BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 57

READT 010/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008 (the Act)
BETWEEN	HAI DUONG HA Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 412) First Respondent
AND	DAVID GRIFFITHS Second Respondent
Hearing:	27 July 2018
Tribunal:	Mr J Doogue, Deputy Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Appearances:	Mr S Judd, on behalf of the Appellant Mr S Simpson, on behalf of the Authority Mr D Griffiths
Date of Decision:	23 October 2018

DECISION OF THE TRIBUNAL

Factual Background

[1] The second respondent, Mr Griffiths, owned a rural zoned property (the property) near Pukekohe which he wished to sell. On 20 March 2012, he signed a sole agency agreement of six months duration with the Property Link Group Limited (The Professionals). Mr Griffiths became dissatisfied with the progress in selling the property. He was contacted by the appellant, Mr Ha, on two occasions during the sole agency telling him that he had a developer client who would be interested in acquiring the property.

[2] Mr Ha during these exchanges advised Mr Griffiths that he had the ability to cancel the sole agency agreement with The Professionals after 90 days because of s 131 of the Act which provides as follows:

> **131 Parties may cancel sole agency agreements in respect of residential property 90 days after agreement is signed**
>
> (1) Any party to a sole agency agreement that relates to residential property and is for a term longer than 90 days may, at any time after the expiry of the period of 90 days after the agreement is signed, cancel the agreement by written notice to the other party or parties.
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> …

[3] Acting on this and other grounds, Mr Griffiths sent The Professionals written notice that the sole agency was cancelled. On 29 June 2012, Mr Griffiths entered into an agency agreement with Mr Ha. Mr Griffiths then entered into a sale and purchase agreement to sell the entire property, as one un-subdivided lot, to Mr Ha's buyer on 1 July 2012. Mr Griffiths subsequently paid $35,000 in commission on this sale to Top One Real Estate.

[4] It is common ground that before Mr Griffiths cancelled the sole agency agreement with The Professionals, Mr Ha told him that a sole agency agreement could only enure for 90 days. That was because the land in question fell within the definition of "residential property" under s 131 of the Act.

[5] It is also common ground that Mr Ha advised Mr Griffiths to contact the Real Estate Agents Authority (REAA) for confirmation of his view that he was entitled to cancel under s 131. Mr Griffiths made a telephone call to the REAA. He says that the person he spoke to confirmed that the 90-day expiry was correct in a case such as the present where the property was a residential listing.

[6] The Professionals, however, asserted an entitlement to commission in addition to that which was claimed by Mr Ha's firm. Proceedings were issued in the District Court and on 20 October 2016 they were settled in terms requiring Mr Griffiths to pay the sum of $16,500 to the plaintiff, The Professionals. Mr Griffiths then brought a complaint against Mr Ha which has led to the present proceedings.

[7] The background to the present appeal is accurately summarised in the submissions which counsel for the first respondent filed:

> 1.1 Don Ha appeals a decision of Complaints Assessment Committee 412 (**Committee**) finding that he engaged in unsatisfactory conduct in that:
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> (a) he failed to clearly explain to the complainant, David Griffiths, that by entering into an agency agreement with him, Mr Griffiths could be liable to pay full commission to more than one agent; and
> (b) he acted in a manner that made it likely that Mr Griffiths would attract more than one commission in the same transaction.
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> 1.2 The Committee's decision was made with reference to rr 9.3, 9.10 and 9.14 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (**2012 Rules**). It is acknowledged that Mr Ha's conduct predates these Rules coming into force. Rules 9.4 and 9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (**2009 Rules**) are applicable.
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> 1.3 The primary ground advanced by Mr Ha on appeal is that he was correct in his view that the property in question was residential property, as defined in s 4 of the Real Estate Agents Act 2008 (**Act**). Therefore, he submits he was correct in advising Mr Griffiths of his right to terminate an existing sole agency agreement with Professionals under s 131 and no further obligations applied.
>
> 1.4 The Real Estate Agents Authority (**Authority**) submits that the basis of the unsatisfactory conduct finding, and the issue for determination on appeal, is not the correctness or otherwise of Mr Ha's advice. The primary conduct issue is the very firm manner in which Mr Ha

> communicated that advice to Mr Griffiths, without recommending that Mr Griffiths seeking legal advice or otherwise advising of the potential for double commission. Mr Ha was required to communicate these matters even if he was correct in his view of s 131. It is submitted the finding of unsatisfactory conduct was correct and the appeal should be dismissed.

