BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 13

READT 038/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	PRASHANTH KUMAR MOTUPALLY Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1903) First respondent
AND	JAYSON HAYDE & DAVID WELLS Second Respondents
Hearing:	22 February 2021
Tribunal:	Mr J Doogue, Deputy Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Appearances:	Mr P Motupally, appellant Ms A-R Davies, for the Authority Mr K Perry & Mr J Tian, for the second respondents
Date of Decision:	31 March 2021

DECISION OF THE TRIBUNAL

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[1] Mr Motupally entered into an Agreement for Sale and Purchase of a bed retailing business on 19 June 2018. The vendor was a company known as Bed and Linen Limited and the director of that company was Mr Robert Flannagan (**the vendor)**. The business was situated at Westgate Mall, Westgate Auckland. The vendor's agents were Mr David Wells and Mr Jayson Hayde (collectively **the second respondents**); and it is against those two named individuals that Mr Motupally originally brought a complaint which was investigated and was the subject of a decision of the Committee which we will refer to below.

[2] The purchaser of the business was a company called Kiwi Bed and Bedz Limited **(the purchaser)** which Mr Motupally (**the appellant)** and his wife had incorporated and which we will refer to as the purchaser in this decision.

[3] In its decision the Committee decided to take no further action. It is against that decision that Mr Motupally appeals. The second respondents have previously applied unsuccessfully to strike out that appeal.

[4] The background to the complaint was that Mr Flannagan had commenced the business in 2013 when a company that he apparently operated, Bobs Bed Limited, entered into an agreement to lease the premises at Westgate, Massey North, from New Zealand Retail Property Group.[1] Mr Flanagan continued to operate the business up until 2018 when it was offered for sale through the second respondents. Mr Motupally became interested in buying the business. As part of the sale process, the vendor through the second respondents provided Mr Motupally with financial statements for the years ended 2017 and 2018.

[5] The 2017 accounts showed that the business was making a profit and that the rent and rates totalled $125,666.

[6] The following year's accounts until March 2018 showed rent as $137,803.92.

[7] On 21 May 2018 Brenda Flannagan, wife of Mr Flannagan sent an email explaining the accounts which noted that:

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1 BD 230.

1. The Westgate store opened in October 2016 so the year end financials for 2017 are not showing as a full year and many expenses included initial set up costs.

2. The above explains why the rent is lower for the 2017 year ended.

[8] Mr Motupally decided to make an offer for the business and on 19 June 2018 the licensees submitted an Agreement for Sale and Purchase **(ASP)** to him for consideration. Mr Motupally's company executed it on that date. Mr Motupally and the purchaser were represented by a solicitor in the transaction. The price of $125,000 and the purchaser was required to pay a deposit of $30,000.

[9] In relation to the premises from which the business was carried on, the agreement provided:

> 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.[2]

[10] In fact, the agreement did not identify any lease that would be assigned. The basis upon which the company was to occupy the premises was that it would enter into a sublease from the vendors. There is no evidence that the second respondents were involved as intermediaries or agents for the vendor in relation to the sub-lease arrangement.

[11] The ASP was subject to a due diligence provision. Mr Motupally considers that the contract had been made unconditional on 6 July 2018. His belief is apparently based on that being the date that he advised his solicitor that the contract could be made unconditional. In circumstances that are not clear, the complainants actually took over the running of the business from 23 July 2018. However, the true position would appear to be that no notice making the contract unconditional had been given by that date. A notice making the contract unconditional was actually given on 8 August 2018.

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[2] BD 64.

[12] In any event, on 28 July 2018 Mr Flannagan sent an email to the Motupally's saying:

> Westgate rent for you commenced 1 August 2018.
>
> Please set up an AP for $16,737.32 monthly rent and opex …
>
> And $493.55 monthly Signage Code [redacted].
>
> [Redacted].

[13] We observe that both the vendor's and the purchaser's actions at this time seem to reflect a shared understanding that the agreement had settled before the end of July 2018.

[14] The rent and opex, it appeared, were going to be close to $200,000 per annum (versus the $125,666 shown in the Flanagan's accounts that they had supplied to Mr Motupally). Further, the email raised, for the first time according to the purchaser, the necessity to pay a monthly signage costs of almost $500 for a total of approximately $6,000 per year.

[15] Mr Motupally was considerably disquieted by the rent and signage costs stated in the email dated 28 July and sought to meet with the licensees to investigate these apparent discrepancies.

