BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 28

READT 044/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**WARREN WILSON**
	First appellant
AND	**ROBERT WYNN-PARKE**
	Second appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20008)**
	First respondent
AND	**DANIEL HEWES and TERENCE GOODFELLOW**
	Second respondent

HEARD ON THE PAPERS

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

SUBSTANTIVE CASE HEARD on 10 and 11 November 2014

DATE OF OUR DECISION 22 January 2015 issued as [2015] NZREADT 8

DATE OF THIS DECISION ON APPLICATION FOR RECALL 20 April 2015

REPRESENTATION

The respective appellants/complainants/applicants on their own behalf
Mr L J Clancy, counsel for the Authority
Mr P J McDonald, counsel for the licensees

DECISION OF THE TRIBUNAL ON APPLICATION FOR RECALL

Background

[1] Broadly, our 22 January 2015 decision related to the marketing by the second respondent real estate agents of an Auckland city property which could be regarded as land locked, or not having appropriate access.

[2] The first and second appellants were the complainants about the conduct of the second respondent licensees, Daniel Hewes and Terence Goodfellow, regarding the sale of a property at 40 Karaka Street, Newton, Auckland. A mortgagee's sale was held on 16 May 2013 but without a confirmed sale. However, the property was ultimately sold on 28 August 2013 to a family company established by the said complainant Mr R Wynn-Parke following a private negotiation.

[3] We endeavoured to cover the evidence and the issues with reasonably detailed reasoning to explain why we dismissed that appeal from the said complainants.

The Present Application

[4] We now have before us an application dated 24 February 2015 by the complainants for recall of our said decision of 22 January 2015. That application refers to s.3 of the Real Estate Agents Act 2008 and to ss.227 and 240 of the Property Law Act 2007 and then continues:

> *"Both Mr McDonald and the Tribunal laboured the point there was no convincing evidence the lessee had assigned the lease in terms of the deed of assignment as there was no evidence Council (Auckland Transport) had consented to the assignment. However to read Property Law Act 2007 s.240(1)(2) that is no longer a requirement as an assignment lawfully takes place without need for the lessors consent. Then leaving it up to the lessor to take legal action if it remains unhappy with that situation. Auckland Transport did not take any such step and have accepted the assignment. In any event the document had been sent to Auckland Council at the time, it was they who elected to do nothing, in effect accepting the assignment through default.*
>
> *The other significant issue is that of who owned the house, with Harcourt's seeking advice from Bell Gully on the auction floor, that advice being that "the Crown owned the house". However the lease document at the first page under the background paragraph C said "Upon settlement the lessee will own the building which is partially on the premises and partially on the adjoining land". That lease was signed by the deputy Mayor, sealed by Council, witnessed by a senior partner of Brookfield's, a highly respected law firm. Prima facie that document is beyond reproach regardless of its source, both Bell Gully and Harcourts held a copy of the lease long prior to the auction and had refused to make it available to prospective purchasers notwithstanding the lessee's specific request. In short prospective purchasers at the auction were misled, inexplicably and in breach of the code of conduct.*
>
> *With respect the approach adopted <u>but</u> the Tribunal is perceived as "she'll be right mate" provided that overt misrepresentation is committed through advice from a "respected" law firm, notwithstanding the real estate agents had documents which proved otherwise.*
>
> *We agree with Mr Clancy's position that it is not for real estate agents to devolve their responsibility to an instructing lawyer, but which is exactly what occurred here, notwithstanding the real estate agents had a copy of the lease which showed the lawyers advice was both false and misleading …"*

[5] Rather helpfully, the appellants/applicants then set out a *"Conclusion"* to their application for recall as follows:

> *"**Conclusion***
> *We say it was unfortunate the Tribunal's attention was not drawn to the new provisions of the Property Law Act 2007 s.240(1)(2) and to the provisions of the lease document.*
>
> *We agree with Mr Clancy's position that it is not for real estate agents to devolve their responsibility to an instructing lawyer, but which is exactly what occurred here, notwithstanding the real estate agents had a copy of the lease which showed the lawyers advice was false and misleading.*
>
> *While real estate agents may not be lawyers a comprehensive understanding of the Property Law Act 2007 is part of their basic education requirement, with how the read a lease document, the same fundamental requirement.*
>
> *We say in this matter there are matters the READT should correct and the real estate agents at the minimum ought to receive a warning they should have been more diligent and should not have abrogated their responsibility to an instructing lawyer who in this case clearly and inexplicably got it wrong, they should have obtained confirmation from the client, supported by evidence or expert advice. That they should have made a copy of the lease available to prospects, advised there was a dispute in respect of whether Auckland Transport intended to cancel the lease but there was no evidence which support that allegation."*

The Response for the Second Respondents

[6] On behalf of the respondent licensees, Mr P J McDonald opposes the application for recall as being devoid of merit and puts it to be simply a reiteration of the appellants' submissions to us at the substantive hearing. He also puts it that the legal criteria for a recall are not made out so that we should dismiss this application on the papers.

