

IN THE HIGH COURT OF NEW ZEALAND  
NAPIER REGISTRY

AP.42/95

**LOW  
PRIORITY**

BETWEEN      HARCOURTS COX COXON

Appellant

A N D      BERNARD IAN LUNAM and  
TWINETTE TANIA LUNAM

Respondents

Hearing:              28 August 1996

Counsel:              D.E. Hardy and C.J. Tong for Appellant  
R.D. Stone for Respondent

Judgment:      **23 SEP 1996**

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JUDGMENT OF GALLEN J.

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This is an appeal against a decision in the District Court where District Court Judge Thompson concluded a claim for commission must fail. There is little dispute over the factual background.

On 8 October 1993, the respondents entered into an agency contract with the plaintiff for the sale of a residential property owned by them in Hastings. The contract was in standard form, giving a sole and exclusive agency until 22 November 1993 and thereafter a general agency, which in terms was to continue until revoked in writing. The agreement provided that the appellant was entitled to commission at an agreed rate if the property was sold:-

- "(i) by the Agent; or
- (ii) through the Agents instrumentality; or
- (iii) to anyone introduced through the agency....."

At a later date in October 1993, the appellant introduced a Mr and Mrs Hannah to the property. An offer was made by Mr and Mrs Hannah to purchase it at a price of \$91,500, but this was a conditional offer, being subject to Mr and Mrs Hannah selling their own property and arranging suitable finance by 29 October. The offer was accepted by the respondents, but it was not possible for the Hannahs to meet the conditions by 29 October, as their own property had not sold by that date. They sought an extension of time, but the respondents declined to grant any extension of time.

The original reason why the respondents had decided to sell the house was because they had had matrimonial difficulties. When the Hannahs were unable to meet the deadline of the accepted offer, the respondent Mrs Lunam decided that she would purchase her husband's interest in the property and retain it as a home for herself and the child of the marriage. She took legal advice with regard to this proposal, from the respondent's solicitor a Mr Grayson.

On 10 November 1993, Mr Grayson telephoned a Mr Wilson who is employed by the appellant. The Judge accepted that Mr Grayson had advised Mr Wilson of Mrs Lunam's proposal to buy out her husband and that Mr Grayson also told Mr Wilson, Mrs Lunam wished to de-list the property, that is, to take it off the market. In pursuance of the instructions to sell, the appellant had arranged for an open home for the following day and there was some discussion as to how that might be cancelled. Shortly thereafter the appellant returned the keys to the property to the respondents.

The Judge accepted that it had been acknowledged by Mr Wilson during the hearing, that Mr Wilson understood from the conversation with Mr Grayson, that the marketing arrangements were off and that the agency was cancelled. Subsequently however, the Judge noted that Mr Wilson's view appeared to be that although the marketing of the property had come to an end or been suspended, the agency agreement continued to subsist and this is a point of some importance for the purposes of the appeal.

By February 1994, the respondents had become reconciled. Mr Lunam and the son of the marriage had moved to Kawerau. Mrs Lunam had remained in Hastings as it had been decided again, to dispose of the property. In evidence Mrs Lunam indicated that she was disillusioned with real estate agents and made a decision to attempt to sell the property herself. She placed an advertisement in a local newspaper. The wording of the advertisement was: -

"PRIVATE sale, Akina, 3 bed-room older style home, good garaging, fully fenced, nice area. Phone 876 4819."

It is to be noted that the advertisement did not identify the exact address of the house. The advertisement was seen by Mr and Mrs Hannah, who by that time had sold their own property and were still looking for a property in the general area of that where the property of the respondents was situated. They telephoned the number shown in the advertisement and discussed the advertisement with Mrs Lunam. The Judge accepted that there was some preliminary conversation, after which Mrs Lunam and Mr Hannah both realised that they were the same people who had been involved in the conditional contract to sell the property in the preceding October. The Hannahs then made what the Judge described as "further inspections of the property" and eventually signed a contract to buy it at a price of \$88,000. Mr Hannah was asked

in evidence about the price and stated that it was lower than the original contract because they themselves had received less for their property than they had expected to receive and had a reduced fund available for purchase.

Mr Grayson who was instructed for the respondents, was concerned at that point that a commission might be claimed by the appellant and at his request, Mrs Lunam obtained from the appellant a copy of the original agency agreement of 8 October. The Judge accepted that Mr Wilson recalled Mrs Lunam obtaining that and that he acknowledged that she did not then ask the appellant to market the property, but he had asked Mrs Lunam to get in touch with him if she wished the appellant to do so. Mr Grayson then spoke to a principal of the appellant and was informed that if the Hannahs were again the purchasers, the appellant regarded the firm as still entitled to a commission. There was some discussion about a possible compromise, but this came to nothing.

Eventually the sale to the Hannahs was settled and the appellant claimed commission on it. The respondents refused to pay commission and the appellant instituted proceedings in the District Court to recover the sum of \$4,200 by way of commission. In the District Court, there seems to have been an emphasis on a contention that the original agency agreement having not been revoked in writing, it remained in force and that the sale having been effected through the instrumentality of the appellant, or at least to a person introduced by the appellant, it was entitled to its commission. The respondent contended that the chain of causality or instrumentality had been broken, that the agency agreement had been terminated and that the appellant was not entitled to claim.

