

Decision No: [2012] NZREADT 11

Reference No: READT 040/11

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

BETWEEN **GARY WAYNE MURPHY**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 10060)**

First Respondent

AND **VENITA POSA**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

HEARD at AUCKLAND on 25 January 2012

APPEARANCES

Mr Murphy in person
Ms Wilde for first respondent
Ms Posa in person

DECISION

Introduction

[1] In the middle of 2010 Mr and Mrs Hollands wished to sell their properties at Patumahoe (south Auckland near Pukekohe). This was as a result of a separation between Mr and Mrs Hollands. On 7 July 2010 Mrs Hollands signed a joint sole listing agency in favour of the Professionals, Waiuku and the Professionals office in Papakura. Mr Murphy is the licensee. The Tribunal has seen a copy of the sole agency agreement and it records two things of interest:

- (i) An additional clause under terms and conditions that *“the vendor reserves the right to sell privately”*; and
- (ii) That Clause 10 where Mrs Hollands, the sole signatory warranted that she had the consent of her husband to list the property as a joint sole agency to sell the property.

[2] The Tribunal heard from Donna Marie Morris an agent with the Professionals. She said that she had the listing agreement signed by Mrs Hollands and that she took Mrs Hollands through all of the clauses and her initial Clause 10. She confirmed that her husband agreed to a sale and provided her with a brochure on the sale process. She advised her about the nature of a sole agency. Ms Morris erected signs outside the property showing the sole agency.

[3] Two weeks later Venita Posa from Harcourts contacted Mr Vaughan Hollands, the other joint owner and asked him about listing of the property. There had been a prior dealing between the Hollands and Ms Posa where she had sold another property for them at a reduced commission on the basis that she would have the right to sell the properties at 9 and 21 Clive Howe Road, Patumahoe. She was told by Mr Hollands that Mrs Hollands had entered into an agreement with the Professionals and understood that Harcourts would be entering into a joint sole agency with the Professionals. The Tribunal have now received a copy of the Harcourts listing agreement. Ms Posa e-mailed Mrs Hollands and got her approval to the listing. She did not ring or check with the Professionals, but the listing agreement shows that Mr Hollands signed an agreement saying he had also appointed the Professionals as agents prior to this authority. He ticked that he was appointing Harcourts as sole agent. He acknowledged he might be liable for more than one fee.

[4] Difficulties arose when, after an open home Harcourts received an offer and a back up offer. Mr Hollands notified the Professionals of the others. He was told by Ms Morris that the Professionals had a sole agency jointly with Waiuku and that he was at risk of having to pay two commissions as the sole agency with the Professional group was valid. This matter was then discussed by the branch manager of Harcourts Pukekohe and Mr Murphy who was the licensee of the Professionals group in Pukekohe. Mr Murphy was concerned that the behaviour of Harcourts was unprofessional. He told the Tribunal that this matter was not about a commission quarrel, as he was happy about the way that that had been resolved but rather about the principle of the matter and the way that Harcourts had handled the situation. It appears that Harcourts initially insisted that they also had a binding sole agency but subsequently they arranged a commission sharing arrangement with the Professionals at Waiuku on the basis of an 80/20 split. However relations were soured when the branch manager of Harcourts refused to discuss what had been arranged with Mr Murphy. Mr Murphy told the Tribunal that he felt very strongly that there needed to be statements to the industry as to how agents should double check that there were no other sole agency agreements. In his opinion it was a matter of good practice for every agent entering into an agency agreement to check whether there are any other agencies, whether expired or sole. He said that if an agent knew that it was going to be a joint sole agency that they should check with the other sole agent to understand what they knew and expected of the sale process. He did not think it was a matter for the salesperson to do. In his opinion Harcourts had an obligation to check with the Professionals before this agreement was signed to avoid the situation which did occur. In this case Ms Posa told the Tribunal that in fact both the agreement and the backup agreement fell through and Mrs Hollands subsequently reached an arrangement with his wife where he would retain the property.

[5] Mr Murphy complained to the Real Estate Agents Authority. The Complaints Assessment Committee dismissed Mr Murphy's complaint saying any further action was inappropriate or unnecessary. Mr Murphy appealed.

[6] The issue for the Tribunal is what was Ms Posa's obligation when executing the signed agreement on behalf of Harcourts, knowing there was already in place another sole agency? We think it is important for the real estate industry that we spell out what we find to be the obligations of an agent when confronted with a joint sole agency. The purpose of the Real Estate Agents Act is consumer protection and to achieve this open communication is needed between all agencies. To do otherwise puts a consumer at risk of a double commission as Mr Murphy noted. We were impressed with the evidence of Mr Murphy who told the Tribunal that it was always his practice to communicate or to ensure communication with the other branch manager when his agency entered into a joint sole agency. We think this is best practice.

We have considered the following statements to be best practice for the industry:-

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1. Arrangements to jointly market a vendor/client property between real estate agencies should in all cases be recorded in writing to avoid any misunderstandings during the marketing period or completion of the sale or subsequent to the sale, i.e. commission arrangements – “*winner takes all*” – processing the agreement – collecting the deposit.
2. The purpose of recording these conjunctional arrangements is to ensure the marketing and commission sharing arrangements are transparent and to avoid the vendor/client being placed at risk of paying two commissions. (see Rule 9.11)
3. At all times conjunctional arrangements should be arranged between the respective agencies managers and recorded in writing with a copy sent to the vendors.

To summarise:

The vendor/client must receive a copy of the REAA booklet “*New Zealand Residential Property Agency Agreements Guide.*”

Arrangements between agencies to be recorded at the time the listing agreement is signed the arrangements will include:

- Commission sharing, who receives what and on what basis;
 - Open home times; - (if sharing open homes)
 - Marketing information;
 - Signage; - (shared signage or separate)
4. In all cases a copy of conjunctional arrangements to be provided to each party including the vendors.

[7] We also think it is best practice in a separation for the agent listing the property to ensure that they get the signature or at the very least e-mail or written confirmation from the other party that they are happy for the property to be sold by that agency. We think the difficulty may have arisen for Ms Morris in that she did not get Mr Hollands' signature or e-mail confirmation on the listing agreement. While as a matter of law Mrs Hollands may have been bound by her warranty under Clause 10 it did lead to what

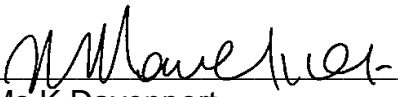
appears to have been a miscommunication between the vendors and Harcourts and the Professionals.

[8] The Tribunal have determined as follows that although the Tribunal have set out in detail the correct standard they do not consider that in this case Ms Posa's actions were sufficiently inappropriate to warrant disciplinary sanction.


[9] The appeal is therefore dismissed.

[10] 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.

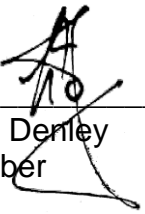
DATED at AUCKLAND this 29 day of March 2012



Ms K Davenport
Chairperson



Mr J Gaukrodger
Member



Mr G Denley
Member