[8] The case for the appellant is described in overview by Mr Judd, counsel, in the following way:

> 3. The key issue is that the appellant was correct in his view that the property in question was "residential property" as defined in the Real Estate Agents Act 2008 ("the REAA 2008"). Therefore, he was correct in advising the second respondent of his right to terminate the sole agency agreement with The Professionals after 90 days pursuant to s 131.

[9] During the course of submissions from counsel, reference was made to the history of the Resource Management Act applications which had been made in respect of the property. Brief comment on this aspect of the case is necessary.

[10] The property which was the subject of the sale, which Mr Ha was instrumental in bringing about, was situated in the Franklin area. It was approximately 2.8 ha in extent. At the time of sale, it was zoned rural under the relevant operative District Plan.[1] A plan change had been made in 2006 which resulted in the property being zoned "rural village".

[11] Mr Griffiths had made an application for consent to divide the property into 10 lots. At first instance, the application was declined. Subsequently, following an appeal brought by Mr Griffiths, a consent order was entered into on 22 December 2010 providing for a modified subdivision.

Decision of the complaints assessment committee

[12] The decision which the CAC came to was that Mr Ha had engaged in unsatisfactory conduct under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

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[1] BD 141.

[13] We interpolate that the parties to the appeal agreed that the decision ought to have been based upon rr 9.4 and 9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the Rules). Nothing turns upon this distinction so far as the present appeal is concerned. The applicable rules were couched in the following terms:

> 9.4 A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest.
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> …
>
> 9.11 A licensee must not invite a prospective client to sign a sole agency agreement without informing the prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.

[14] The Committee concluded that Mr Ha failed to clearly explain to Mr Griffiths that if he entered into another agency agreement with him, he would be liable to pay full commission to more than one agent in the event that a transaction was concluded.[2]

[15] The Committee found that Mr Ha "in the main" agreed with the facts as outlined by Mr Griffiths. It noted that Mr Ha had told Mr Griffiths that he had a willing purchaser available to acquire the property and that he formed the view of the application of s 131 of the Act and passed this very firm view on to Mr Griffiths without equivocation. The Committee noted that a large portion of the submissions which Mr Ha filed restated his position that having carefully reviewed all the documents he was firmly of the view that Mr Griffiths was entitled to cancel the first sole agency agreement after 90 days as he considered the sole agency agreement was in respect of residential property.[3]

[16] The Committee stated that for the purposes of s 131, the issue of whether this property was a residential property was not determinative of their decision.[4] It was the fact that there was a lack of clarity about the position which should have been brought to the attention of Mr Griffiths, in the view of the Committee.

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[2] Committee decision at 3.2 and 3.3.
[3] At 3.6.
[4] At 3.7.

[17] The Committee considered that it was clear from Mr Ha's clear defence of his position, the equally clear legal advice that had been obtained by The Professionals and the remarks of the District Court Judge hearing the case on 20 October 2016 that liability for commission payments on the facts of the case was far from clear. The Committee further considered that "[i]t [was] this lack of clarity that should have been brought to the complainant's attention." [5]

[18] The Committee's opinion was that Mr Ha:[6]

> … Did not for one instance think his legal interpretation of the previous sole agency listing agreement was wrong. [He] admits that after satisfying himself that the property was residential and was not precluded by section 131(6) he informed the complainant that he was legally entitled to cancel the previous sole agency. To back up the authority of this opinion [he] admits that he told the complainant of his past experience in such sales and when questioned by the complainant about the legality of cancelling the six-month sole agency, … simply reiterated that it was legally possible to do so …

[19] The Committee considered that Mr Ha was also at fault because he did not clarify with Mr Griffiths that he was not qualified as a solicitor or wait to see that The Professionals, on receiving the cancellation notice, would not be seeking commission from Mr Griffiths.[7]

Discussion

[20] It is significant, we consider, that when Mr Ha filed his response to the complaint made against him he did so at a time when, if anything, there was even less room for certainty about the correct meaning of s 131 than there might have been in June-July 2012 when Mr Griffiths gave him the authority to sell the property. At the point where Mr Ha gave his response to the Authority, he had been informed of the contentions which were being put forward on behalf of The Professionals by their counsel, Mr Waymouth. It is not necessary to review in detail what Mr Waymouth said or what Mr Ha stated by way of response to or commentary on the Waymouth contentions.

