

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 91

READT 035/15

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

BETWEEN **RONG JUN (JUNE) ZHANG**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 406)**

First respondent

AND **BRYAN ISAAC RICHARDSON**

Second respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Mr J Gaukrodger – Member
Ms C Sandelin – Member

HEARD at Auckland on 26 November 2015

DATE OF DECISION 18 December 2015

APPEARANCES

The appellant in person
Ms U B Keller and Ms C Patterson for the first respondent
Ms K M Burkhart and Mr J Bardsley for the second respondent

DECISION OF THE TRIBUNAL

The Issue

[1] Ms Zhang appeals against a decision of the Complaints Assessment Committee to take no action on her complaint against Mr Bryan Richardson. Ms Zhang and Changmin Sun are the trustees of the Sun and Sunbirds Family Trust. They were the owners of 11 Hilstan Place, Royal Oak. Ms Zhang has two sisters April and Julie. The property had formerly been owned by April who sold it to Ms June Zhang and Changmin Sun, as trustees for Ms Sun's family trust, the Sun and Sunbirds Family Trust. After Ms Sun purchased the property it continued to be rented to Ms Zhang's mother. When Ms Sun decided to sell the property in October 2012 Julie Zhang made an offer to buy the property but the offer was rejected. Ms Sun decided to list the property with an agent. On 15 November 2012 she listed the property with L J Hooker, Ponsonby. The property was to be auctioned on 12 December 2012.

[2] The agency agreement is a little confusing in that the sole agency clause has been crossed out, then ticked and initialled by the vendor and the words “*until 11 June 2013*” added to the end of the paragraph. The key instructions read “*quite happy to authorise L J Hooker as the exclusive sole agency for eight weeks until 11 Jan 2013*”.

[3] Rong Fang (Julie) was still interested in purchasing the property. However she did not make any further offer prior to the property’s auction date. She went to the auction where the property was passed in. Ms Sun had set the reserve at \$810,000. The only bidder at auction (a Ms Dong) made an offer post-auction to purchase the property for \$760,000. This offer was made on 16 December. Ms Dong agreed to pay \$775,000 for the property. Ms Sun signed the agreement for sale and purchase on 16 December 2012 but June Zhang did not sign the agreement. For reasons that are unclear, despite this omission the sale to Ms Dong continued to proceed, the deposit was paid and the solicitors exchanged correspondence. Settlement was set for 17 January 2013 but on or about 16 January solicitors for the vendor advised Ms Dong that the agreement was unenforceable and was to be cancelled because it had only been signed by one of the vendors. The deposit was returned but L J Hooker retained the commission of approximately \$22,000. Ms Dong subsequently issued proceedings in the High Court seeking to enforce her agreement. The decision of Justice Faire on 19 February 2014 confirmed that the agreement had not been valid as June Zhang had not signed the agreement as vendor.

[4] Meanwhile following the auction Ms Julie Zhang had been talking to June about her desire to purchase Hilstan Place. After much discussion between the family, and with Ms Sun, Ms Julie Zhang and her husband made another offer to purchase the property. This offer was accepted by Ms Sun on about 20 December. Ms Sun had expected this offer on 16 December 2012. No offer arrived. Ms Sun, believing that Ms Julie Zhang and her husband would not now offer for the property, signed the agreement with Ms Zhang. However a few days later Julie made a revised offer of \$760,000 for the property. Ms June Zhang calculated that this would give Ms Sun the same return as the Dong offer, the only difference being that no commission would be payable. Ms June Zhang and Ms Sun believed that any contract entered into after the expiry of the agency agreement on 11 January 2013 would not attract commission. Ms Sun was keen to sell to Ms Julie Zhang and to Ms Sun and Ms June Zhang subsequently (after 11 January 2013) signed the agreement for sale and purchase to Ms Julie Zhang and her husband. The property was sold to them. A dispute now exists between L J Hooker and Ms June Zhang as to whether or not the commission deducted by L J Hooker was properly deducted.

