

Decision No: [2012] NZREADT 9

Reference No: READT 029/11

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

BETWEEN **Sylvester & Tafadzwa KAMHARA**

Appellants

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 10046)**

First Respondent

AND **VARINDRA JHAGROO**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Appellants in person
Ms N Wilde for first respondent
No appearance for second respondent

HEARING at AUCKLAND on 24 January 2012

Summary of Complaints

[1] In 2007 Mr and Mrs Kamhara contacted Mr Jhagroo with a view to inspecting a property that he was advertising at 19 Janway Avenue, Dannemora. This property was initially listed for \$570,000. They viewed the property and advised Mr Jhagroo that they only had \$500,000 to spend and did not believe that the property was within their price range. They were urged by Mr Jhagroo to make an offer of approximately \$500,000 for the property. Mr Jhagroo took them back to the agency ReMax Point East Realty where he appears to have been the branch manager. Mrs Kamhara told the Tribunal that Mr Jhagroo showed them a valuation for the property. Mrs Kamhara said Mr Jhagroo told them that he had been in contact with Westpac New Zealand Limited and that the vendors were in dire financial circumstances and that they would accept an offer of approximately \$500,000 on the property because their other option was to sell the property by mortgagee sale. If this happened, Mr Jhagroo said that the vendors would receive nothing. The valuation report that Mr and Mrs Kamhara were shown contains a reference to other encumbrances on the title (caveats) but Mrs Kamhara said they were told not to worry about these. Mr Jhagroo said that the sale process would remove these obstructions from the title.

[2] The agreement was signed on or about 18 July 2007. The vendors accepted \$505,000 for their property. The agreement was conditional upon Mr and Mrs Kamhara obtaining finance and a satisfactory building report. Settlement was due to take place on 31 July 2007 and the builder's report was to be obtained within 10 working days of the agreement being signed. There was not much time from the date of the agreement becoming unconditional to the date of settlement. There was a subsequent agreement to extend settlement to 3 September 2007. On or about 27 July 2007, (i.e. nine days after the agreement was signed) Mr and Mrs Kamhara say that Mr Jhagroo contacted them and put significant pressure on them to pay the deposit and to declare the contract unconditional, even though they were not required to do so at that time. Mrs Kamhara told the Tribunal that Mr Jhagroo told them that there was a real risk that they would lose the property unless they made the contract unconditional immediately. Mrs Kamhara told the Tribunal that Mr Jhagroo had insisted that she went to the bank and paid the deposit on Friday 27 July just before closing time so that they would not lose the property. Mrs Kamhara did this.

[3] Unbeknownst to Mr and Mrs Kamhara (but apparently known to their solicitor but not the associate acting for them) on this date the solicitors for the vendor had advised Mr Jhagroo that there was a real risk that the vendors might not have sufficient funds to clear the mortgage and may be unable to settle. A copy of this letter was given on the Monday to Mr and Mrs Kamhara who immediately took it down to their solicitors. A letter was sent on 2 August 2007 by Mr and Mrs Kamhara's solicitor to Mr Jhagroo advising him that there was a real risk that the purchaser might not be able to settle with the vendors and requesting that ReMax not release the deposit until further notice.

[4] Mr Jhagroo then arranged for Mr and Mrs Kamhara to rent the property pending settlement. The settlement did not take place on 3 September and a settlement notice was issued on 12 September 2007. On 8 October 2007 the vendor instructed Mr Jhagroo to repay the appellants' deposit. Mr Jhagroo however refused to do this claiming he had legal advice to the effect that the contract was unconditional, he could take the money from the deposit and Mr and Mrs Kamhara could recover the money from the [insolvent] vendors.

[5] Mrs Kamhara told the Tribunal that Mr Jhagroo assured them that they would not get their deposit back unless:

- (i) They moved into the property.
- (ii) They continued with the contract.

They said that Mr Jhagroo never told them where the money was, that he never responded to any requests that they made and that despite being advised prior or at least contemporaneously with the payment of the deposit that there was a potential problem with settlement and by letter dated 2 August, he has refused to account for the commission. He claims that it is a civil matter between the licensee and/or the vendor and Mr and Mrs Kamhara.

