

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 7

READT 033/14

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

BETWEEN **HARCOURTS GROUP LIMITED**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC306)**

First respondent

AND **DAVID GRAVES**

Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 30 October 2014

DATE OF DECISION 22 January 2015

APPEARANCES

Mr P McDonald for the appellant
Mr M Hodge for the first respondent
Mr D Graves in person

DECISION OF THE TRIBUNAL

[1] This appeal came for hearing on 23 September 2014. The issue for consideration appeal was whether the listing agreement used by Harcourts Group Ltd. contravened Rule 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care Rules) 2012. The issue is whether the agency agreement precludes clients from entering into sole agency agreements with other agencies for at least seven days after the expiration of the agency agreement. Mr Graves the complainant argued that this contravened s 131 of the Real Estate Agents Act 2008.

[2] The clause complained of read as follows:

“Exclusive and sole agency authority”: “

At the expiry of this exclusive and sole agency authority this agency appointment shall continue on general authority terms noted below.”

[3] Under “general authority” it says “*this general authority shall continue until seven days after written notice of its cancellation given by either party*”.

[4] The Complaints Assessment Committee considered that the agreement did not make it clear that the client had a right to cancel the agreement before it converted to a general agency and therefore s 131 had been breached. They made a finding of unsatisfactory conduct.

[5] On 23 September 2014 Mr McDonald appeared for Harcourts. It transpired that he had been the drafter of the clause, the subject of the appeal. An issue was raised with him as to whether it was proper to appear as counsel in support of advice drafting which he had given. The hearing was adjourned for the parties to consider this issue.

[6] Subsequently the parties filed a joint memorandum in which they advised the Tribunal that the Authority consented to the appeal being allowed. The grounds on which this was said to be appropriate were that the appellant had obtained advice on the drafting of the listing agreement from experienced counsel and relied on that listing agreement.

[7] The Authority accepted in the particular circumstances of this case the appellant could rely on the defence of having taken all reasonable steps.

[8] The appellant has now agreed to use standard terms promoted by the Authority as model agency clauses in its listing agreement and will follow guidance from the Authority.

[9] The Tribunal invited the parties to attend/appear at a telephone hearing with members of the Tribunal to discuss this issue. Further memoranda had been filed. The appeal brought by Harcourts provided three reasons on which the appeal should be allowed:

- (i) The clause did not breach s 131 because it was properly drafted and in fact did not contravene s 131.
- (ii) The work the subject of the decision by the CAC was not “*real estate agency*” work within the meaning of the Act.
- (iii) Harcourts could not be guilty of unsatisfactory conduct when they had taken appropriate advice from an apparently appropriately qualified and experienced Legal Adviser.

[10] Since the appeal had been lodged counsel have referred to the decision of the High Court in *Complaints Assessment Committee 20003 v Jhagroo* [2014] NZ HC

2077. In that case the agent had obtained legal advice before inappropriately paying out his own commission from a deposit paid by the purchasers. At paragraph [89] the Court held that the reliance on the legal advice meant that there could be no basis for finding that the agent's conduct met the criteria of disgraceful conduct under s 73.

[11] At the hearing before the Tribunal Mr Hodge took the unusual step of arguing that the appeal be allowed. Mr McDonald had concluded that it would not be proper for him to make submissions to the Tribunal. Mr Hodge submitted that having carefully considered the matters the Authority did not consider that the decision of the Complaints Assessment Committee could be upheld. He advised that the Authority now accepted that Harcourts had reasonably and properly taken legal advice from their Legal Adviser as to how the clause should be drafted and it should not be regarded as unsatisfactory conduct for them to have reasonably relied upon the accuracy of that advice. On the basis of the Jhagroo decision Mr Hodge concluded that the appeal ought to be allowed. Mr Graves, the second respondent, did not take part in the conference but filed a memorandum in which he concluded that the appeal should continue because the REAA has taken a strong position on agents exposing clients to the possibility of paying double commission.

[12] The Tribunal has naturally some concern about an arrangement being reached between the parties that an appeal should be allowed. However counsel have acknowledged, rightly, that the decision as to whether this appeal should be allowed or not rests solely with the Tribunal.

[13] After consideration, the Tribunal have decided to allow the appeal. Its reasons are as follows:

- (i) The Tribunal have concluded that they may have breached s 131. However the decision of Jhagroo makes it clear that the Tribunal must consider that a licensee's reasonable reliance on legal advice can provide a defence to the charge. The Tribunal note that the Court in Jhagroo was at great pains to point out that it must be reasonable reliance on legal advice.
- (ii) Mr Hodge submitted, (and we agree), that the real issue was the drafting of a particular clause of an agency agreement by a lawyer who is a specialist in this area. He submits that it was reasonable for Harcourts to rely upon his advice. Mr Hodge rightly noted that while a breach of the Rules appears to amount automatically to unsatisfactory conduct a defence can be made by a licensee if they can be seen to have taken all reasonable steps to prevent/avert a breach. The Tribunal accept that Harcourts did take all reasonable care to see its agency agreements complied with the Act and rules.
- (iii) Mr Hodge further submitted that there was no consumer risk as the complainant had had no direct interest in the agency form but rather was in a position of one who worked in the industry.
- (iv) Finally the Tribunal acknowledges that the mischief, the subject of this appeal, has been remedied in that all Harcourts agency forms now are in the form which is deemed acceptable to the Real Estate Agents Authority.

[14] In the circumstances therefore of this unique case the Tribunal allows the appeal and substitutes its own view to take no further action on the complaint.

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

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Ms N Dangen
Member