

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2016] NZREADT 76**

**READT 031/15**

UNDER THE REAL ESTATE AGENTS ACT 2008  
IN THE MATTER OF AN APPEAL UNDER SECTION 111 OF  
THE ACT  
BETWEEN PHILIP LEE and HYUN SIM HWANG  
Appellants  
AND THE REAL ESTATE AGENTS  
AUTHORITY (CAC 404)  
First respondent  
AND HYUN (Mario) PARK, WON OK (Grace) OH  
Second respondents

Hearing: Auckland, 25 October 2016

Tribunal: Ms KG Davenport QC, Chairperson  
Ms C Sandelin, Member  
Mr J Gaukrodger, Member

Appearances: Ms K Lawson-Bradshaw for first respondent  
Ms S K Kimberley and Ms C Pitas for the appellants  
Hyun (Mario) Park and Won Ok (Grace) Oh, second respondents in  
person

Decision: 6 December 2016

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**DECISION OF THE TRIBUNAL**

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[1] In November 2014 Mr Lee and his wife Ms Hwang complained to the Real Estate Agents Authority about an agreement for sale and purchase that they had entered into in December 2012. This settled in January 2013. The complainants were the vendors. Mr Park, Ms Oh and Ms Watkins are all agents. Mr Park and Ms Watkins were involved in the sale. Ms Oh was the purchaser of the property.

[2] Mr Park, Ms Oh and Ms Mary Watkins were all found guilty of unsatisfactory conduct with respect to the purchase by Ms Oh of the complainant's property and the subsequent on-sale of the property by Ms Oh to a third party in March 2013. Ms Watkins does not appeal her finding of unsatisfactory conduct. Likewise, Ms Oh and Mr Park do not appeal the findings of unsatisfactory conduct made against them. However, the complainants appeal the decision of the Complaints Assessment Committee (CAC) alleging that the conduct was misconduct.

### **The Facts**

[3] Mr Lee is a lawyer in practise in Auckland. In late 2012, Mr Lee had acquired a fishing vessel which he needed to fund. He had decided to sell his family home at 32 Corunna Road, Milford. He listed the property with Mr Park. The property went to auction in November 2012 and did not sell. Mr Lee and Ms Hwang (as trustees of their family trust) also owned a recently acquired property at 70 Anzac Street in Takapuna, which was in some state of disrepair. They had purchased it for \$615,000 some months before these events took place.

[4] By late December 2012, Mr Lee was in increasing need of funds and so decided to put the Anzac Street property on the market. He contacted Mr Park on 21 December and asked him to urgently list the property and to obtain a sale. Mr Park says (and Mr Lee does not contest this), that because it was 21 December 2012, Mr Park was uncertain of whether he would be able to find a buyer so quickly. Nonetheless he went to the property on 21 December and signed an agency agreement with Mr Park and Ms Hwang. There is a dispute over whether or not an appraisal was given but the bundle of documents<sup>1</sup> contains a document which appears to be a handwritten appraisal for the property at \$650,000. Also in the bundle of documents<sup>2</sup> is the comparative market analysis which was also prepared on 21 December 2012 with extracts from Property Guru (dated 21 December 2012); it shows a rating valuation for the property of \$760,000. The previous sale of the property in August 2012<sup>3</sup> is shown on this document at \$615,000. This was the purchase price paid by the complainants.

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<sup>1</sup> At page 81.

<sup>2</sup> At page 91.

<sup>3</sup> At page 92 of the bundle.

[5] From this information, the Tribunal concludes that Mr Park did provide a somewhat sketchy market analysis but nonetheless a market analysis of the property. The complainants signed a listing authority. Mr Park's evidence was that he tried to contact potential purchasers on his database but no-one was interested. On 21 December, Ms Oh, another agent in the Ray White Milford office, did express an interest in purchasing the property. Mr Park says the vendors also signed on 21 December a document called "Consent for partner or employee of real estate agent or a director of a company who is a real estate agent to take an interest in property". This document records that the vendors consented to Ms Oh obtaining a freehold interest in the property and agreed to be supplied with a valuation. There is an issue as to whether or not this form was the appropriate form under s 136 of the Real Estate Agents Act (the Act) and thus whether the provisions of ss 134 – 136 have been complied with. The Tribunal will discuss this issue below.