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[5] At 3.9.
[6] At 3.8.
[7] At 3.10.

[21] An illustration of Mr Ha's stance appears in the following passage from his submissions to the Committee:

> In support of the complaint Mr John Waymouth, barrister, asserts that in this case, the sole agency with the "Professionals" could not be cancelled. His reason, that the property in question is "rural". That, the property is not, "residential".
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> Letter dated 7 August 2013 at page 47 of the "Initial Referral Report":
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> "As indicated to you this property however is not a residential property, it is zoned "village", and the principal and prime use of the zoning under "village" under the permitted activity is that of farming. It is not zoned residential."
>
> The opinion however has no regard to the "Discretionary Activities" that are permitted pursuant to the "village zone", and more importantly, has no regard or reference to Resource Consent which allowed, permitted the "original" site to be subdivided into eight separate residential sites.
>
> The opinion of Mr Waymouth additionally, has no cognizance of the "Environment Court" decision dated 15 June 2010. A decision that adjudicated and provided for the subdivision of the site under the auspices of a "RURAL RESIDENTIAL ZONING".

[22] We have noted earlier in this decision that the position that the appellant's counsel took was that the definition of residential housing in s 131 was clear and obvious, not complicated and not calling for legal advice.

Assessment

[23] Rule 9.11 required a licensee to advise the client that there is a risk of a double commission should the sale transaction, under which the licensee would earn a commission, become unconditional. That is the minimum advice that the rule requires the licensee to give in that circumstance. No particular form of words is required by the rule. So long as the licensee makes a statement which substantially communicates the advice required under r 9.11, that will suffice. The intended meaning and effect of what is stated must be to convey that circumstances of this kind can give rise to jeopardy that a double commission will be payable. An agent is not entitled to completely ignore the obligation under the rule. Nor does an agent satisfy their duty if they provide advice which is substantially different from the required advice. If an

agent gives advice which suggests that there is no risk, or that such risk as there is can safely be ignored because it is so slight, then the agent will not have satisfied his or her obligations under r 9.11. In such circumstances, the agent will not have told the client that "he or she … could be liable to pay full commission to more than one agent". The obligation under r 9.11 was mandatory in other words.

[24] The obligation under r 9.11 was not expressed in terms which left open an alternative. The rule did not contemplate that a licensee could proceed without giving a warning so long as he or she believed that there was no risk or that any risk was so minimal that it could be ignored. In fact, r 9.11 did not mandate a licensee expressing his or her view about the extent of the risk at all.

[25] In terms of the Rules, the licensee is required to inform the client that he or she could, not would, be liable for a second commission. That obligation comes into effect when the preconditions referred to in the rule are present, namely, when there is an existing client agency agreement.

[26] It would appear that Mr Ha has not understood that the obligation to provide the advice that the Rules call for is a simple matter.

[27] He has apparently concluded that a licensee in his position may be excused from compliance with the rule where the circumstances so permit. One such circumstance would be where the licensee comes to a judgement that while there is a pre-existing agency agreement in existence, he can give advice that it is unlikely that the agreement could actually be enforced.

[28] We consider that Mr Ha did not give the required advice. There is no doubt that a pre-existing agency agreement was in existence. Mr Ha was required to tell Mr Griffiths that he could be liable to pay a full commission to The Professionals as well as to Mr Ha. It was not an option open to Mr Ha to elect not to give such advice and instead provide his assessment of the effect of the legal position.

[29] It is our conclusion that the legal issue that Mr Ha expressed his views on was a complicated one. Without going into all the detail of the questions of statutory

interpretation that were involved, we can say that it is our view that the case that was put forward by counsel for Mr Ha at the hearing before us did not include a complete coverage of the issues that arise. Rather than set out a detailed opinion on an issue which, after all, we are not required to decide, we consider that it is enough to say that the need for a proscription of licensees expressing their views on whether there was a risk of double commission or not is reinforced by what happened in this case. There is good reason to suppose that Mr Ha got it wrong when he opined, in effect, that there was no real risk of a double commission being incurred. This reinforces the reasons why licensees should not put themselves in the position of doing anything more than explaining the potential risk of a double commission and leaving it to the client to obtain further legal advice if he/she wishes to take the matter further.

