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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP934/90

BETWEEN: DUNBAR SLOANE REAL ESTATE LIMITED a duly incorporated company having its registered office at Wellington

Plaintiff

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AND: ANTHONY DALE LORIMER of 5 Eden Court, Cleveland, Brisbane, Queensland, Manager and RUBY MARGARET LORIMER his wife

Defendants

Hearing 12 February 1991

Counsel: Mr M V Smith for plaintiff
Mr S N Meikle for defendants

Judgment: 13 February 1991

[redacted] JUDGMENT OF MASTER J H WILLIAMS QC

This is an application for summary judgment. By the use of that procedure the plaintiff, Dunbar Sloane Real Estate Ltd, seeks judgment for $10,165 that being commission which it claims is payable to it arising out the sale of property formerly owned by Mr and Mrs Lorimer.

Mr and Mrs Lorimer claim that they are entitled to two defences to the application for summary judgment. The first is that Dunbar Sloane Real Estate has breached its duty of full disclosure in failing to advise Mr and Mrs Lorimer that the offer to purchase their property by a Mr Keay was conditional on the sale of Mr Keay's own property. The second is that Dunbar Sloane Real Estate is in breach of its duty to the Lorimers because it failed to collect the whole of the deposit.

In 1988, Mr and Mrs Lorimer were the owners of the property at 29 Trelissick Cres, Ngaio, Wellington. They had decided to move to Brisbane to live - and in fact have done so and still reside there. They wished to sell their house and, naturally enough, say that they wanted a firm date for its sale to enable them to make the necessary arrangements for the shift to Australia.

On 1 September 1988, they signed an authority for Dunbar Sloane Real Estate to act as their agents in connection with the sale of the property. At that point, they hoped to realise $330,000 for it. The 'authority to sell contained the following provisions concerning when commission was to be payable. It said that it was agreed that:

" 4. If the property, or any part of it is sold: (a) by the Agent; or (b) through the instrumentality of the Agent; or (c) by anyone introduced by the Agent during the term of the contract of agency; the Owner agrees to pay the Agent the commission and/or other payments specified below.

" 5. This contract of agency shall commence from 2.00pm... on 1-9-88... and continue until sold...

...

SCHEDULE OF CHARGES

(1) On the sale of all property freehold or leasehold whether by auction or private treaty - $350 basic fee plus 3.50% of the total price plus GST on the total fee."

The real estate salesman who was apparently principally involved in efforts to sell the Lorimers' property was a Mr Flett who was employed by Dunbar Sloane Real Estate. Mr and Mrs Lorimer say that in mid to late October 1988, Mr Flett brought them an offer to purchase the Trelissick Crescent property signed by a Mr Kaey. In fact it now appears that Mr Keay was the owner of a property at 10 Burma Road, Wellington and was considering selling that property and shifting to live somewhere else in that city. In order to assist him with the

sale of the Burma Road property he, too, had appointed Dunbar Sloane Real Estate as his agents and had visited a number of properties in the Wellington area, again with Mr Flett's assistance. Mr Keay says that Mr Flett would have known, at that stage, that he, Mr Keay, would have to sell the Burma Road property in order to be able to purchase another home.

The first offer which Mr Keay made to purchase the Lorimers' property was conditional on the sale of the property at 10 Bruma Road and apparently conditional on Mr Keay raising finance to enable him to proceed. It is common ground that that first offer was rejected by Mr and Mrs Lorimer. They felt that it was too uncertain, having regard to their own need for certainty in relation to the move to Brisbane, and was too indefinite. At that stage there was no contract or even an offer in existence for the purchase of Mr Keay's property nor was there any assurance as to his ability to raise the necessary extra finance.

A day or so later, Mr Flett brought the Lorimers a second offer from Mr Keay for the purchase of the property at 29 Trelissick Crescent. That offer was conditional only on Mr Keay's solicitor approving the title to the property within 14 days. The other conditions as to the sale of Burma Road and finance had been deleted. Of his signing that second offer, Mr Keay says:

> " ... I made it very clear to Flett that under no circumstances could I finance the purchase of 29 Trelissick Crescent unless my property was sold, as well as my mother's property, and other finance was arranged. He told me that the clause regarding title would be sufficient to allow me to avoid the contract if the finance sources were not available. On his advice and with his further assurance that he would verbally inform the Defendants of my position, I signed the agreement."

However, when Mr Flett brought the second offer to the Lorimers, the evidence shows that he did not tell them what Mr Keay had told him concerning the necessity for the sale of properties and the arranging of finance nor that he had told Mr

Keay that he would be able to avoid the contract by use of the condition as to title if Mr Keay did not obtain a contract for the sale of his property or his finance within the requisite period.