[7] We set out below relevant law, which Mr McDonald had very helpfully set out for us and which has been accepted as appropriate by Mr Clancy on behalf of the Authority.

[8] However, we first set out the following from Mr McDonald's submission in response to the application for recall.

> *"**The Application raises nothing new***
>
> *5. The main point advanced in support of the application is the suggestion "that the Tribunal's attention was not drawn to the new provisions of the Property Law Act 2007, s.240(1)(2) and to the provisions of the lease document".*
>
> *6. The written submissions of Mr Wilson for the appellants dated variously 2 November 2014 and 3 November 2014 and filed and served on 3 November 2014, at paragraph 7 say as follows:*

> *"7. Refer to Exh.3 – copies of key sections of Property Law Act 2007 of which the respondents would have been aware and which castes aspersion on the Bell Gully letter at Exh. 2"*

At Exh3, the text of ss.227 and 240 of the Property Law Act 2007 are set out verbatim.

7. *It is clear that the terms of the lease were before the Tribunal, and the Tribunal's attention was drawn to the recital in the lease as to the ownership of the house. The appellants' Brief of Evidence dated 12 September 2014, filed and served by email that day, says at paragraph 4:*

> *"If you look at page 251 and para C of the back ground to the lease you will note the house is clearly owed [sic] by the lessee and not Auckland Transport. It is a matter of record Hewes/Goodfellow had a copy of the lease, refused to provide it to prospects yet continued to mislead bidders right up to auction."*

8. *It therefore simply cannot be said, as the Application for Recall endeavours to do, that the Tribunal's attention was not drawn to the provisions of the Property Law Act 2007 or to the relevant terms of the lease.*

9. *A subsidiary point relied upon by the Application to Recall, is that the Second Respondents and Bell Gully had a copy of the lease and should have made a copy of the lease available to prospects. This subject was extensively canvassed in submissions prior to the hearing and at the hearing. At Paragraph [83] of the decision, the Tribunal quotes extensively from counsel's submissions in respect of that very issue, as to whether the copied lease document should have been provided to prospective purchasers.*

10. *It therefore simply cannot be said that the Tribunal has not been addressed upon and considered this issue.*

11. *The remainder of the application is likewise a simple reiteration of submissions made orally and in writing by the appellants prior to and at the hearing."*

[9] As Mr McDonald also added, the appellants had a right of appeal from our substantive decision but have not exercised that right; and an Application for Recall is not an opportunity to reconsider our fundamental decisions as the appellant applicants seem to be seeking.

The Stance of the Authority

[10] On behalf of the Authority, Mr Clancy concurs with the submissions filed by Mr McDonald which we have referred to above and opposes the Application for Recall.

[11] He also submits that the stated grounds for the Application for Recall are a reiteration of issues and submissions dealt with at the hearing and are not properly grounds for an Application for Recall rather than an appeal.

[12] He also invited us to deal with this application on the papers and to decline it.

Relevant Law

[13] The legal position in respect of recall is conveniently set out in the judgment of Justice Goddard in *Svitzer Salvage BV v Z Energy Limited & Anor* [2013] NZHC 3541.

[14] As Mr McDonald puts it, paragraphs [16] and [17] of the judgment neatly set out the position as follows:

> *"[16] Against that context, I refer to the leading statement of Wild CJ in Horowhenua County v Nash (No 2 on recall):*
>
> > *Generally speaking, a judgment once delivered must stand for better or worse subject, or [sic] course to appeal. Were it otherwise there would be great inconvenience and uncertainty.*
>
> *[17] I recalled this judgment on the basis of a plain mistake as to remedy. Striking-out the first cause of action will rectify that mistake. It will be consistent with the findings I made in the judgment, which are that there are no pleaded facts which support the first cause of action. It is not open to reverse those findings in the context of a recall application and nor do I resile from them. As the Court stated in Faloon v Commissioner of Inland Revenue:*
>
> > *… it is quite clear that the discretion to recall must be exercised with circumspection, and it must not in any way be seen as a substitute for appeal. In particular there are some things that it can be said the power to recall does not extend to. It does not extent to a challenge of any substantive findings of fact and law in the judgment. It does not extend to a party recasting arguments previously given, and re-presenting them in a new form. It does not extend to putting forward further arguments, that could have been raised at the earlier hearing but were not"*

Outcome

[15] We consider it to be self evident that the stated grounds for the application are merely a reiteration of the issues and submissions we have already dealt with in our said substantive decision and in terms of the submissions from Mr McDonald, in particular, there is no proper basis for recall.

[16] The proper course for the applicants/complainants was to appeal our decision of 21 January 2015. This present application for recall seems to us to be a substitute for that. They are seeking to challenge our findings of fact and law in our said decision. That would be an abuse of the recall procedure. We agree with the respective stances of Messrs McDonald and Clancy as covered above.

[17] Accordingly the application for recall is hereby dismissed.

[18] 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

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member