[16] In summary, as a result of the enquiries it became clear to the second respondents that the purchaser would not be acquiring an assignment of the lease of the property. Instead, Mr Flannagan or his company would be continuing as lessee and would sublease the property to the purchaser. The licensees say that the terms of this sublease were arranged between the vendor and purchaser's solicitors without their involvement. In any case, the rent was considerably more than that which the accounts that the purchasers disclosed might have suggested.

[17] Further, another reason that was put forward by Mrs Flannagan in correspondence was apparently that the rent shown in the vendor's accounts was net of certain rebates that their company was entitled to (and which it seemed were not

available to the purchasers). This too, had the effect of reducing the net amount of rent that the vendor paid and resulted in the vendors paying a significantly lower rent.

[18] It is not clear what if any disclosure had been made to the solicitors who were acting for Mr Motupally concerning the new and different rental that the purchaser would be paying. It is notable that even after the purchaser learned of the rental and opex, it gave notice through its solicitor making the agreement unconditional[3].

[19] The appellant made a complaint to the Real Estate Agents Authority (Authority) on 11 April 2019 about the second respondents' conduct during this transaction, including allegations that:

[a] the second respondents failed to disclose the correct information about the level of annual rent that the purchaser was required to pay when acquiring the business, so that the purchaser ended up paying an annual rent that was higher than expected;

[b] the second respondents gave the appellant the impression that he might lose his $30,000 deposit if he failed to pay the actual rent due under the sublease;

[c] the second respondents did not disclose to Kiwibed that the vendors were engaged in a dispute with Sleepyhead, which they state subsequently resulted in Sleepyhead terminating its contract to supply beds to Kiwibed; and

[d] the second respondents did not tell Kiwibed about an additional monthly signage fee that Kiwibed was required to pay on acquiring the business.

The committee decision

Non-disclosure of the level of rental the company would have to pay

[20] The appellant alleged that the second respondents had an obligation to ensure that the accounting information, including information about the rent, provided to him was correct. The appellant claimed that the rent information provided initially

[3] BD 47, 48. But as already noted above, Mr Motupally had already taken over the business

suggested an annual rent liability for the business of approximately $125,000. As we have already noted, the actual rent which Mr Motupally was required to pay was approximately $200,000 annually.

[21] The second respondents passed on to the appellant this information which had come to them in the first instance - apparently without comment. The committee concluded that the second respondents in doing so, functioned as conduits passing on the accounting information provided to them by the vendor.

[22] The Committee further found that the rent information was incorrectly interpreted by the appellant as applying to his situation, when this was not the case. The circumstances were different. The purchaser was going to be Kiwibed paying rent to the vendor, pursuant to a sublease instead of directly to the owner of the building. The Committee found that the terms of this sublease were negotiated without the input of the second respondents.

[23] The Committee found that it was the responsibility of the appellant to check, interpret or evaluate the accounting information provided, using whatever professional assistance they might choose to engage. The appellant did engage a solicitor, at the recommendation of the second respondents.

[24] The Committee noted that when the appellants were aware of how much rent they would have to pay, and while in receipt of legal advice, they made the contract unconditional.

[25] This part of the complaint was therefore dismissed.

Additional signage cost

[26] The Committee found that there had been no obligation on the part of the second respondents to advise the appellant about the signage fee. The second respondents did not find out about the signage fee until after the agreement had become unconditional. The Committee further concluded that it was not clear why the existence of the signage fee did not show up in the financial information that the vendor provided to the appellant.

[27] In the circumstances there was no basis for concluding that the second respondents ought to have known about the signage fee and advised the appellants before the agreement was entered into and the complaint was dismissed.

Sleepyhead complaint

[28] The Committee also considered complaints which the appellant made which were that:

[a] there was a dispute between Sleepyhead and the vendor; and/or

[b] that the second respondents were aware that the Sleepyhead contract with the vendor might be terminated.

[29] The Committee found that these complaints were not proved on the balance of probabilities.

Approach to appeals

[30] Ms Davies, counsel for the first respondent submitted:

> Appeals from Committee decisions to take no further action under s 89(2)(c) of the Act proceed on general appeal principles (as articulated in *Austin, Nichols*[4]), and are by way of rehearing. Accordingly, if the Tribunal reaches the view that it should substitute a finding of unsatisfactory conduct, it may do so.

