BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 55

READT 038/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	PRASHANTH KUMAR MOTUPALLY Applicant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1903) First respondent
AND	JASON HAYDE & DAVID WELLS Second respondents
Tribunal:	Mr J Doogue, Deputy Chairperson Ms C Sandelin, Member Ms N O'Connor, Member
Submissions filed by:	Mr P K Motupally, Appellant Ms A-R Davies, for the First Respondent Mr J Tian for the Second Respondent
Date of Decision:	9 November 2020

DECISION OF THE TRIBUNAL ON STRIKE OUT APPLICATION BY SECOND RESPONDENTS

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[1] On 12 May 2020 the Tribunal issued an interim decision on the strike out application which the second respondents brought.

[2] In the interim decision we expressed the hope that the appellant would reconsider the way in which he had framed the Notice of Appeal so that it would convey with greater clarity and succinctness what the actual grounds of the appeal were. The appellant in response has filed an amended Notice of Appeal dated 18 June 2020 ("**amended Notice of Appeal**") at the heart of the amended Notice of Appeal are contentions that real estate agents in the position of the second respondents must make "full disclosure" to the customer. Further, the appellant states[1]:

> 17. All information including the details of lease should have been collated by the Second Respondents before the advertisement was done and the Second Respondents have a duty to provide all the information on the Sale and Purchase Agreement correctly as that is the **foundation for the transaction**.
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> 18. The significant point raised by the Appellant is, if the Second Respondents had completed the Sale and Purchase Agreement's heading under the "**Lease Details**", which include **Current Rent**, then the Appellant may not have gone ahead with the purchasing of the Westgate "Thebedpeople".

[3] In its decision the Committee ("**CAC**") dealt with this point by saying that the licensees were only conduits for the information and they had no obligation to check the accuracy of it or to question its accuracy unless there was something to alert them to the possibility or actuality that it was correct. The CAC did not find anything in the evidence that should have alerted the licensees to query or check the information which had come from the vendor's accountant and which stated the amount of rent which the vendor had been paying for the Westgate premises.[2]

[4] The CAC also said that the claim by the appellant failed for another reason in that the information which the second respondents had provided to the appellant was not incorrect. The CAC stated it was of the view that what happened was the

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1 At paragraph 17.
2 CAC decision 3.1.

information was incorrectly interpreted by the purchasers as applying precisely to their situation and that the purchasers could not expect that the costs and expenses would be the same if they acquired the business and this was because, unlike the vendor, Kiwibed would not be paying rent to the owners of the Westgate Mall under a lease, but to the vendor under lease. They noted that the rent under the lease was lower than the rent under the sublease and that although the complainants were misled by the accounting information this was not the fault of the licensees. The licensees were not acting for the complainants and there was no general responsibility on them to check, interpret or evaluate the accounting information for the complainants. This was the complainants' responsibility, using whatever professional assistance they might choose to engage.[3]

Appeal grounds

[5] Following the interim decision which we issued in this matter, the appellant filed an amended notice of appeal. In that decision we invited the appellant to file a concise statement of the grounds of appeal to replace the lengthy and discursive original notice of appeal. The key passage in the amended notice of appeal which sets out the basis upon which the appellant brings his appeal is as follows:

> 31. The issue in this appeal is the CURRENT RENT of the premises which was indicated initially through the account $130,803.92 per annum. However, the actual rent of the Appellant had pay to the landlord was $206,760.00 per annum and this was only known to the Appellant after taking possession of the premises.
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> 32. It is patently clear from the sale and purchase agreement the Second Respondents should have provided this information under the heading "LEASE DETAILS". Because the Second Respondents failed to provide the correct information the Appellant has lost:
>
> a. A sum of $125,000 which was the purchase price
>
> b. Value of stock purchase by the Appellant was $56,000.00

[3] Paragraphs 3.2 and 3.3 of CAC decision to take no further action, 4 October 2019.

c. The total money lost through rent was $155,070.00 (**it must be noted that there was no personal income for the Appellant during the period)**

Is the appeal ground a viable one or should it be struck out?

