAA & Ors* [2012] NZREADT 46 and *Johnston v Vining Realty Group Ltd & Ors* [2013] NZREADT 67?"
 - 2.6 Is there sufficient evidence of a breach by Wally Smith of Rules 5.1 and 6.4 in light of the legal requirements set out in *Tucker v REAA & Ors* [2012] NZREADT 46 and *Johnston v Vining Realty Group Ltd & Ors* [2013] NZREADT 67?"

The Facts

[13] The Tribunal heard from Mr Domb (for the appellant) and Mr Smith, Mr Leitch and Mr Ellis (from Harcourts).

Mr Domb's evidence

[14] Mr Domb told the Tribunal he had listed the property at 33/1 Halswater Drive, Churton Park for Ms Gunn in October 2011. He told the Tribunal about the initial offer from Ms Slight in December 2011 and a little about the amount that was offered and counter-offered. In the end no agreement was reached. Ms Gunn renewed the sole agency in March 2012 but cancelled it in April 2012.

[15] When Ms Gunn contacted Leaders to withdraw the agency Mr Domb suggested that Ms Slight be contacted again to see whether she would be prepared to re-present her offer. Leaders did contact Ms Slight and she declined to represent the offer. Mr Domb agreed by e-mail to release Ms Gunn from the agency agreement but recorded that Leaders would be entitled to a commission if she ever sold a property to anyone who had been introduced by Leaders. He gave no names but suggested that if she got an offer he would be happy to check with the Leaders team to see whether this person had previously made an offer.

[16] Mr Domb said that he found out that the buyer was Wendy Slight after the property had been sold. He then reminded Ms Gunn of the terms of her release from the sole agency. Ms Gunn apparently told Mr Domb that she had not been aware of Ms Slight's prior involvement with Leaders when Harcourts presented the offer to her.

[17] Mr Garlick wrote to Ms Gunn suggesting that she refer the matter of the commission to her solicitor. Mr Domb said that he never suggested or thought that there would or could be a split commission as he knew that Mr Garlick wanted to make a complaint about the behaviour of Harcourts "*from the minute that he told him about it*".

[18] Mr Garlick did not give evidence but subpoenaed Ms Gunn to come to the hearing. At the hearing a decision was made not to call Ms Gunn. Mr Domb's evidence was therefore the only evidence for the appellant.

The Respondents

[19] The Tribunal then heard from Mr Smith. Mr Smith told the Tribunal that he had known Ms Slight as a client for some time and once he knew the property at Halswater Drive was on the market he approached her to see whether she was interested in the property. She told him that she had seen it through Remax and she was not particularly interested. The next day she rang him back and arranged to see the property again. She told him during the course of the viewing that she had made an offer through Remax in December 2011. She also told Mr Smith of the contact by Mr Domb just before the Leaders agency agreement was cancelled.

[20] Mr Smith said he spoke to Mr Leitch and Mr Ellis to seek guidance about the commission and offer given that the purchaser had made an offer through Remax. He said that once he was given the go-ahead to present the offer, he had Ms Slight sign it. He then gave the agreement to Mr Leitch to present to the vendor. The agreement was concluded on 20 April 2012.

[21] Mr Leitch was the listing agent. He told the Tribunal that he had taken Ms Gunn through the listing agreement. He said he specifically drew her attention to the fact that she might be exposed to more than one commission but also gave her an assurance that Harcourts would not put her in a position where she actually had to

pay two commissions. He said he did not elaborate on the Harcourts policy¹ He gave the agreement to Ms Gunn to sign. He was adamant that when he took the offer to Ms Gunn he told her that the purchaser had made a previous written offer which had been rejected. However Ms Gunn said the purchaser's name did not mean anything to her. Mr Leitch then reiterated that Harcourts would not put her in a position where she would have to pay two commissions and told her it would be sorted out with the other agency.

[22] Mr Leitch was not shaken on cross-examination and continued to maintain that he had clearly explained to the vendor that there was a risk of two commissions but that he would ensure that she did not have to pay them.

[23] Mr Ellis told the Tribunal that he was one of the principals in Active Real Estate (T/A Harcourts) and he was aware that the property at Halswater Drive had been listed with Remax and in a general way that Harcourts had taken on a listing for a short period of time. Once an offer was made he spoke to Mr Smith and Mr Leitch. He was aware that the property had previously been seen by Ms Slight through Leaders (Remax) and that she had made a written offer through them. Mr Smith wanted guidance he said as to how he should prepare the offer and how he should proceed. Mr Ellis said that he told Mr Smith to go ahead and prepare the offer and he checked with Mr Leitch. He concluded that there had been a significant four month gap since Ms Slight had seen the property with Remax. He said that it had been his approach for many years that if any client was exposed to double commission he would do whatever it took so that the client's exposure was eliminated as quickly as possible. He said he would never pursue a client for further commission if another agency would not share it. He said that he had offered to arbitrate the commission dispute between Remax and Harcourts and also offered Remax two thirds of the commission. However Leaders would not agree to that proposal or to discuss it any further or agree to arbitrate the dispute.

