

Decision No: [2011] NZREADT 26

Reference No: READT 039/11

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

BETWEEN **LEONARD ROY HANSEN**

Appellant

AND **COMPLAINTS ASSESSMENT
COMMITTEE (CAC 10052)**

First Respondent

AND **WENDY SADD**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport – Chairperson
Mr J Gaukrodger – Member
Mr G Denley – Member

APPEARANCES

The appellant in person
Mr Clancy for First Respondent
Mr Rea for Second Respondent

DECISION

Introduction

[1] This is an appeal by Leonard Roy Hansen (“the appellant”) against the decision of Complaints Assessment Committee 10052 (“the Committee”) to take no further action in respect of the appellant’s complaints against Wendy Sadd (“the licensee”) an agent under the Real Estate Agents Act 2008 (“the Act”).

[2] The second respondent Wendy Sadd was at all material times employed by Barfoot and Thompson as a licensed salesperson at their Greenlane office.

Summary of Complaints

[3] Mr Hansen complained about Ms Sadd’s involvement in the sale of his property at 100 Luke Street, Otahuhu East. He had some associated complaints relating to the purchase by him of 19R Convoy Lane, Otahuhu East. Ms Sadd did not act on the purchase of that property.

[4] In the Committee's decision dated 9 March 2011 the Complaints Assessment Committee said that:

"Under s 89(2)(c) it would take no further action with regard to the complaint or any issue involved in the complaint (paragraph 5.1)"

[5] The appellant was unrepresented by counsel and some of the matters which he advanced in the initial complaint were not advanced in the appeal. At the commencement of the hearing the Tribunal asked Mr Hansen to identify the issues which were still at large for him. He identified the following issues:

- (i) That Ms Sadd offered a reduced commission agreement and did not honour it.
- (ii) That there was a misrepresentation as to the sale price of 19Q Convoy Lane.
- (iii) He did not receive a post auction offer said to have been made on or about 14 February 2010.
- (iv) He also alleged that false information was given to the Disputes Resolution Service by Barfoot and Thompson.
- (v) Mr Hansen had brought a claim in the Disputes Tribunal seeking \$10,000 compensation for the actions of Barfoot and Thompson and an order that he not be required to pay the balance of \$3,000 claimed for the commission. He was unsuccessful in the Tribunal. These are the issues on which the Tribunal will decide this appeal.

[6] The facts are as follows:

- (i) Mr Hansen was the owner of a property at 100 Luke Street in Otahuhu East. He had a friend, a Peter Fitzgerald, who was completing a development which adjoined Luke Street in an area called Convoy Lane, Otahuhu East. Through a process which is not fully understood by the Tribunal (and which is not relevant to this appeal) Mr Hansen came to a situation where he had agreed to buy 19R Convoy Lane, Otahuhu East and to facilitate this was required to sell his property at 100 Luke Street, Otahuhu East. The Agreement for Sale and Purchase for the purchase of 19R Convoy Lane is dated 22 October 2009 and appears at page 42 of the bundle. This shows a purchase price of \$505,000.
- (ii) During the course of the evidence Mr Hansen said that this was wrong and he had only paid \$495,000 for this property. He was not certain of whether there had been a subsequent agreement or whether the \$10,000 difference represented the fact that he had already paid a deposit. In any event Mr Fitzgerald used Ms Sadd as agent to help him sell the other properties in the development at Convoy Lane and introduced Mr Hansen to Ms Sadd. Mr Hansen's evidence was that he had another agent (a Ray White agent) that he wanted to use to sell his property but he agreed to use Ms Sadd on the basis that he would only pay the same commission as Mr Fitzgerald was paying, which he understood to be a reduced rate. His evidence was that he

understood that he was to pay about \$14,000 in commission but he was not certain what reduction that represented.