[6] The second respondents said that the appellant's case was weak. The argument in essence was that having regard to the largely undisputed facts, there could have been no breach of obligation on the part of the licensees. The complainants were intending to buy business which carried on trade from leased premises in a shopping precinct. Prior to the complainants entering into the agreement, the licensees had been provided by the vendor's accountant with a set of historical data which set out the rent that the vendors had been paying for the right to occupy the leased premises. The licensees passed this on to the complainants.

[7] The licensees did not provide any other information about the terms on which the purchasers would occupy the leased premises. Apparently, the licensees' principal, the vendor, did not intend that the ASP should contain any provision which dealt with that question. We do not know whether such an approach is the usual one that is adopted by parties in the position of the vendor here. But it did mean that the parties to the ASP would have to enter an additional or collateral agreement to the ASP regarding the right to possession of the rental premises. The question of possession of the premises was an important one. A purchaser in the position of the complainants will be expecting to take over the same business as the vendor had carried on. In order to do so, the purchaser would need to be assured of an entitlement to occupy the same premises as the vendor did.

[8] It is implicit in the position that the licensees take that information which they were required to provide to interested parties, did not include the details of the tenancy. That was because that question was not part of the overall obligations that the vendor had required them to accept when they entered into the agency contract. They would be, and were, required to pass on one item of specific information about the tenancy, namely the historical rental costs which the vendor had incurred and which were shown in the financial statements which the accountant provided. But

beyond that they were not apparently authorised to provide information about how the purchasers would take over the physical premises from which the business was carried on. Based on the evidence available to the tribunal to this point, it does not appear that the licensees were given detailed instructions about whether the vendor proposed an assignment of the lease, a sublease of existing lease or indeed whether fresh arrangements direct between the purchaser and the landlord would be required.

[9] As it turned out, when the lease arrangements were finally disclosed at an advanced stage in the negotiations, it became apparent that there was going to be a major increase in the amount of rent that the purchasers would have to pay. They would be required to pay an additional $70,000 per annum approximately.

[10] The essence of the second respondents' position is that on the basis of the facts summarised above, the apparent ignorance of the purchasers about the vulnerable position they were in concerning the rent was not a matter for which the second respondents were responsible.

[11] For these reasons, it would seem to be implicit in the approach that the second respondents take concerning the extent of the licensees' responsibility, that if the instructions which the licensees have from the principal limits the matters upon which they are to engage with intending purchasers, then that will be an answer to any complaint that they provided an adequate information about the subject matter of the contract to the purchaser.

[12] Whether such an approach is correct is not a matter of course for further discussion at this point. It could be argued that obligations such as that contained in rule 6.2 of the Client Care rules (imposing an obligation to act fairly) have force and effect regardless of what instructions the licensee has from his/her principal[4].

[13] The first respondent took the view that the issues that arose in this case were not suitable for disposal by means of a strike out application. The first respondent considered that the dispute should be dealt with at a hearing of the substantive appeal

[4] While the decision of the CAC did not specifically refer to it, Client Care Rule 9.9 also impacts the obligations of licensees to provide customers with material information.

and that an appellant is entitled to advance an argument even though it may be thought to have low prospects of success.[5] Counsel for the first respondent, Ms A-R. Davies said that:

> Without more, such an appeal is unlikely to cross the threshold into the types of cases that typically attract strike out. They acknowledge that a case would cross the line where the merits could be said to be absurd on their face or the point was of such insignificance that it could be said to be frivolous.

[14] The first respondent did not consider that such was the case with the present appeal.

[15] While it may be that counsel for the second respondents, Mr J Tian, has some justification for criticising the strength of the appellant's case, even taking the point at its highest, we would not accept that this is the type of appeal which should be struck out on the grounds set out in s 109A of the Act. We further accept that the first respondent is correct in arguing that strike out of appeals where there is a perceived lack of merit, should be reserved only for clear cases otherwise there is a danger that the strike out procedure will be deployed for the purposes of a "dry run" of the respondent's arguments which is not the purpose for which s 109A was enacted.