The Issues

[24] The Tribunal considers that the issues are:

[25] Whether or not there is evidence of misconduct by the agents? In determining this the Tribunal will need to consider the impact of Rule 9.11 (responsibility for double commission), and Rule 9.10 (the obligation to put all of the terms of an agency agreement or any other contractual agreement in writing).

[26] The Tribunal must consider if Mr Leitch breached R 5.1 and R 9.11.

[27] Mr McDonald also raised two other issues for consideration by the Tribunal:

- (i) Was there any jurisdiction for the Tribunal to consider the appeal issues raised by Mr Garlick as they had not been raised in the earlier decision?
- (ii) Was there an abuse of process by Mr Garlick as set out in Mr McDonald's submissions?

¹ This policy was that if a vendor was exposed to two commissions and the other agency would not accept less than 100% then Harcourts would forego commission.

[28] Mr Matsis has also raised breaches of R 5.1 and R 6.4 against each agent.

Issue 1 – Rule 9.11

Mr Leitch

[29] Did Mr Leitch correctly explain to Ms Gunn her double commission risk?

[30] The only evidence on this issue is Mr Leitch's evidence (unshaken by cross examination). He is clear he explained to Ms Gunn the risk of payment of two commissions but equally clear that he told her that Harcourts would ensure she would not have to make such a payment.

[31] The issue for the Tribunal here is how this case sits with the decision given by the Tribunal in *Tucker v REAA*, [2012] NZREADT 46. Rule 9.11 (2009 Rules) makes it clear that a client must be warned that if they have recently exited a sole agency with another agency prior to entering into a second agency agreement that there is a potential risk that they could be obliged to pay commission to more than one agent. In the *Tucker* decision the agent had not warned the vendor of the risk of two commissions but instead had directly advised her that there would be no risk of a double commission. It is important that an agent make it clear to the vendor that there is a potential for a second commission if the property is sold to someone introduced by the previous agency. This is a simple matter of educating a vendor to a risk after a change in a sole agency. But does *Tucker* preclude an agent from confirming to a vendor that the second agency will not seek commission in the event of a dispute? In the *Tucker* case, the agent did not take the first step of advising the vendor that there was a risk of a second commission before giving the assurance. Mr Leitch's evidence was that he did tell the vendor that there was a possibility of two commissions but then assured her that Harcourts would not allow her to be put in a position of having to pay two commissions. It was submitted to the Tribunal that this assurance effectively abrogated the effect of Rule 9.11. Mr Matsis submitted that what Mr Leitch did in this case undermined the requirement of *Tucker* and that there should have been no assurance given by Mr Leitch to the vendor.

[32] Mr Hodge agreed with Mr Matsis and submitted that the assurance given [however nugatory] immediately after the warning nullifies the warning. He submitted that Rule 9.10 provided that any such variation to the contractual terms [that a commission be paid to the new sole agent] should be put in writing. He submitted that there was a real risk of confusion and distress if the vendor was not aware of change to the written contractual term. Mr Hodge submitted that an assurance such as Mr Leitch gave was a variation of the term in the listing agreement that the vendor agrees to pay the fees of the agent and should thus be recorded in writing.

[33] Mr McDonald for the second respondent did not consider that this was necessary. He submitted that all that Rule 9.11 required was a warning, and that a subsequent assurance did not negate that warning. He submitted that Rule 9.10 could only apply to the terms of any written commission agreement. Mr Matsis submitted that it was open to the Tribunal to find both a breach of Rule 9.11 and 9.10.

[34] It is trite but true to say that every case is determined upon its facts. In this case we consider that Rule 9.11 was adequately discharged by Mr Leitch explaining

to the vendor her exposure. We accept that the vendor probably did not consider that there was a risk of exposure given that the next comment was a categorical assertion that she would not have to worry about that. However we do not read Rule 9.11 as preventing this assurance from being given. Rather it requires a vendor to be aware of the risk. Mr Leitch did this.

[35] For the reasons set out above we consider that Rule 9.11 simply requires the warning to be given. The vendor must understand the risk. We are satisfied that Mr Leitch did that. However the Tribunal acknowledge that the spirit of the Rule is abrogated by an immediate assurance by the agent that in fact no commission will be paid. However this does not change the fact that Rule 9.11 simply requires a warning. It would not be in the public's interest to prevent or hinder agents from waiving the right to receiving the whole commission.