What the Lorimers say occurred was that:

> " ... Flett explained to us that the condition requiring Keay to sell his house before confirming the purchase of our home,... had been deleted, and that the proposed contract was only conditional on his solicitor searching and approving our house's title within 14 days of us accepting the offer. Flett also told us that it would be necessary tó drop the sale price by $10,000-00 (from $290,000-00 to $280,000-00) in return for the condition being removed.
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> " We specifically asked Flett about whether or not the removal of the condition would prevent the sale... Flett assured us that Keay was a wealthy man and that he was a senior partner in a national accounting firm. He said that there would be no problem with the sale of Keay's home at 10 Burma Road, and that its sale was virtually assured. He went onto say that even if Keay's house wasn't sold immediately, Keay would find it easy to secure bridging finance which would allow him to complete the sale. From this comment we assumed that Flett knew it was essential for Keay to sell his house in order to complete the sale.
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> " Relying on Flett's assurances that it was not necessary to include the condition and that Keay would be able to complete the sale we signed the proposed contract..."

It is common ground that Mr Keay's solicitor approved the title to the Trelissick Crescent property within the required period and that the contract for Mr and Mrs Lorimer to sell 29 Trelissick Crescent to Mr Keay for $280,000 became unconditional.

In fact, as it has turned out, Mr Keay has not settled the purchase of the Lorimers' property whether on the settlement date set out in the contract, 25 November, or at all. He said that he was unable to settle the purchase because his property at 10 Burma Road had not been sold and he was unsuccessful in obtaining bridging finance.

The contract was later cancelled. The Trelissick Crescent property was put back on the market for sale. It was sold by the Lorimers to other purchasers with settlement set down for March 1989 and at a price of $270,000 ie $10,000 less than the sale to Mr Keay. Mr and Mrs Lorimer have paid a commission on that sale to other real estate agents of $10,275 plus GST. It also appears that some indemnity has been given to Mr and Mrs Lorimer by Mr Keay in relation to the commission for which Dunbar Sloane Real Estate sues but the precise terms of that indemnity are not before the Court.

There being no dispute by the parties as to the calculation of claim for commission, the Court passes to a consideration of the claimed defences. It is convenient, first, to deal with the claimed defence relating to a lack of full disclosure. The obligations of a real estate agent in those circumstances are, in this Court's view, correctly summarised by the learned authors of Webb & Webb Luxford's Real Estate Agency 5th ed para 172 pp 111-112 in the following terms:

> " The relationship between principal and agent is one of trust and confidence, and the agent's duties and liabilities are increased accordingly. The principal employing an agent is entitled to require in the agent the possession of integrity, care, and skill. More than that, he is entitled to have these qualities unreservedly, and in his interests only, placed at his disposal... In a real-estate agency contract, however, the agent stands in a fiduciary relationship with his principal, to whom he must disclose all that he knows which may affect his principal's interests. If he knows something material which, if known to his principal, might cause his principal to refuse to deal, he must disclose it, notwithstanding the possible resultant loss of commission..."

That view of the law is also supported by Bowstead on Agency 15th ed Art 45 p 156ff and the decision of Reed J in McPhail v Brown [1925] GLR 390, 391-92. In McPhail v Brown agents endeavoured to obtain two commissions on a sale and purchase and failed to advise their principal of the position which they occupied. The learned Judge held (at 391) of real estate agents:

> " ... his implied bargain with the plaintiffs as his agents was that they should exercise disinterested skill, diligence and zeal in his interests. They occupied a fiduciary position towards him and owed to him the utmost good faith. Their duty clearly was to inform him of their special interest in the transaction and in failing to do so, they committed a breach of that duty, and are not entitled to any remuneration for their services."

And then, after some instructive comment about the actions of the real estate agents in that case, the learned Judge continued (at 392):

> " If an agent, employed by both parties, in respect of an exchange of landed property (the fact of the double agency being known to such parties) has no special knowledge relating to either property, and confines himself to simply introducing the parties, leaving them to make their own bargain, the transaction is a legitimate one and will stand both as regards to proceedings between the parties, and in respect of the land agent's right to commission. If, on the other hand the land agent is possessed of any special knowledge, regarding either of the properties, information in respect of which it is important that the non-owner should be possessed of in order to be in a position to exercise a reasoned judgment, and such information is not imparted, the land agent has failed in his duty, and it is no excuse that the information was acquired whilst acting as agent for the other party."