[6] Ms Oh signed the agreement for sale and purchase at 6.55 pm on 21 December. The vendors also signed the agreement. This was just before the Christmas break and on 9 January 2013, a valuation was prepared by Prendos. Ms Oh's evidence is that she took this valuation into Mr Lee's law firm and handed the valuation over. The complainants claim that they did not get the valuation until after settlement. The Tribunal have concluded that it accepts Ms Oh's evidence that it was delivered on 9 January 2013. It was dated this date, the complainants were vague as to the date and they acknowledged receipt of the valuation. It seems very unlikely they would have done this after settlement as this point would have been moot. On the balance of probabilities, the Tribunal find the valuation was served on 9 January 2013. This date is more than the 14 days prescribed in s 135(3) but given the statutory holidays over this time and the difficulty in getting a valuation done over Christmas, the Tribunal does not place much weight on the few days delay. A bundle of documents<sup>4</sup> shows the front page of the valuation had been signed by the vendors but it does not show the date on which it was signed. The valuation shows that the property "as is" has a valuation of \$685,000 and if complete (meaning that if all the remedial works were carried out) of \$740,000.

[7] Ms Oh had already paid \$100,000 by way of deposit on 21 December 2016 and a further \$50,000 was paid by her [at the vendor's request] in part payment on or

about 3 January 2013. In return for this payment, she was given early access to the property. She commenced renovation works shortly after this date. At the request of the vendors, the settlement date for the property was brought forward from 25 January 2013 to 15 January 2013.

[8] After settlement, Ms Oh continued to carry out renovations. Ms Oh moved into the property with her son. The property was on-sold by her in March 2013 for a significant profit, even taking into account the cost of the renovations. The sale price was \$820,000. The complainants made no complaint about the sale until November 2014 when they say they realised Ms Oh had on-sold the property.

[9] The real issue in this appeal seems to be whether or not the respondents complied with their obligations to make the complainant/vendors aware of their disclosure obligations that were required by ss 134 to 136 of the Real Estate Agents Act 2008. Those sections provide:

***134 Contracts for acquisition by licensee or related person may be cancelled***

- (1) No licensee may, without the consent of the client for whom he or she carries out real estate agency work in respect of a transaction, directly or indirectly, whether by himself or herself or through any partner, sub-agent, or nominee, acquire the land or business to which the transaction relates or any legal or beneficial interest in that land or business.*
- (2) No licensee may, without the consent of the client, carry out or continue to carry out any agency work in respect of a transaction if the licensee knows or should know that the transaction will, or is likely to, result in a person related to the licensee acquiring the land or business to which the transaction relates or any legal or beneficial interest in that land or business.*
- (3) The client's consent is effective only if—*
  - (a) given in the prescribed form; and*
  - (b) the client is provided with a valuation in accordance with section 135.*
- (4) The client may cancel any contract—*
  - (a) made in contravention of subsection (1); or*
  - (b) brought about by agency work carried out in contravention of subsection (2).*
- (5) No commission is payable in respect of any contract of the kind described in subsection (4), regardless of whether the client cancels the contract.*
- (6) The client may recover any commission paid in respect of any contract of the kind described in subsection (4) as a debt.*

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<sup>4</sup> At page 182.