[6] The Kamharas immediately complained to the REINZ about Mr Jhagroo but Mr Jhagroo apparently relocated to Australia during the investigation and the investigation was never concluded. The REINZ however promised Mr and Mrs Kamhara that they would object if Mr Jhagroo ever applied for a licence again.

[7] Mr Jhagroo did in fact come back to New Zealand and is now working for Zest Realty as a salesperson. The REINZ investigation was never concluded and the file, the Tribunal understands, remains with the REINZ. It has not been passed to the Real Estate Agents Authority during the course of this investigation.

Committee Decision

[8] In its decision the Complaints Assessment Committee found that the issue was one of legal interpretation and the contractual obligation between the parties. They decided that the complaint was therefore beyond the remit of the Complaints Assessment Committee. It therefore determined under s 89(2)(c) of the Real Estate Agents Act 2008 to take no further action with regard to the complaint.

[9] Ms Wilde on behalf of the Real Estate Agents Authority acknowledged that it did not appear that the issue of the misrepresentation by the agent at the time that the contract was signed (i.e. as to the price, vendors' ability to give clear title etc.) was an issue which had been considered by the Complaints Assessment Committee. She agreed that if the representation was intentionally made then it was clearly misconduct. She submitted that everything else that happened after that date was coloured by Mr Jhagroo's behaviour at the time of misrepresentation. She acknowledged that if he put pressure on Mrs Kamhara to pay the deposit and if he knew that there was likely to be a difficulty with the vendors' settling, then Mr Jhagroo was acting inappropriately. She agreed that his conduct ought to be properly investigated. She also sought an order under s 85 of the Real Estate Agents Act 2008 so that REINZ could provide to the Real Estate Agents Authority the papers and records that it held relating to the earlier and uncompleted investigation of Mr Jhagroo's behaviour.

[10] The Tribunal were assisted by these very helpful acknowledgements by Ms Wilde. It seems clear to it that the behaviour of Mr Jhagroo, if the evidence of the Kamharas is to be believed, was at its very best misleading and at its very worst deceitful. Mrs Kamhara has consistently asserted the facts which we set out above and has not changed her story since that time she first made a complaint about Mr Jhagroo in 2007. She has not wavered from this story. Mr Jhagroo did not come to the hearing to give his perspective to the Tribunal and there is minimal material from him, except to say that he believed that this matter had been resolved in 2007. The issue is clearly not just a civil issue between the parties but has significant public issue concerns.

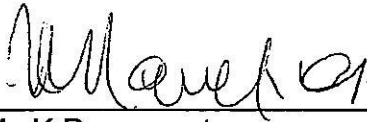
Tribunal Decision

[11] The Tribunal decided that the matter ought to be sent back to the Complaints Assessment Committee for it to enquire into the complaint under s 79(2)(e). In particular we direct that it should enquire into the question of the misrepresentations allegedly made by the agent at the time that the contract was signed, the timeline relating to the collection of the deposit and the declaring of the contract unconditional and any other matter which the Complaints Assessment Committee after investigation considers is relevant in relation to Mr Jhagroo's conduct. We consider that on the evidence we have heard a charge should be laid against Mr Jhagroo. The Complaints Assessment Committee is directed to lay a charge against Mr Jhagroo relating to the misrepresentation and such other matters as it considers appropriate.

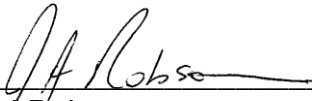
- (i) The Tribunal accordingly reverses the decision of the Complaints Assessment Committee not to investigate this matter and directs an investigation into the complaint pursuant to s 79(2)(e) as particularised above.
- (ii) The Tribunal makes an order under s 80 that the REINZ is to provide to the Complaints Assessment Committee a complete copy of its file on the investigation of Mr Kamhara's complaint against Mr Jhagroo in 2007.

The Tribunal draws the parties' attention to s 113 of the Real Estate Agents Act and advises that any party may appeal this decision to the High Court under s 116 of the Real Estate Agents Act 2008.

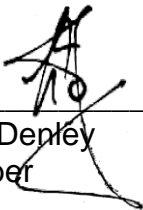
DATED at AUCKLAND this 29 day of March 2012



Ms K Davenport
Chairperson



Ms J Robson
Member



Mr G Denley
Member