- (iii) The listing agent agreement was produced which was dated 30 November 2009. It showed an estimated appraisal price of \$450,000 for Luke Street with an estimated commission payable of \$16,000. This had been altered down from \$18,000.
- (iv) In his written complaint Mr Hansen said that he had noticed the agreement showed this commission and that it did not mention a special commission rate. In his oral evidence he said that he did not appreciate that the agreement was incorrect and should have recorded a reduced rate. In the hearing he challenged the right of Barfoot and Thompson to claim this commission. Mr Hansen said it should be reduced by \$3,000. The issue of whether the commission of \$16,593.75 claimed by Barfoot and Thompson should be paid or whether a lesser sum of \$13,593.75 should be paid was the issue of the Disputes Tribunal claim in August 2010.
- (v) An issue for this Tribunal is a factual dispute between the evidence of Ms Sadd and that of Mr Hansen. Mr Hansen claims that the agreement that Ms Sadd would give him the same commission as Mr Fitzgerald paid was made at a meeting prior to the signing of the listing agreement outside the property at 19 Convoy Lane. He said that the agreement was made in discussions between himself, Mr Fitzgerald and Ms Sadd. Prior to the souring of the relationship between them Mr Fitzgerald provided a letter dated 18 June 2010 in which Mr Fitzgerald also claimed that an agreement was reached with Ms Sadd that Mr Hansen was *"to pay the same commission rate as me"*.
- (vi) However Ms Sadd's evidence was that Mr Fitzgerald did not actually receive any discounted commission rate, that she had no authority to discount the commission rate and that the commission charged to Mr Hansen was at the standard Barfoot and Thompson rate. She said that this rate was what Mr Fitzgerald had also been paying on the sale of all of his properties. She denied that there was any agreement to reduce the commission. Ms Sadd said Mr Hansen was also charged the standard commission rate. We have to reach a decision as to whether Mr Hansen (who has the burden of proof) has established that there was an agreement to reduce commission. If there was such an agreement what was the commission to be reduced to? Having considered the evidence we do not find that on the balance of probabilities that Mr Hansen has proved that there was an agreement to reduce commission. All the evidence points to a regular commission structure. In particular the signed agency agreement estimates commission at \$16,000, \$500 less than was charged. We accept that there was a discussion that the commission would be the same as that charged to Mr Fitzgerald. The problem is that Mr Fitzgerald did not receive any discount. Mr Hansen acknowledges signing the written agency agreement and noticing the amount of the estimated commission. He is bound by this agreement therefore we do not accept this ground of appeal was established on the facts.
- (vii) The next ground of appeal related to the purchase price of Convoy Lane. He also explained to the Tribunal that the purchase price that he was to pay for 19R Convoy Lane was linked to the purchase price of 19Q Convoy Lane. He

said that he had been told by Mrs Sadd that the sale price for 19Q was \$520,000. He said that in fact the sale price was only \$510,000.

- (viii) Ms Sadd denies this. She says that she was asked by Mr Hansen what the property at 19Q Convoy Lane sold for but that she told Mr Hansen that she did not know as she was not involved in the sale process. She said that she told him that she could find out if he wanted. She denied that there was any attempt made by her to mislead Mr Hansen as to the sale price of 19Q Convoy Lane. In her statement she said that it would not have made any sense for her to have done this as she had nothing to gain by asserting any increase in price as she was not at any time acting on the sale of the property as it was a private sale between Mr Fitzgerald and Mr Hansen. The only other evidence on this point was the agreement for sale and purchase referred to in paragraph 5(ii). It did not show any link between the sale price of the two properties.
- (ix) The Tribunal do not find this point of appeal established. There is confusing and insufficient evidence as to the details of the agreement for sale and purchase of 19R Convoy Lane. Mr Hansen has not proved on the balance of probabilities that Ms Sadd lied to him about the purchase price for Unit Q.
- (x) Mr Hansen was also very concerned about what he considered were lies told by Barfoot and Thompson to the Disputes Tribunal over the claim that an agreement had been presented to him after the auction with a sale price of \$450,000; which he had declined. The property at Luke Street went to auction on 10 February 2010 and the maximum price offered was \$445,000. A Mr Kirk was prepared to offer this sum but Mr Hansen was not prepared to accept it. The evidence from Ms Sadd was that on 13 February 2010 she took to Mr Hansen an offer for \$450,000 prepared by another Barfoot and Thompson agent. She said she told him it was an offer but said he refused to look at it or accept it saying that he had taken the property off the market. Mr Hansen told Ms Sadd that he no longer wished to sell the property and that he was withdrawing it from the market. Mr Hansen denied this. He said that the confirmation by Mr Kirk that he had received the information relating to the Sale and Purchase Guide (page 32 of the bundle of documents) was not dated until 14 February 2010, a Sunday, and thus the offer (which was undated) could not have been presented until that time. He said that it was simply untrue to say that any offer had been presented to him as he was completely unaware of this and did not hear about it until August 2010 when he was in the Disputes Tribunal.
- (xi) We accept that this is a very difficult issue for Mr Hansen. We find it hard to reach any conclusion as to the date on which the offer was presented. The document signed on 14 February may have been signed at the time that the agreement was signed or before or after. All that we can say is that an offer was made for \$450,000. Ms Sadd's evidence was that she attempted to present this to Mr Hansen but he refused to accept it. We have to assess the evidence on the balance of probabilities with the obligation to prove the facts (the burden of proof) with Mr Hansen. We find on the balance of probabilities that it is more likely than not that Ms Sadd would have attempted to have presented this offer to Mr Hansen. This is because her ability to receive any commission depended upon the offer being accepted by Mr Hansen. However she may not have pressed the offer in the face of Mr Hansen's decision to