- (7) *For the purposes of this section, a person who is the client of an agent in respect of a transaction is also the client of any branch manager or salesperson whose work enables the agent to carry out real estate agency work for that client.*
- (8) *This section and section 135 have effect despite any provision to the contrary in any agreement.*

**135 Client to be provided with valuation**

- (1) *For the purposes of section 134(3), the licensee must give the client a valuation made at the licensee's expense.*
- (2) *The valuation must have been made by—*
  - (a) *an independent registered valuer; or*
  - (b) *in the case of a business, by an independent qualified statutory accountant (within the meaning of section 5(1) of the Financial Reporting Act 2013).*
- (3) *The licensee must give the client the valuation either—*
  - (a) *before seeking the consent of the client; or*
  - (b) *with the agreement of the client, within 14 days after obtaining that consent.*
- (4) *Every consent given under section 134 without the valuation being supplied to the client in accordance with subsection (3) is ineffective.*
- (5) *Any contract to which the client is a party and to which the consent relates is voidable at the option of the client if—*
  - (a) *the client gives his or her consent in accordance with subsection (3)(b); and*
  - (b) *the valuation, when supplied, is greater than the valuation specified in the prescribed form of consent as the provisional valuation.*

**136 Disclosure of other benefits that licensee stands to gain from transaction**

- (1) *A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.*
- (2) *Subsection (1) does not apply to any matter disclosed under section 128 or 134.*
- (3) *The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.*
- (4) *For the purposes of this section, an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect of the transaction.*
- (5) *A contract entered into in contravention of this section may not be cancelled merely because of that contravention.*

[10] Section 134 is directed at the licensee and requires him or her to obtain the client's consent to the acquisition of the property by a related person on the

prescribed form and then to provide a valuation in accordance with s 135. The client has the right to cancel the contract if the prescribed form is not used or the client is not provided with a valuation which is greater than the provisional valuation provided in the consent form within 14 days.

[11] The section provides that a client may recover commission paid in respect of any contract which is entered into in contravention of these provisions, regardless of whether there is a subsequent cancellation of the agreement. The form which was signed by the vendor consenting to the sale does not comply with the current form. The printed form is a long form and has an explanatory note which says:

“We (the vendor) sign the agency agreement with (agent) in respect of the transaction relating to the following land and we consent to (the purchaser) a related person acquiring directly or indirectly the following interest in the land.”

[12] The form requires either a valuation to be provided with it [referred to in the form] or consent to be provided based on a provisional valuation of the land and subject to the licensee providing us with a copy of the valuation 14 days later. The form that the complainant signed provided some of this information but in particular did not confirm any provisional valuation for the property. Therefore, the form was deficient.

[13] The Real Estate Agents Authority submits that the consent form signed by the appellants was deficient because it did not provide this provisional valuation and that Mr Park breached ss 134 and 135 as he did not ensure that the consent was obtained on the appropriate form.

[14] The Tribunal concurs that s 135 sets out a clear, strict liability for any agent who does not comply with the strict provisions of s 134. From the evidence before the Tribunal, it appears that Mr Park earned \$6,000 as commission from the sale of this property. In accordance with s 134(6), the complainants are entitled to the return of the commission paid to Mr Park. The agency is not before the Tribunal so the Tribunal can only order the return of the commission paid to Mr Park rather than the total commission. Accordingly, the Tribunal modifies the decision of the Complaints Assessment Committee and orders the refund of Mr Park’s commission to Mr Lee

and Ms Hwang (as Trustees of their family trust). This commission is to be paid within 28 days of the date of this decision.

[15] However, the Tribunal is not convinced that the conduct of Mr Park with respect to this sale was so serious that the Tribunal ought to refer the matter back to the Complaints Assessment Committee for a decision as to whether or not charges ought to be laid.