[31] In *Austin, Nichols* the Supreme Court determined[5] that on general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

[32] Just as the Committee was required to do at the original hearing, the Tribunal is required to enquire whether the party making the allegations, namely the appellant in this case, has proved on the balance of probability that its assertions are more than likely than not to be true.

Issues on appeal

[33] At the appeal hearing, the appellant provided a further iteration of the grounds of appeal which was couched in the following terms:

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[4] [2007] NZSC 103
[5] At paragraph 5

(a) whether the second respondents provided insufficient and/or misleading information to the Appellant, regarding the rent variation and signage fee, as:

(i) The Appellant was not properly informed that the rent was going to be higher than that indicated by the accounting material passed to the Appellant by the Second Respondents.

(ii) The Appellant was not informed that a signage fee would be payable.

(iii) When the Appellant met with the Second Respondents about the rent variation and signage fee, the Second Respondents advised that it was too late in the process to resolve the matters. The Second Respondents advised that the Appellant risked losing his investment, presumably if the Appellant pulled out of the agreement for sale and purchase.

(b) Whether the Committee erred in its finding of fact that the sale and purchase agreement was declared unconditional after the Appellant became aware of the rent variation and signage fee.

(c) Whether the Second Respondents were aware of the situation regarding the Appellant's sublease, because they provided advice in relation to the Vendor providing bank guarantees for the Appellant.

[34] The issues have been modified since the original hearing but we accept that the matters now stated to be the grounds of appeal are matters that we can properly enquire into and determine.

The rent and the signage fee

[35] The appellant asserts in his appeal that the second respondents failed to give him adequate advice in that they did not warn him that the rent that had been paid by the vendor or company was not necessarily the same as the rent that the purchasers would have to pay.

[36] The Authority submitted that the relevant rules under consideration were the following:

Rule 6.4: A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

Rule 9.1: A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

> Rule 9.8: A licensee must not take advantage of a prospective client's, client's, or customer's inability to understand relevant documents where such inability is reasonably apparent.

[37] The other parties apparently accept that those were the rules that were relevant to any liability on the part of the second respondents.

[38] The complaint that the appellant made to the Authority was that the second respondents did not explain to him what the rent was going to be. It is implicit in the complaint that the second respondents knew that the historical rental figures that had been provided as part of the accounting information were irrelevant to the question of how much the appellant could be required to pay for rent and that the appellant would be paying a higher figure.

[39] The second respondents reject that suggestion. They say that the quantum of the rent that would become payable under the sublease was not a matter that the second respondents had any information on. What rent the appellants would ultimately end up paying would depend upon the terms of the sublease which the parties contemplated entering into. Clause 26 of the ASP provided that the agreement for sale of the business was conditional upon -

> "the approval of the Lessor and Lessee as to the suitability of [the appellant] and agreeing to grant a sublease of the premises to the Purchasers on terms and conditions acceptable to all parties".

[40] Neither the second respondents nor anyone else would know what the rent under the sublease was going to be until the appellant and the vendor had agreed on that and other matters. The second respondents say that they were not involved in fixing that rent.

[41] They say that the sequence of events was as follows. On the day after the they met with the appellant, and having learned of his concerns about the rent and the signage, they communicated such concerns to the vendor's representatives.

[42] The next day on 31 July 2018, the vendor personally met the appellant to discuss the rent and signage costs issues.

[43] The next day on 1 August 2018, the appellant advised the vendor that he had paid the rent, operating expenses and signage fees.

[44] On 8 August 2018, the vendor's solicitor and the appellant's previous solicitor signed and returned notices to the second respondents confirming that the agreement was unconditional and that the deposit was able to be released to the vendor.

[45] There is no evidence which controverts the account of matters which the second respondents have given.

[46] The evidence establishes that the second respondents only learnt about the rent under the sublease and the obligation to pay a signage fee and the amount when they met Mr Motupally at their offices on 30 July 2018 to discuss the rental amount and the monthly signage cost. The second respondents say that they were as surprised as the appellant to calculate the difference in rent, and the monthly signage costs. But there is no reason to believe that the second respondents had prior knowledge about this issue which they kept from the appellant.

[47] It is our conclusion that the second respondents did not mislead the appellant about the rent issue. They simply passed on the historical information about the rent which the vendor had apparently agreed to provide to the purchaser. By doing that they did not assume an obligation to make enquiries as to what the actual basis for possession of the premises was going to rest upon and, using that as a starting point, provide advice to the purchaser about whether the accounting information which the vendor had provided constituted a reliable guide to what the purchaser could expect to pay by way of rent.