withdraw the property from the market. It may be that in the stress of the situation that Mr Hansen (who was being forced to sell a property that he liked because of his arrangement with Mr Fitzgerald) simply forgot that in his discussion with Ms Sadd on 13 February that this offer had been discussed with him.

- (xii) As we have said Mr Hansen is required as the appellant to prove on the balance of probabilities that no offer was presented to him. For the reasons set out above he has not done this. Having made this finding we also cannot find that Barfoot and Thompson's manager lied in his evidence to the Disputes Tribunal about this offer.
- (xiii) It is clear to the Tribunal that Mr Hansen was at that time under a great deal of pressure. The evidence of Ms Sadd also supports this. There were also some stressful personal events going on for Mr Hansen. The Tribunal do not need to canvass these but they were obviously adding to the unhappy situation for Mr Hansen. Further the price that he had expected to receive for his much loved house had not been realised at auction and he was undeniably unhappy about this. He did not want to be forced by Mr Fitzgerald into having to sell his house. However a few weeks after 15 February he had to relist the property for sale and accept an offer of \$455,000 which was significantly less than he felt the property was worth. This agreement is dated 27 March 2010.
- (xiv) The Tribunal observe that Ms Sadd could have kept better diary notes about her times and meetings with Mr Hansen and the dates on which agreements were presented. This would have eliminated any confusion. She acknowledged that she now keeps a diary. The Tribunal would also have been assisted by the original listing agreement rather than a photocopy, especially in circumstances where there had been changes to it.

[7] Having made these findings of fact we need to consider the relevant law. An agent may be sanctioned if he or she breach ss 72 or 73 of the Real Estate Agents Act. They provide:

Relevant Legislation

“72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.”

“73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
- (c) consists of a wilful or reckless contravention of—
 - (i) this Act; or
 - (ii) other Acts that apply to the conduct of licensees; or
 - (iii) regulations or rules made under this Act; or
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

[8] As this is an appeal the Tribunal must consider the legal basis on which the appeal must be considered.

[9] The principles applying to the exercise of appellate jurisdiction have been considered by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. According to the judgment, a Court considering an appeal from a lower Court is not obliged to defer to the reasons of the decision appealed from. Rather, the appellate Court has the responsibility of arriving at its own assessment of the merits of the case [paragraph [16]]:

“[16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate Court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion”.

[10] In *Kacem v Bashir* [2010] NZSC 112 the Supreme Court has clarified that the principles in *Austin, Nichols* apply to Courts exercising jurisdiction over general appeals from lower Courts, not appeals from decisions made in the exercise of a lower Court's discretion. The distinction between general appeals and appeals from discretionary decisions is set out at paragraph [32]:

“[32] But for present purposes, the important point arising from ‘Austin, Nichols’ is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a

decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. (emphasis added)".

Effect of Committee Decision

[11] Having applied these legal principles, ss 72 and 73 and the facts, the Tribunal finds that the Complaints Assessment Committee reached the correct decision. The Tribunal confirms the decision of the Committee to take no further action in this complaint. The appellant has not proved facts which could amount to a breach of either s 72 or s 73. For this reason the appeal must fail.

Reasons

[12] In the circumstances therefore the Tribunal dismiss the appeal and confirm the decision of the Complaints Assessment Committee.

[13] Pursuant to s.113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s.116 of the Act.

DATED at AUCKLAND this 23rd day of September 2011

Ms K Davenport
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member