Applying those authorities to the facts of this matter, it is clear that when Mr Flett obtained Mr Keay's signature to the second offer, the one which matured into the contract, he did so, according to the evidence, on the basis of the underlying representation which Mr Keay describes in the passage from his affidavit earlier set out. The evidence then goes on to show that it is clear that Mr Flett did not convey to the Lorimers the substance of what he had told Mr Keay. The position, therefore, is that the vendors' agent was only able to obtain Mr Keay's signature to the second offer, Mr Keay being cautious about his ability to settle the purchase in the circumstances of the matter, on the basis that Mr Keay could escape from the contract by the use of the condition as to title if he were

unable to obtain a sale of his property and the necessary finance. Then Mr Flett, as the vendors' agent, did not advise them that that was the basis on which Mr Keay had signed the offer containing only the condition as to title. Mr Flett did tell them a number of other matters as related by the Lorimers in their affidavit and clearly referred to the possibility or even probability, of the sale of Mr Keay's Burma Road property. It seems that the representation concerning that sale may have been erroneous, but nothing hangs on it in the resolution of this claim. The Lorimers were anxious to obtain certainty because of their plans to shift to Brisbane. The second offer presented to them by their agent appeared to give them that certainty because it was subject only to the one condition and they must have known that it would be likely that that condition could be satisfied, and in any event only prolong any conditional nature of the contract for a fortnight. But they were not told that that condition had been represented to Mr Keay as being capable of use by him to escape from the contract for an entirely different reason.

The Court notes that there has been no affidavit filed in this matter by Mr Flett so that the statements by Mr Keay and the Lorimers stand uncontested. In this Court's view it could not be said that Mr and Mrs Lorimer have no arguable defence based on Mr Flett's failure to advise them of the underlying basis on which Mr Keay had signed the second offer.

Turning then to the second claimed defence, it is common ground that Mr Keay paid only $1,000 by way of deposit notwithstanding that the contract said:

> " 5. That the Purchaser pay a deposit of Eleven Thousand Dollars ($11,000) to Dunbar Sloane Real Estate Limited, immediately upon acceptance of this offer and on date of settlement the Purchaser pay the balance of the purchase price to the Vendor."

Mr Keay says that Mr Flett approached him some days after the acceptance of the second offer with regard to the deposit and he, Mr Keay, told Mr Flett he was expecting funds from overseas and also that "the sale of my property was essential to the entire transaction". There is no suggestion that any further approaches were made to Mr Keay for payment of the balance.

Of importance in this Court's view to the resolution of this aspect of the claim, is that the second offer reappointed Dunbar Sloane Real Estate as the Lorimers' agents in the following terms:

> " To DUNBAR SLOANE REAL ESTATE LIMITED: We accept the above offer and appoint you to act as our Agents to sell the above property on the above terms or on any other terms that may be approved by us and agree to pay your commission in accordance with the Real Estate Institute of New Zealand (Inc). $350. Basic fee plus 3.5% of the total selling price plus GST on the total fee."
>
> A D Lorimer R M Lorimer
> .....
> Vendor's Signature"

There have been a number of authorities bearing on the question as to whether a real estate agent is under a duty to obtain payment of a deposit in full. In the leading case on the topic, Latter v Parsons (1906) 26 NZLR 645 Sir Robert Stout CJ held (at 650):

> " ... In my opinion, however, the authorities show that if the commission agent undertakes to effect a sale for a commission he is entitled to his commission if he produces a purchaser who enters into a proper contract of sale with the vendor, the vendor approving of the purchaser proposed, and there being no concealment or misrepresentation made by the agent regarding the purchaser or regarding any material facts upon the purchase.

and Edwards J held (at 655):

" ... if an agent is employed simply to sell, without any special condition making the payment of his commission payable only upon actual completion of the purchase or upon the performance of some other specified condition, the agent is entitled to payment of his remuneration so soon as he has procured a person approved by the vendor to enter into a binding contract of purchase upon terms warranted by his authority, and that he is not concerned with what afterwards takes place between the parties. This proposition, of course, presupposes that the agent does not deceive his principal, and does not conceal from him anything which it is his duty to disclose..."

More directly in point, in Progressive Agency v Bennett [1928] 2 NZLR 100, 103 Skerrett CJ was dealing with a claim for commission in a contract which simply said "£200 cash 'deposit' and held:

" ... It is clear, therefore, that the agent's authority to sell could only be exercised if, at the time of exercising it, he obtained payment of the sum of £200 by way of deposit, or saw that that sum had been paid to the vendors...

" It was undoubtedly a material term of the agent's authority that the deposit should be paid..."