Rule 9.11

[30] There is good reason why r 9.11 should have been cast in such unambiguous terms. The question of whether or not a double commission was payable depends upon, amongst other things, the interpretation of contractual terms and the meaning of statutory provisions. Giving advice in this context falls within the province of lawyers. Encouraging a belief that a client could safely rely upon the judgement of a real estate agent in this area would be self-evidently invidious.

[31] The warning that r 9.11 called for reflects the reality that the way in which sole agency agreements are drafted. The plain policy reason for including the rule was that clients of real estate agents may expose themselves to a risk of paying double commission, when some of them might regard it as a surprising outcome. They might come to that conclusion on the basis that if an agent has not actually been provably instrumental in reaching an agreement, it is difficult to see why he or she would be entitled to a commission.

[32] In this case, the licensee did raise the issue of whether there was a risk of a double commission. He took it upon himself to provide an assessment of the risk to the complainant. The risk assessment that he undertook plainly involved oversimplification of the issues that were involved. He appeared to take the view that the critical distinction was between residential property and rural property. But the

fact that the property which the complainant was offering for sale had been categorised in resource management terms as being rural land was not the key issue in our view. The actual distinction which the legislature had in mind may well have been concerned with the difference between a sale of an un-subdivided area of land and one where a subdivision had already taken place so that sections were available for sale to the buying public.

[33] The question of whether the complainant in this case was able to bring himself within the exempting provisions of s 131 is a complex issue involving the consideration of legal issues.

[34] But in any case, because of the unqualified mandatory advice that Mr Ha was required to give under r 9.11, whether he was qualified to provide such advice or considered that he was are both matters that were irrelevant to the duty that he was under.

The request for advice from the REAA

[35] On or about 26 June 2012, in the course of a conversation between Mr Ha and Mr Griffiths, there was a discussion about the ability of the latter to cancel the agency agreement that he had with The Professionals. The exact terms of that discussion are not important but the substance of it was that Mr Ha suggested to Mr Griffiths that he should call the REAA to obtain their views on the question in a context where the property which was being sold was residential property. Mr Griffiths acted on the suggestion and spoke to a person at the Authority who told Mr Griffiths that it was correct that a sole agency residential property agreement expired after 90 days.[8]

[36] Mr Griffiths said that following this conversation, and presumably because it confirmed the understanding that he had received from Mr Ha, he cancelled the sole agency agreement with The Professionals.

[8] BD 11.

[37] This exchange of information is referred to by counsel for the appellant in his submissions. The approach that he appears to take is to defend his client for suggesting that Mr Griffiths should call the REAA.[9] That is not however an issue that the Committee or the Tribunal would properly regard as being relevant to whether the charge had been proved. The call to the REAA is not a factor that bears upon the culpability or otherwise of Mr Ha. The fact that the REAA gave an affirmative answer when asked if it was possible to cancel a sole agency for the sale of property which appeared to be residential real estate does not excuse the agent. In case this point is what underlies the references to the REAA conversation, the position needs to be clarified that even if such a conversation took place it could not absolve the agent from his obligation to advise the client about the risk of double commissions.

Reference in the agency agreement to Mr Griffiths having received advice about the nature of residential property

[38] Mr Judd referred us to the provisions of the agency agreement which Mr Griffiths signed and which was to take effect from 29 June 2012.[10]

[39] The listing agreement which was in favour of the licensee, relevantly provided as follows:

> 3. Existing agreements
> 3.1 The client undertakes that the only agencies it has granted are those listed in the Existing Agencies;
> 3.2 Any Sole Agency is given subject only to the Existing Agencies and the Client undertakes if this is a Sole Agency agreement that will cancel those Existing Agencies and any general agency as soon as the Client can legally do so.
> 3.3 The Client acknowledges and agrees that:
> 3.3.1 the Agent has advised the Client about the options available to the Client for cancellation of any prior agency agreements including the Existing Agencies. Having received that advice, the Client has relied on the Client's own judgement about any right to cancel prior agency agreements and the giving of notice; and
> 3.3.2 if the client enters into or has already entered into any agency agreement other than this agreement

[9] Paragraph 41 submissions
[10] BD 40.

