BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 15

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
Tribunal:	Mr J Doogue, Deputy Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Submissions filed by:	Mr Motupally, Appellant Ms A Davies, on behalf of the Authority Mr J Tian, on behalf of the second respondents
Date of Decision:	12 May 2020

INTERIM DECISION OF THE TRIBUNAL (SECOND RESPONDENT'S STRIKE OUT APPLICATION)

---

[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 business was situated at Westgate Mall, Westgate Auckland. The vendor's agents were Mr David Wells and Mr Jayson Hayde; 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] In its decision the committee elected not to take any steps against the licensee. It is against that decision that Mr Motupally appeals. The second respondents have applied to strike out the appeal. The details of the appeal, the strikeout grounds and other matters will be considered below.

[3] The purchaser of the business was a company which Mr Motupally and his wife had incorporated. The documents which have been placed in evidence in places refer to "Kiwi Bedz and Bedz Limited" but it is also referred to as "Kiwi Bed and Bedz Limited". The former appellation is how it is identified in the Agreement for Sale and Purchase and we will refer to it as the purchaser in this decision.

[4] It would seem 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 shop at Westgate, Massey North, from New Zealand Retail Property Group.[1]

[5] On 19 June 2018 the licensees produced an Agreement for Sale and Purchase for consideration by the purchaser and it was signed on that date. The agreement fixed a total price of $125,000 and required a deposit to be paid of $30,000. 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

---

1 BD 230.

above and in the general terms of sale and in any further terms of sale and the schedules to this agreement.[2]

[6] Mr Motupally and the purchaser were represented by a solicitor in the transaction. That was Mr Loga Pullar of Avondale Lawyers.

[7] The vendor provided financial statements for the years ended 2017 and 2018. The 2017 accounts showed that the business was making a profit and that the rent and rates totalled $125,666.

[8] The following year's accounts until March 2018 showed rent as being $137,803.92. However, as is described below, any expectation that either of these figures provided a reliable guide to what rent the purchaser would have to pay was misplaced.

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

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.

[10] The agreement was subject to a due diligence provision. In circumstances that are not clear, the complainants actually took over the running of the business from 23 July 2018. Mr Motupally considers that the contract had been made unconditional on 6 July 2018. His belief is apparently because at that date he advised his solicitor that the contract could be made unconditional. However, the true position would appear to be that the contract was still conditional at the time when the purchaser began running the business. The required notice making the contract unconditional was actually given on 8 August 2018.

---

[2] BD 64.

[11] In any event, on 28 July 2018 Mr Flannagan sent an email to the Motupallys 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 1800000 ref 604485.
>
> Kiwi Property Group 01-0564-0113422-000.

[12] The rent and opex, it appeared, were going to be close to $200,000 per annum. Further, the email raised, for the first time according to the purchaser, the necessity to pay a monthly signage code of almost $500 for a total of approximately $6,000 per year.

[13] Mr Motupally met with the licensees to investigate these apparent discrepancies. In summary the outcome of those enquiries was 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 amount of rent to be charged was to be more than the rent that Mr Flannagan would pay. 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. Further, another reason that was put forward by Mrs Flannagan in correspondence was apparently that the rent shown in the 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 a significantly lower rent being paid than the purchasers would be paying.

[14] It is not clear what if any disclosure had been made of these matters between the solicitors who were acting for Mr Motupally. Significantly, though, even after

the purchaser learned of this situation it gave notice through its solicitor making the agreement unconditional.[3]

[15] A further aspect of the relevant background is that one of the suppliers of products which were sold through the business was the company Sleepyhead. The appellant says that, to the detriment of the business, Sleepyhead discontinued the supply of products to the business after the new purchaser had taken it over. The appellant alleges that the second respondents knew that there was a dispute in existence between the vendor and Sleepyhead before the purchaser acquired the business and that, in breach of the obligations that the second respondents owed, they did not disclose this dispute to the appellant.

[16] The appellant also asserted that the second respondents ought to have alerted him to the existence of the additional signage charge referred to at paragraph [12] above.

The outcome before the committee

[17] The committee came to the following conclusions concerning the three issues which it needed to decide.

[18] First, it dealt with the appellant's contention that the licensees breached the obligations that they owed to him in that they failed to ensure that the accounting material which the vendor had provided to the purchasers, including information about the rent, was correct. The view that the committee took of this issue was that the second respondents were conduits for the accounting information provided to them by the vendors.[4] It was not the responsibility of the second respondents to verify the information.