That decision was followed the following year in Herdman v C. Dickinson and Co., Ltd. [1929] NZLR 432, 436 by MacGregor J but both those cases were distinguished by Christie J in Dawson v Braund [1949] NZLR 29. That learned Judge held (at 32-33):

" The plaintiff did not, in fact, ask for or receive a deposit from O'Neill. If his failure to do so immediately upon completion of the contract for sale and purchase disentitles him, without regard to any other facts or circumstances, to claim commission on the sale arranged by him, the obligation to obtain a deposit must arise, not from express stipulation by the vendor, but by virtue of an implied term imported into the contract by the law. Such a term could, in the present case, be so imported only if the Court is satisfied that there exists an established practice making the payment of commission to an agent dependent in every case (unless a contrary intention is expressed in the contract) on payment of the purchase-money or of a sufficient deposit in respect of the purchase-money."

The authorities were reviewed by Wilson J in Columbus v Williamson & Co. Ltd [1969] NZLR 708, 710-711. The learned Judge held:

> " The first inquiry should therefore be directed to ascertaining from the language of the contract between the appellant and the respondent the conditions upon which the latter was entitled to payment of commission. The result of such inquiry is to satisfy me that commission was payable if the property were sold on the terms of the written offer by Martyn. These included a price of £6,500 cash and a deposit of £300 payable 'immediately on the acceptance of this offer'. Martyn's offer was unconditional and, accordingly, a valid and binding contract of sale was made by its unqualified acceptance. ' If the terms of the contract between the appellant and the respondent merely required the procuring of a binding contract of sale, then, subject to the effect of any breach of duty on its part, the respondent had earned its commission, regardless of what happened thereafter: see Latter v Parsons (1906) 26 N.Z.L.R. 645. In my opinion however Mr Mahon was right when he submitted that, properly construed, the contract between them required that the respondent should, immediately on communicating the appellant's acceptance of Martyn's offer, collect the £300 deposit from Martyn. I think that this conclusion follows from the fact that the deposit was, in terms of the offer, payable 'immediately on the acceptance of this offer'. The immediate collection of the deposit was therefore a contractual condition of the respondent's right to be remunerated and, as it was not fulfilled, no commission became payable by the appellant."
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> " In the instant case the respondent failed to collect the stipulated deposit at the time of the acceptance of the purchaser's offer and the terms of the agency contract required that this be done as one of the conditions required to be fulfilled in order to become entitled to the commission for which it has sued. As I have pointed out above, the result was that the commission never became payable."

In McLennan v Wolfsohn [1973] 2 NZLR 452, 458-459 Cooke J (as he then was) held that if the contract acknowledged receipt of a deposit then it was the agent's duty to obtain or arrange payment; and that an agent may have such a duty was referred to by the Court of Appeal in Hooker v Stewart [1989] 3 NZLR 543, 545.

In this case, the terms of the reappointment of Dunbar Sloane Real Estate as the Lorimers' agents in the second offer were "to sell the above property on the above terms" and those terms were expressed by cl 5 to include an obligation on Mr Keay's part to pay the deposit of $11,000 "to Dunbar Sloane Real Estate Limited immediately upon acceptance of this offer".

Those provisions, seen in the light of the authorities referred to, in this Court's view arguably imposed an obligation on Dunbar Sloane Real Estate to obtain payment of the deposit in full and to have it paid to them immediately on acceptance of the offer. It is clear that the full deposit was never paid. The payment of the $1,000 which was paid was not obtained immediately upon acceptance. The evidence suggest that little effort was made by Mr Flett thereafter to obtain payment of the balance. In this Court's view, therefore, Dunbar Sloane Real Estate was arguably under a duty to collect the full deposit and breached that duty.

In all those circumstances, the Court is driven to the conclusion that the plaintiff has failed to satisfy the onus cast on it by R 136 and the cases decided under that rule of demonstrating to this Court's satisfaction that the defendants have no defence to the claim for summary judgment. Both the claimed defences are arguably available to Mr and Mrs Lorimer. The application for summary judgment is accordingly dismissed.

In the circumstances, this Court is of the view that it is appropriate to follow the usual rule of practice and reserve the question of costs noting that the hearing of the application and the delivery of judgment have occupied 2hrs.

The proceeding is directed to be set down in the Master's Chambers list on 25 February 1991 for the making of such timetable or other orders as may be appropriate including the possibility of the transfer of the proceedings to the District Court for determination.

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Master J H Williams QC

Solicitors: Murray V. Smith, Petone for plaintiff
Treadwell Stacey Smith, Wellington for defendants