[16] The standard form ADLS 4th Edition 2008 Business Sale Agreement makes provision at page 2 for the insertion of "lease details". At the foot of the page the standard form agreement states:

> It is agreed that the vendor sells and the purchaser purchases the business and takes an assignment of the lease of the premises (if any) on the terms set out above and in the general terms of sale and in any further terms of sale and the schedules to this agreement.

[17] A reasonable purchaser reading through the ASP would note that it did not include any contractual entitlement on the part of the purchaser to a continuation of the lease pursuant to which the vendor occupied the business premises.

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5 Paragraph 4.8 of submissions.

The conclusion of the CAC concerning the circumstances in which the contract became unconditional

[18] An additional argument that bears upon the strength of the appellant's case was put forward by the second respondents. That was to the effect that the purchaser advised the vendor that the contract was being made unconditional at a point where it had already discovered that it would be paying significantly greater rent to occupy the business premises than the vendor had. In other words, it understood that the rent which the vendor had paid was not going to be continued and that it would be paying a considerably higher rental. Notwithstanding that knowledge, the second respondents say, it went ahead and made the contract unconditional.

[19] The appellant does not accept that that argument is factually correct and does not, in particular, accept the correctness of the date upon which the second respondents say that the contract became unconditional. In the context of a strike out application, the Tribunal does not have available to it an uncontested factual basis upon which it could make an order for striking out, even assuming that the point that the second respondents raise could, if accepted, be the basis of a successful strike out application.

[20] While we accept that the second respondents would seem to have strong grounds for the submission that they make about the unconditional date, we are not able to approach the strike out application on the basis that their contentions are correct.

[21] In any case, if there had been misleading conduct on the part of the second respondents, the fact that it may not have been causative of any loss on the part of the appellant, is not necessarily a defence to a prosecution for an unsatisfactory conduct.

Our assessment of the strike out application

[22] The kernel of the appellant's complaint is that the licensees did not provide information to him which he was entitled to so that he was fully informed about all material aspects of the contract for sale. It would also appear that the appellant formulates his complaint in an alternative way which goes beyond alleging an omission to inform him and amounts to an assertion that the licensees had the objective of misleading the purchasers of the business.

[23] A licensee is required to act in good faith and deal fairly with all parties engaged in a transaction[6]. Further, a licensee must not mislead a customer, provide for false information or withhold information that should by law and in fairness be provided to a customer.[7]

[24] Mr Tian for the second respondents did not contest that the licensees were subject to such legal obligations. The thrust of his submissions, though, was that the second respondents were not guilty of providing inadequate information to the complainant about what rent would be payable. That is, the licensees' duties did not include a requirement that they should make enquiries to ascertain what rental the purchasers of the business would be required to pay. Part of the alleged breach which the appellant claims occurred, was that the licensees did not advise the purchasers that the rent figures which the accountant for the vendor gave to the licensees to pass on to the purchaser would not necessarily accurately reflect the amount of rent that the incoming purchaser would have to pay. That is a contention which assumes that the licensees were responsible for the factual accuracy of information which the vendor authorised or instructed them to pass on to the purchaser. The CAC found that the licensees only involvement in the process of informing the purchaser was as a "conduit" between it and the appellant and that their role was simply to pass on to the purchaser information which the vendor made available.

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6 Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 6.2.
7 Client Care Rules 6.4.

[25] Whether the CAC was correct in this conclusion required them to come to an understanding of what duties the client care regulations imposed upon the licensees. That required them to consider the meaning of the regulations to which reference has just been made. It also depended upon the factual circumstances of the case. If the complaint depended solely upon a construction of the meaning and effect of the Client Care Rules, then it might be the case that there was no viable basis for the complaint. This would be the equivalent of the ground to strike out in rule 15.1(1)(a) of the High Court Rules 2016.

[26] But the client care rules must be construed in the factual setting of each case to which they have application. Understanding what fairness required depends upon an understanding of the factual circumstances in which the standard of fairness is to be applied.