[19] The committee was of the further view that the purchasers had not appreciated that the rental arrangements between the vendor and the lessor were different than those under which the purchasers will occupy the premises. The purchaser would be

---

3 BD 47, 48.

4 Committee decision at [3.1].

paying rent to the vendor under a sublease instead of directly to the owner of the building.[5]

[20] Additionally, the second respondents were not involved in the negotiation of the lease arrangements under which the purchasers would occupy the building.

[21] The Committee concluded 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 retained a solicitor.

[22] The Committee noted that with knowledge of how much rent they would have to pay, and while in receipt of legal advice, the appellant proceeded to declare the agreement for sale and purchase unconditional.[6] It also noted that after it had learnt what the actual rent was going to be, the purchaser made the contract unconditional.

[23] Regarding the Sleepyhead matter, the committee stated that it was not satisfied that there had in fact been a dispute between Sleepyhead and the vendor and in any case, it was not satisfied that the second respondents appreciated that the Sleepyhead contract might be terminated.

[24] With regard to the additional signage charge, the committee concluded that most of the points relevant to the rent complaint were applicable to the claims regarding the purchasers' lack of awareness that an additional signage fee was being claimed. The committee stated that the evidence did not prove that the second respondent should have known about the fee and informed the appellant before entering into the agreement for sale and purchase.[7]

---

5 Committee decision at [3.2].

6 Committee decision at [3.4].

7 para 3.10

Mr Motupally's appeal

[25] The appeal document that Mr Motupally filed is difficult to understand.

[26] The first point is that in relation to the rent and signage complaint the Committee was wrong in concluding that the Sale and Purchase Agreement was made unconditional on 8 August 2018 and the appellant asserts that the business was actually taken over by the purchaser on 23 July 2018.

[27] It asks, rhetorically, why the purchaser was allowed to take over the business without the Agreement for Sale and Purchase having become unconditional. It refers to the fact that the agreement became unconditional on 6 July 2018 when the appellant sent an authorisation to his lawyer, Mr L Pullar, to that effect.

[28] The Notice of Appeal asserts that Mr Flannagan's advice on 28 July 2018 about how much rent had to be paid made the appellants aware of "huge rent" which occurred on 28 July 2018. It also refers to the fact that the appellant requested a meeting with the licensees to "resolve rent variation and signage costs" but the licensees were "not helpful at all, instead advised it was too late to resolve at this stage and I would risk losing all my investment. The licensees' actions were misleading".

[29] A further matter stated in the reasons for the appeal was that:

> In regards to sublease, the licensees were aware of what was going on, Kiwi Property landlords wanted [purchaser] to provide bank guarantee for about 83,000, [purchaser] was not told about the bank guarantee, when [purchaser] after getting to know this wanted to pull out of the appeal, licensee David Well advised that vendor Bob Flannagan would leave his bank guarantee for two years, but Kiwi Property approved vendor's bank guarantee to be left in place for only a year.

[30] Also, the grounds of appeal stated that [purchaser]

> "asked licensee David Wells what would happen if they were unable to come up with replacement bank guarantee, licensee David Wells said that vendor would find a way to extend the bank guarantee.

[31] We understand that the appellant argues that the contract became unconditional upon the day when he asked his solicitor to make it so, that is on 6 July 2018, rather than the date when the solicitor provided the notice that was required which was on 8 August 2018. We understand that the comments that we have been discussing are directed towards paragraph 3.4 of the COMMITTEE decision, which was as follows:

> 3.4 It should also be noted that after the complainants became aware of how much rent they would have to pay, and while in receipt of legal advice, the complainants proceeded to declare the Agreement for Sale and Purchase unconditional. The sale and purchase process as set up by the licensee was a fair one. It was not out of the ordinary.

The substance of the contentions in the notice of appeal

[32] We will now set out our understanding of the meaning and intent of these various contentions. It would appear that the appellant contends that the purchasers were committed to the acquisition of the business from the date when "the business was taken over on 23 July 2018". This contention is apparently put forward to counter the significance that the Committee attached to the fact that in their understanding the sale and purchase was declared unconditional even after the purchaser became aware of the actual rent that it would have to pay. The appeal notice repeats the complaint that there was a large variation between the rent shown in the accounts which the purchaser supplied and the actual rent; and that this variation had not been disclosed.

[33] There is also a complaint that the second respondents were not helpful in resolving the situation when the variation in the rent was discovered and instead advised the appellant that it was too late to resolve, and that he would risk losing all his investment. The appellant says this was "misleading".