There are a number of issues which arise from this claim:

1. Whether the second respondent [who had nothing to do with the sale and is the branch manager of Ponsonby Estate Agents Limited, a franchise of L J Hooker in Ponsonby], has breached any duties or obligations owed to Ms Sun and Ms Zhang.
2. Is it appropriate for the Tribunal to determine a commission dispute between Ms Zhang and the agents?
3. Was there a general or sole agency with L J Hooker?
4. Was Ms Julie Zhang introduced to the property by L J Hooker?

Issue 1: What liability does Mr Richardson have?

Mr Richardson is not a director or a shareholder of L J Hooker, Ponsonby. He is an employee and describes himself as the operations manager. He had no supervisory role over the agent who did sell the property (a Ms Chen). Ms Zhang considered that he was the branch manager and a person in a position of being able to determine the refund of the commission. While a complaint can be made against any agent we agree with the Complaints Assessment Committee that the licensee appears to have handled himself in a professional and courteous manner and that he personally has not breached the Act or Rules with his conduct. His only involvement had been communicating with Ms Zhang since Ms Zhang sought to recover the commission. She has not presented any evidence that his conduct has been unsatisfactory. Her only complaint is that Mr Richardson has not refunded the commission. However there is a more fundamental issue which determines this dispute. We discuss this at paragraph [7] below.

The commission - agency

[5] There appears to be a genuine dispute between the parties about whether or not commission was properly chargeable by L J Hooker and whether the agreement was a sole agency or a general agency. If it was a general agency, [which expired on 11 January 2013], or a sole agency which expired on 11 January 2013 then became a general agency, the question remains whether or not Ms Julie Zhang was introduced to the property by L J Hooker. The evidence of Mr Richardson was that the marketing, publicity and auction conducted by L J Hooker all led to Ms Julie Zhang making a higher offer than her October offer and one that was ultimately accepted by the vendor. He submits that were it not for the actions of L J Hooker it is highly unlikely that the property would have sold to Julie Zhang. However it is also clear that Julie Zhang was familiar with the property independently of any introduction by L J Hooker.

[6] However the Tribunal do not consider that they have jurisdiction to consider or determine the commission issues. Issues as to charging of commission could be a disciplinary matter if the commission charged was excessive, wrongly calculated or there was some other feature of the conduct relating to the commission which was a breach of the Real Estate Agents Act or the Client Care Rules. However in this case the dispute is a simple dispute between L J Hooker and Ms Zhang as to whether or not commission was payable.

[7] The purpose of the Real Estate Agents Act 2008 are set out in Section 3.

3 Purpose of Act

- (1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.
- (2) The Act achieves its purpose by—
 - (a) regulating agents, branch managers, and salespersons:
 - (b) raising industry standards:

- (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[8] The resolution of this dispute is not a disciplinary matter. It raises no issues of maintaining industry standards or protection of the public. It is unrelated to any of the disciplinary functions of the Act. Further we do not consider that in this case the dispute about what commission (if any) is payable falls within the definition of real estate agency work. This is defined as “*work done or services provided in trade on behalf of another person for the purpose of bringing about a transaction*”. Transaction is defined as “*the sale, purchase or disposable acquisition of a freehold estate or an interest in land*”. As the second respondent’s solicitors submits, Mr Richardson was not involved in carrying out any work for the purposes of bringing about a transaction. In fact the transaction had been concluded before he became involved in the dispute. This is a civil dispute between the parties which should be resolved by the parties in the appropriate civil forum. This Tribunal is not that forum. We do not have jurisdiction to consider or resolve this claim. There was no real estate agency work done by Mr Richardson on this sale and consequently no breach of any Rule or of the Real Estate Agents Act. The Tribunal accordingly dismisses the appeal.

[9] The Tribunal draws the parties’ attention to the provisions of s 116 of the Real Estate Agents Act 2008.

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member