[48] We come to the same conclusion in relation to the signage fee which the appellant became responsible for as a result of entering into the sublease arrangement with the vendor. Because the second respondents had no part in the negotiations that led to the sublease there is no logical basis for assuming that they knew that the appellant was going to be responsible for paying such a fee. In that circumstance there was no obligation to give assistance to the appellant to enable him to avoid this particular liability. So far as the signage fee is concerned, the appeal fails as well.

[49] We consider that the Committee came to the correct decision in regard to this particular issue and the appeal is dismissed in regard to it.

Undue pressure to not cancel the arrangements in the light of the high sublease rent

[50] The position of the appellant is that when he found out about the high rent and the extra signage fee that was payable under the sublease, he communicated his concerns to the licensees and expected them to assist him. The actual evidence of the appellant was:

> (a)"…we were given the impression that we might lose our $30,000 deposit if we fail to comply with the actual rent that was demanded to pay by the vendors as we had already taken over the business on 23rd July 2018. We were under a lot of pressure and stress as we just took over the business and found it really hard to deal with this. Eventually we were forced to pay the rent as demanded by them (sic)".

> (b)"[The second respondents] gave me the impression that it was too late to bring up these issues. Also if I don't resolve this amicably, I would lose all the money that I paid to buy this business. This put me under a lot of pressure and mental stress. The information that [the second respondents] provided was not just misleading but false as well. This caused us huge loss financially and put us under a lot of stress".

[51] Mr Perry noted that the allegation now appears to be formulated as a complaint that after the appellant discovered what the rental would be under the proposed new sublease, he failed to take steps to cancel the arrangement because he was pressured or misinformed by the second respondents. In particular, he claims that he was told that it was too late to now exit the arrangements with the vendor and that if he did so, he would jeopardise his deposit.

[52] Mr Perry submitted:

> 56. It is submitted that there is no evidence to support the above allegation. On the contrary, the notes taken by the second respondents pursuant to the 30 July 2018 meeting showed that the second respondents fully appreciated the appellant's concerns and discussed those concerns with the appellant. The second respondents also immediately contacted the vendor to pass on those concerns and arranged a meeting for the very next day for the vendor to discuss the issues with the appellant directly.

[53] Mr Hayde states that in the 30 July 2018 meeting, he "diligently warned" the appellant about the risk of putting themselves into a position whereby the vendor may have grounds to cancel the agreement. Mr Hayde states that they were "fulfilling

[their] duty" in ensuring the appellant understood the risks involved. He denies putting undue pressure on the appellant at this meeting.

[54] Whether Mr Hayde had a proper basis for expressing his opinion depends upon whether on the date it was given, there were reasonable grounds for him to believe that the purchaser was unconditionally bound to purchase the business. If it was unconditional then it would be apparent to those involved including the licensees, that Mr Motupally's options would be very limited and that if he declined to proceed with the transaction then there could be serious adverse consequences including loss of the deposit.

[55] The question of when the contract actually became unconditional was a matter of some controversy. It is not necessary to resolve that question. That is because the licensees would not have been without justification for expressing such the view – if indeed they did – that it was too late for Mr Motupally's company to back out of the ASP. But whether it was or was not, there were good grounds for the second respondents to raise the issue, given that the appellant had actually entered into the premises and began running the business as though he were the owner from 23 July 2018.

[56] But in any case, while the second respondent's may have expressed some doubt as to whether it was too late for the purchaser to back out of the transaction, they did not prevent them approaching the vendor to raise Mr Motupally' concerns about the rent and signage, which they did after the 31 July meeting.

[57] Our conclusion is that if Mr Hayde gave no more than the warning that he claims he did, then in the circumstances that applied at the time, it cannot be said that he engaged in misleading or other unsatisfactory conduct.

[58] Lastly, whether Mr Hayde went further than he claims he did when giving the warning to the appellant would seem to be a disputed question of fact. The burden of proving that Mr Hayde's claims are untrue and that he applied illegitimate pressure rest with the appellant. The appellant has failed to establish that such was the case.

[59] This ground of appeal, too, fails.

Result

[60] The appeal is dismissed.

[61] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. 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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Ms C Sandelin
Member

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Mr N O'Connor
Member