[34] There is an allegation that the purchaser had not been told that a "bank guarantee" would be required; that when the purchaser found out about this, David Wells, one of the respondents, advised that the vendor would leave in a bank guarantee for two years and that Kiwi Property had approved the vendor's bank guarantee to be left in place for only a year. We interpolate that it is difficult to

understand what is being conveyed in this part of the notice of appeal. It does however appear that the topic of bank guarantees and any responsibility on the part of the respondents in relation to that subject is a new matter that was not raised in the original hearing.

Overview

[35] In overview, our understanding of the overall effect of the notice of appeal is to mount a challenge to the decision that the Committee came to acquit the licensees of unsatisfactory conduct. That is to say, it is apparent that the appellant challenges the conclusions of the Committee in dismissing his complaints:

(a) that the purchaser was not properly informed that the rent was going to be higher than that indicated by the accounting material that the licensees passed on to it, and took over the business in ignorance of that fact; As a subsidiary point, he also challenges the view that the Committee came to concerning when the contract was made unconditional;

(b) that the licensees breached their obligations and as a result the purchaser did not know about the extra signage charge;

(c) that the licensees, knowing as they did that there was an extant dispute between the vendor and Sleepyhead failed to inform him about it so that the purchaser went ahead and acquired the business in circumstances where shortly after Sleepyhead ceased to supply its products.

The strike out application

[36] The second respondents' application is for orders:

> Striking out the appellant's appeal as set out in the appellant's Notice of Appeal dated 31 October 2019 in full (Bundle of Documents, pp. 314-316).

[37] The grounds upon which the orders are sought are set out in the second respondents' notice of application to strike out which accompanies these submissions, are that:

(a) The purported appeal discloses no reasonably arguable cause of action and has no bearing on the Committees determination of the complaint against the second respondents;

(b) The purported appeal is frivolous and vexatious and an abuse of process in that it attempts to re-litigate an argument involving the Committees determination of an immaterial fact which has no bearing on the complaint as initially made by the appellant; and

(c) The purported appeal is an abuse of process in that it attempts to bring a fresh allegation on appeal that had not been raised before the Committees in the first instance.

Strike out applications in proceedings before the Tribunal

[38] The Tribunal's jurisdiction to make strike out orders as contained in section 109A which provides as follows:

> 109A Disciplinary Tribunal may strike out, determine, or adjourn proceeding
>
> (1) The Disciplinary Tribunal may strike out, in whole or in part, a proceeding if satisfied that it—
>
> (a) discloses no reasonable cause of action; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or

(d) is otherwise an abuse of process.

(2) If a party is neither present nor represented at the hearing of a proceeding, the Disciplinary Tribunal may,—

(a) if the party is required to be present, strike out the proceeding; or

(b) determine the proceeding in the absence of the party; or

(c) adjourn the hearing.

[39] The application which the second respondent has brought assumes that the power of the Tribunal to make strike out orders is not limited to substantive proceedings but can be made in the case of appeals as well. The first respondent did not state the contrary. The appellant did not deal with the question. Both parties referred to the decision of the Tribunal in the appeal of *Nottingham*.[8] In that case, the Tribunal stated that the power to strike out in section 109A was the same as that contained in the High Court rules and that authorities decided under the High Court rules provided guidance in this jurisdiction when exercising the strike out powers.

Principles

[40] The Court of Appeal in *AG v Prince*[9] confirmed the following principles are applicable to strike out applications:

a) The court should assume the facts pleaded are true;

b) The causes of action must be so untenable that they cannot possibly succeed; and

c) The jurisdiction is to be exercised sparingly and only when the court is satisfied that it has the requisite material;

d) The jurisdiction is not excluded where the application raises difficult questions of law, requiring extensive argument.

[8] *Nottingham & Ors* [2019] NZREADT 53
[9] *Attorney-General v Prince & Gardiner* [1988] 1 NZLR 262.

The issue concerning the point at which the purchasers made the contract unconditional

[41] As part of the notice of appeal, the appellant addresses the evidence before the Committee and the timeline of events relevant to state of knowledge of the purchaser/appellant when the contract was made unconditional. The contention of the appellant is that the Committee were wrong in concluding that the appellant committed itself to the purchase at a point where it had full knowledge of the details of the rent that would be charged for the shop.