> and the Existing Agencies that it could be liable to pay full commission to more than one agent

[40] If it is contended that the effect of this provision was to absolve the licensee from his duties pursuant to the Rules, then we would be unable to agree.

[41] The form of the sole agency agreement which Mr Griffiths entered into with Mr Ha envisages the latter giving advice to the former about the options available for cancellation of prior agreements. The agreement envisages a form of advice that is different from what r 9.11 contemplates.

[42] This provision raises the question of whether it is open to the parties to agree to an arrangement that deprives a seller of real estate of rights under a statutory regulation by which the interests of the class to which he belongs are protected. This engages the subject of whether a party is able to waive or contract out from statutory protections which were promulgated for the benefit of a class to which he or she belongs.

[43] The authors of *Burrows and Carter Statute Law in New Zealand* make the following observations in regard to the limits of contracting out:[11]

> However, *Johnson v Moreton*, the best recent exposition of this area of the law, demonstrates that, as in the waiver cases, "public policy" alone may not be an entirely satisfying explanation. Even if a statutory provision is for the benefit of a party it cannot be contracted out of if the statute prohibits that expressly or impliedly. It was held in that case that a term in a lease was void which attempted to oblige the tenant not to claim the benefit of statutory provisions protecting security of tenure. Lord Simon said:
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> > Where it appears that the mischief which Parliament is seeking to remedy is that a situation exists in which the relations of the parties cannot be left to private contractual regulation … a party cannot contract out of such a statutory regulation (albeit exclusively in his own favour), because so to permit would be to reinstate the mischief which the statutory provision was designed to remedy, and render the statutory provision a dead letter.
>
> Lord Simon's statement demonstrates that at bottom this is often just another question of statutory interpretation that involves discovering the purpose of the legislation and deciding whether that purpose would be infringed by the waiver or contracting out. "Public right" and "public policy", the common catch cries, may not be the whole answer.

[11] RI Carter and JF Burrows *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 36 (footnotes omitted).

[44] The appellant did not expressly submit that it would have been open to Mr Griffiths in this case to waive his rights under r 9.11. There was an obligation on the appellant to show that such a waiver was available to him if he were to take advantage of the provisions of the sole agency agreement that he entered into with Mr Griffiths. Given the consumer protection nature of the rule, we would be surprised if such an entitlement could be established. Consumer legislation of the kind under consideration here implicitly recognises the risks inherent in a situation where an agent — using that term loosely — is acting in circumstances where his or her personal interests are engaged. It also assumes a reliance or dependency of some degree by the client on the agent to advise on all aspects of the transactions in hand, including the terms upon which the agent is to be engaged and the benefits that he or she will receive from the transaction.

[45] In specific terms, the rule under consideration here is also designed to prevent licensees who are more conversant with the rules relating to the circumstances in which commissions can be claimed, and where a risk of double commission exists, from taking advantage of their superior understanding of the position.

[46] The statutory regulation would not have the effect of redressing that imbalance in the positions of a licensee and client if the agent could avoid its effect by having the client sign away its rights.

[47] The written acknowledgements in paragraph 3 of the listing agreement which Mr Ha obtained from Mr Griffiths did not therefore affect the obligation of the appellant to give the required advice under r 9.11.

Was unsatisfactory conduct established?

[48] We next consider whether the Committee was in error in concluding that Mr Ha was guilty of unsatisfactory conduct under s 72 of the Act.

[49] In our view, the Tribunal should be guided by the earlier Tribunal decision in *Evans v REAA & Orr* in which the Tribunal expressed the following view:[12]

[12] *Evans v REAA & Orr* [2012] NZREADT 67.

> [51] A wilful or reckless breach of the Rules is misconduct under s.73(c)(iii). A breach of the Rules simpliciter is unsatisfactory conduct under s.72(b) which creates strict liability in this regard, reflecting Parliament's view about the importance of compliance with the Rules (as well as the Act and regulations made under the Act).

[50] Our conclusion is that the above statement is applicable to the circumstances of the present case. It follows that we agree with the Committee that Mr Ha acted in breach of s 72 of the Act by failing to give Mr Griffiths the required advice pursuant to r 9.11.

Result

[51] The result is that the appeal which Mr Ha has brought is dismissed.

[52] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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J Doogue
Deputy Chair

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Ms C Sandelin
Member

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Mr N O'Connor
Member