[36] However whilst it is not necessary for our decision in this case we find that a statement that no second commission would be claimed from the vendor in the event of a dispute is a variation of a material term of the agency agreement and should, as a matter of good practice be recorded in writing. This would prevent any ongoing dispute about the liabilities for commission between vendor and agent (No. 2). Given we are extending previous understanding of R 9.10 we do not make a finding of any breach of R 9.10 in this case.

Mr Smith

Rule 5.1: The appellant alleges he breached R 5.1 and/or R 6.4

[37] Rule 5.1 requires an agent to exercise skill, care, competence and diligence at all times when carrying out real estate agency work.

Rule 6.4

[38] 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.

[39] There has been no evidence that would support any allegation of breach of R 5.1 and R 6.4 by Mr Smith. The factual allegations relate only to the previous agency agreement and the risk of a double commission. These allegations are property dealt with under R 9.11 and R 9.10.

[40] Mr Smith recognised that there were concerns with Ms Slight having made a previous offer and took them to his manager (R 5.1). This is appropriate and shows an appropriate level of skill and care. There is no evidence to suggest anyone was misled. He did not breach R 6.4 or R 5.1.

[41] In conclusion we do not consider that Mr Smith has displayed any behaviour which would be warranting of disciplinary action and accordingly uphold the decision of the Complaints Assessment Committee to take no steps against him. He behaved appropriately in all.

Mr Leitch

[42] For the reasons set out above we find that Mr Leitch is not in breach of Rule 9.11.

[43] For the reasons set out in our discussion about R 5.1 and R 6.4 with Mr Smith we do not consider that there has been any evidence to show Mr Leitch breached these rules.

Mr Ellis' supervision

[44] We can find no evidence to support the assertion by Mr Garlick that Mr Ellis inappropriately supervised Mr Smith (or Mr Leitch). Mr Ellis obviously took a different approach to the question of whether or not commission should be shared between Leaders and Remax or paid entirely to Leaders as Mr Garlick wanted. We do not consider that this shows any want of supervision by Mr Ellis. Mr Garlick appears to have taken an inordinately rigid and rather inflexible approach to commission and has apparently declined to take steps to resolve the dispute. His failure to appear at the Tribunal hearing and his subpoena of the vendor all indicate an attitude which does not appear to be in keeping with a spirit of cooperation between agents. Likewise R 5.1 and R 6.4 have not been breached by Mr Ellis's conduct. We do not therefore uphold the appeal against Mr Ellis.

[45] We now turn to consider Mr McDonald's issues.

Mr McDonald submits:-

[46] That Mr Garlick could not bring the appeal because it was abuse of process. In summary his points were as follows:

- The complainant's [manifest] purpose was to pressure the vendor and the second respondent to pay 100% of the commission.
- The appellant was not a witness to any of the matters which were complained about.
- The complaint is in fact a claim for commission which is an improper purpose within Rule 7.3 of the 2009 Rules.

[47] He further submits that the matters which were raised by Mr Garlick in the appeal were not matters which were previously raised in the initial complaint which gave rise to the appeal. He argued that the matters which were raised were new matters which should not be dealt with by the Tribunal.

Abuse of process

[48] It is a breach of Rule 7.3 to threaten to bring a complaint solely for the purpose of obtaining a commission payment. It would also arguably be an abuse of process. However there has been insufficient evidence to satisfy us that this was the sole purpose of Mr Garlick's complaint. Mr Garlick's interest was probably mostly to recover commission but nonetheless he also appeared to have been concerned about whether or not the vendor had been given the appropriate warning under R 9.11. Certainly this was the way in which the appeal was structured and run by

Mr Matsis. Accordingly there is insufficient evidence to make a finding that this appeal is an abuse of process.

Issues not raised in the initial application

[49] Mr McDonald submitted that the appeal raised new issues.

[50] The Tribunal treats appeals as hearings *de novo* (except in some limited cases where they are regarded as an appeal from an appeal from a discretion, see *Kacim v Bashir* [2010] NZSC 112).

[51] However it would be a breach of natural justice for the respondent to have to deal with completely new matters not raised in the complaint. However issues can and do become refined or more or less important during the appeal process. In this case the issues which are dealt with in the appeal are factually similar to those in the complaint and the decision of the Complaints Assessment Committee. We consider therefore that it is appropriate for the Tribunal to consider these issues as well. We have in the end not upheld any aspect of the appeal but we have considered all of the aspects that Mr Matsis raised in his client's appeal.

[52] The Tribunal therefore dismisses the appeal against all respondents.

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

DATED at AUCKLAND this 28th day of May 2014

Ms K Davenport QC
Chairperson

Ms C Sandelin
Member

Mr G Denley
Member