[42] In itself this is not material which, depending on whether the Committee took an accurate or erroneous view of the facts, would resolve the charges of unsatisfactory conduct against the two licensees. Whether Mr Motupally confirmed the contract before or after he became aware of the actual level of the rent to be charged was only a background matter. The main issue to which it was background was whether the licensees failed to ensure that they provided the purchaser with adequate information about the transaction that they were entering into. It is concerned with whether they complied with the obligations that are contained in the Real Estate Agent Act (Professional Conduct and Client Care) Rules 6.2 and 6.4, and possibly, 9.8. Whether there has been insufficient or misleading information provided to a customer is at the heart of the enquiry.

[43] While the question of whether Mr Motupally knew or did not know about the actual level of rent before making the contract unconditional could potentially be relevant to different types of proceedings between the parties; in the appeal proceedings this question is not relevant other than as a matter of background.

[44] It is possible, for example, that the purchaser in a case like this could have come to an erroneous view that the company was obliged to go through with the transaction even after discovering that the rent was higher than the purchasers thought: that even though it had been misled, it was now too late to do anything about that. Even if in a hypothetical case this occurred, if the licensees had suppressed information that they had in their position about the higher rent, they would still be liable to a complaint that they had breached their duties and had engaged in unsatisfactory conduct. A good argument can be mounted that in such

circumstances it would be no answer for licensees to make the assertion that the complainant had contributed to his own misfortunes.

[45] Notwithstanding the appellant's mis-focusing of the appeal document on peripheral aspects, the notice of appeal makes it clear that the appellant is appealing against the entire determination that was delivered on 4 October 2019. One of those is the disproportionate amount of attention given to the question of the sequence in which the contract had been made unconditional. Even though the notice of appeal is hard to follow, plainly, the appeal is against the determination of the committee that the licensees had not breached their ethical obligations by failing to provide relevant financial and rental information to the purchaser.

[46] It is our further view that it is relevant to keep in mind the consideration that the Act is a consumer protection measure. Further, having regard to the undoubted fact that many parties (including the present appellant) are legally unqualified, too great an emphasis should not be placed upon the niceties of pleading and a more tolerant view about such questions is justified.

[47] To the extent that we can understand the case of the appellant both from the text of his notice of appeal and the background of the appeal and complaint, we do not regard this as an appeal that can be dismissed upon the grounds that it is so untenable that it cannot possibly succeed; and that the strike out remedy is only to be granted sparingly: *AG v Prince*.

[48] At the same time, we recognise the deficiencies in the notice of appeal and consider that procedural fairness requires that if the appeal is to proceed, the appellant will have to file an amended statement of the grounds of appeal so that the second respondents are able to identify exactly what the appeal is concerned with.

Our conclusion

[49] We consider that the appellant should be allowed the chance to proceed with his appeal. We do not intend to convey that we consider that the appeal necessarily has any prospect of success. However, we consider that it is important that he should have the opportunity to have the matter heard by the Tribunal. If he can repair his

notice of appeal, then it will be possible to proceed to the substantive appeal. We will defer until a later point any discussion about the nature of the appeal. We only mention this because counsel for the second respondents has expressed certain views concerning whether the appellant is entitled to question on appeal determinations of fact which the committee came to.

[50] Because there is a prospect that the appeal can be put into proper order, it is likely that at least one of the key matters will be able to be dealt with on appeal. That issue is whether the second respondents breached their obligations in not informing the appellant about the significant pending upward variation in the rent.

[51] If an amended notice of appeal is filed, it may be that the second respondents will wish to resume hearing of this application or alternatively they may consider it is more efficient to proceed to a substantive hearing of any legitimate appeal points, leaving any other matters, such as whether the appellant is attempting to raise on appeal new matters which he is not entitled to, for consideration at that hearing.

[52] We would urge the appellant if possible, to take legal advice - if only on the drafting of any amended notice of appeal.

[53] A suitable timetable from this point would allow the appellant a period within which to file an amended notice of appeal followed by a further interval for the other parties, and in particular the second respondents, to consider matters and advise the Tribunal of their views about the future course that the proceeding should take.

[54] The Registrar should check with Mr Motupally and counsel their availability to respond on the timetable question. If it appears that any of the parties are not contactable because of the Covid-19 emergency, she should refer that matter back to the Tribunal to re-consider the directions in this decision. Subject to her doing so, the parties are to file brief memoranda dealing with a suggested timetable within 15 working days of the date of this interim decision.

[55] 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.

_____
Mr J Doogue
Deputy Chairperson

_____
Ms C Sandelin
Member

_____
Mr N O'Connor