[27] The basis of the appellant's complaint was its assumption that historical information taken from the vendor's financial accounts could be relied upon as a basis for believing that the purchaser would be paying the same rent in the future. But given that there was nothing in the agreement which obliged the vendor to ensure continuity of possession under the same terms and conditions as the vendor had enjoyed, it could be said that that assumption was fallacious. Further, in the absence of the second respondents making an express representation that position would be available on that basis, it could be argued that the second respondents had not conducted themselves in a way which fell short of the required standard. It is apparently not claimed that such a representation was actually made.

[28] A complaint could be justified if in circumstances where the licensee took no steps to intervene in a case where it seemed likely that the purchaser was going to be misled unless the licensee corrected his/her understanding.

[29] That issue raises the sometimes difficult question of whether the complaint is attempting to settle a licensee with responsibility to give advice in areas which were traditionally seen as the province of solicitors. There are a number of authorities which discuss that matter but they do not provide some kind of blanket ruling which is applicable to all conceivable fact situations. The interface of the areas of advice

expected from a solicitor, on the one hand, and a licensee on the other, cannot be entirely dismissed as a factor of importance. Unless a proper distinction is maintained, licensees could find themselves being obliged to make incursions into areas in which the law had created a statutory prohibition for persons who are not legal practitioners.

[30] On the other hand, a reasonable licensee might be expected to pick up the fact that because the purchaser was not going to be able to take over the lease which the vendor had entered into with the landlord, then the question arose as to what was the basis upon which the purchaser would occupy the shop premises. If that question could reasonably arise, then so too could the consequent issue of what exactly were the terms and conditions on which the purchaser would be occupying the shop premises. As well, a question arises whether the licensees should have appreciated that the historical financial information which pertained vendor provided about its occupation costs was irrelevant to the purchaser and that it was necessary for the purchaser to at least make further enquiries to find out what the rent liability that it would be assuming was. The rent liability of the vendor, in other words, licensees might have appreciated, had nothing to do with the purchaser.

[31] We do not of course make any findings on these questions but they are raised to show that it is not necessarily clear-cut that the points that the appellant wants to raise on the appeal has no prospect of success.

[32] There is another possible issue to be considered. That is that it could be argued that the licensees finding themselves in the position where they were dealing with a purchaser who was represented by a solicitor, were not under an obligation to duplicate advice that they could reasonably expect the solicitor to give. In other words, they were not required to give advice along the lines that the purchaser was not going to stand in the same position as the vendor vis-à-vis the landlord as the assignee of the former.

[33] What inferences could be drawn from the evidence is a question of fact. The licensees may well be of the view that any Complaints Committee or a Tribunal which had properly directed itself could only come to one view about whether the

provision of the information in the circumstances in question gave rise to the sort of inferences that we have been discussing. However, no matter how obvious it may seem to be to the respondents what the proper outcome is, the appellant is entitled to obtain the view of the Tribunal on appeal on that question. As the first respondent noted in general appeals an appellant is entitled to ask the Tribunal to accept their version of the facts, then make legal arguments as to why those facts support (or do not support) a finding. We also agree with the counsel for the first respondent that the issue of low prospects of success (short of abuse or absurdity) do not justify strike out alone.

[34] The question of whether a strike out is available cannot be resolved by reading the authorities. In the end it is a matter of judgement to be exercised by the Tribunal. For the reasons discussed, we do not accept that the appeal should be struck out. While it may be correct that the chances of the appeal succeeding may be low, we do not take the view that this is the sort of case where sending the matter to a hearing will be unjustified because there is virtually no chance of success.

[35] In the interim decision which we delivered in this matter we remarked upon the difficulty of making sense of the Notice of Appeal. We have noted in this decision that the appellant has now firmly committed himself to a definition of the issue that the Tribunal is required to consider on the appeal. That being so, a possibility of the proceeding being struck out because it is unintelligible is no longer dominant.[8]

[36] The application to strike out is dismissed. An oral hearing is to be allocated (one day's duration).

[37] The parties should confer on the filing of synopses of argument and attempt to reach a consent position about that matter. If necessary, a further case management conference can be convened.

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[8] See *Commissioner of Inland Revenue v Chesterfields Preschools Limited* [2013] NZCA 53 at [90] and [95].

[38] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, 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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Mr J Doogue
Deputy Chairperson

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C Sandelin
Member

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N O'Connor
Member