[16] The financial reality of the complainants' position at the time was such that they wanted an urgent sale in order to fulfil another financial obligation. Mr Lee is a solicitor and while this does not in any way obviate the need for the real estate agents to comply with their obligations, there is no doubt in the Tribunal's mind that the sale would have still proceeded had the correct form been used. An attempt was made to comply with the requirements of the Act and the form signed twice by the vendors – the second time when Ms Oh bought the valuation into Mr Lee's office. Certainly, when the valuation came in which showed all the valuation information that the complainants needed and that the sale price was for less than the valuation, they asked for the settlement date to be brought forward and they settled promptly. Therefore, the Tribunal does not consider that Mr Park's conduct shows the necessary elements of disgraceful, seriously incompetent or seriously negligent real estate agency work that would be required before the Tribunal could find a breach of s 73. He made an effort to comply with his obligations under ss 134 – 136. The fact that he did not makes his unsatisfactory conduct finding appropriate. However, the Tribunal does not think his conduct had the necessary level of fraud, dishonesty, extreme negligence or recklessness needed, or any other element that would amount to disgraceful conduct. Therefore, the Tribunal dismisses the appeal against the finding of unsatisfactory conduct against Mr Park but amends the penalty decision of the Complaints Assessment Committee to provide that Mr Lee and Mr Hwang should be repaid the commission received by Mr Park.

*Ms Oh*

[17] The decision of the Complaints Assessment Committee was directed to the second agreement for sale and purchase that Ms Oh entered into in March 2013. As the purchaser of the property from Mr Lee and Ms Hwang, Ms Oh did not owe any

obligation to the complainants as she was not the licensee referred to under s 134. The only issue can be with her conduct in on-selling so quickly.

[18] The complainants' submissions were directed at the contract for the sale of their property and while they have submitted that the respondents' plan was "well determined by both licensees to make a profit in an unethical and unprofessional manner" the evidence does not support this. Ms Oh adduced evidence that she had to purchase another property when a deal went bad. There is evidence to support this which is as credible as the evidence that she wanted to make a quick profit. The finding of unsatisfactory conduct is appropriate for her wrongdoing. The Tribunal repeat their reasons as set out for Mr Park at paragraph [15] as to why the level of wrongdoing did not amount to misconduct. The Tribunal sees no reason to upset the decision of the Complaints Assessment Committee with respect to their finding about Ms Oh and dismiss the appeal against her.

[19] The complaints also alleged that Mr Park did not properly market the property. This is a difficult factual issue for the Tribunal. The evidence that the Complaints Assessment Committee accepted was that Mr Park rang people on his database who might want to purchase the property. He was undeniably facing pressure from the vendors who wanted a quick sale of the property at a time when it was very difficult to effectively market the property. On the facts before it, the Tribunal have evidence to support Mr Park's evidence about the vendors' desire to sell the property extremely rapidly. Thus, the tribunal cannot conclude that the limited marketing he could carry out in one day was not a discharge of his obligations in the circumstances. While Mr Park could undeniably have done significantly more marketing, it would need to have been done after the Christmas period to have been effective. The vendors clearly did not want that delay. In the circumstances, therefore, the Tribunal is not satisfied that the complainants have produced sufficient evidence to establish that there was any breach of Mr Park's obligations in this respect.

### *Appraisal*

[20] The complainants say that they were misled by Mr Park's low appraisal for their property. The appraisal was for \$650,000 and was supported by a search that



Mr Park did on the Property Guru. Some support for the figure that he reached is derived from the Prendos valuation which shows that in the state that the property was sold it had a market value of \$685,000 including GST. Mr Park's appraisal at \$650,000 was less than this but given the purchase of the property by Mr Lee in August 2012, it was probably not so unrealistic in all the circumstances.

[21] However, it was clearly not a particularly detailed, accurate or in-depth analysis of the market value of the property. However, again the Tribunal have to take into account the circumstances in which this was given. Mr Lee called Mr Park on the day on which the property was listed and had him come down to the property and he had to provide an appraisal within that time. His appraisal was scanty but given the pressure of the time, was within the margins of acceptable conduct.

[22] In all the circumstances therefore the Tribunal:

- (i) Dismisses the appeal against a finding of unjust conduct against Ms Oh.
- (ii) Dismisses the appeal against a finding of unsatisfactory conduct against Mr Park.
- (iii) Modifies the decision of the Complaints Assessment Committee on penalty by requiring Mr Park to repay the commission to the complainant of \$6,000 within 21 days.

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**Ms KG Davenport QC**  
Chairperson

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**Ms C Sandelin**  
Member

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**Mr J Gaukrodger**  
Member