The argument before me proceeded on a slightly different basis. It was the contention for the appellant that whether or not the agreement had been terminated by the oral conversation, was irrelevant. Mr Hardy submitted that all rights which had arisen before the purported termination, remained extant and those rights included the right to commission if any of the limbs of the commission clause applied. He contended that in this case, the property had been sold to the Hannahs, persons introduced through the agency or alternatively, the property had been sold through the instrumentality of the agents. He drew attention to the fact that the commission clause was expressed in independent form so that all that was necessary was for the appellant to establish any one of the bases of claim.

As I understand Mr Hardy's argument, he accepted that it was necessary for the appellant to establish that the sale resulted from the original introduction or alternatively, that the sale was occasioned by the instrumentality of the appellant during the time that it was actively acting as agent. Mr Hardy put a considerable emphasis on the short lapse of time between the original agreement which did not proceed and the final agreement negotiated directly between the respondents and the Hannahs. This was a period of 4 months only and Mr Hardy's point is that the shortness of time is a significant factor in determining whether or not the effects of the original introduction and negotiation, subsist.

Mr Hardy relied on the decision of Bisson J. in *Howells v. Waikare Lakelands Limited* (1982) 1 NZCPR 513, which emphasised that where commission is dependent upon introduction, introduction was sufficient, but it is also clear from that case and in particular the comments which appear at p.517, that the introduction as such is not enough. It must be an introduction which proceeds without a break in the chain of causation to the eventual sale. In that case although the subsequent negotiations were conducted by the parties and there was a

lengthy delay, the Judge in the District Court had found that the introduction was the effective cause of the sale and this was accepted on the appeal.

In Merton Real Estate v. Cooper and Cooper (unreported, Auckland Registry M.547/92, judgment of Williams J. delivered 22 April 1993), difficulties had arisen over a sale where a number of partners were involved. In the end the Judge took the view that in the circumstances the conclusion was irresistible that the sale eventuated from the original introduction by the agent and accordingly the claim to commission was justified.

In Lewis v. Wong (1982) 1 NZCPR 533, Bisson J. drew the distinction between a *causa sine qua non* and a *causa causans*, holding that if the agent could establish that his actions were a *causa causans*, he was entitled to recover. In the particular case there had been a distinct break in the chain of causation and a subsequent sale made between the same parties 15 months later was held to be independent so that the original introduction of the parties was an incidental, not an instrumental, element.

In Wrightson NMA Limited v. Cooper 1995 DCR 789 where there had been a gap of 18 months between the first introduction and the sale, it was held that there needed to be a nexus between the introduction and the sale ultimately concluded and reference was made to the agent being the efficient cause of the sale. In the particular case, the transaction was said to have been revived after a considerable period, but no commission was payable.

Mr Hardy however placed most reliance on the decision of Tipping J. in Harcourts Group Limited v. McKenzie (unreported, Christchurch Registry AP.129/93, judgment delivered 9 September

1993). In that case, the respondents were the owners of a property and had appointed Harcourts as their agent to sell it. The agent arranged to show prospective purchasers around the property, but they considered the price to be too high for them. Some 6 weeks later as a result entirely of a coincidence arising out of a different transaction altogether, the parties met again. They then struck a deal without any involvement on the part of the agent. It was accepted that the property had not been sold by the agent or through its instrumentality, so that the question remained as to whether it had been sold to someone introduced through the agency. Tipping J. accepted that it was necessary for the agent to show that the introduction was causative of the sale and he was not prepared to accept a submission that there was no need for a causative link under the agency. The Judge expressed the view that the obligation to pay commission ceases only when the agent's introduction ceases to have a material bearing on the sale. He noted that without the introduction which had taken place in that case, neither of the parties would have been aware on the one hand that the property was for sale and on the other, that there was an interest in purchase and he considered that on the facts the earlier introduction remained an effective cause of the sale. He expressed the view that on the facts it was highly improbable that without the introduction, the sale would have proceeded.

In his decision in this case, the District Court Judge considered that there were a number of factors which indicated that there was no nexus between the original introduction and the sale. He referred to the complete withdrawal of the property from the market, the termination of the agency and the purely coincidental reunion of vendor and purchaser. In the light of the McKenzie case (supra) which does not seem to have been cited before the Judge, the question arises as to whether or not there was a sufficient residue remaining from the original introduction, negotiations and contract, to lead to the conclusion that that was related to the ultimate sale.

Mr Hardy maintains that it must have been. He pointed out that the interest of the purchasers had progressed beyond inspection to the completion of a conditional contract. He said therefore that their interest in the property, their acceptance, the fact that it was suitable for their purpose and their actual decision to buy, would all have carried over to the second lot of negotiations and played a part in the final transaction. He again emphasised the shortness of the lapse of time between the two contracts, submitting that there would have been no time for the initial impressions and decision to have faded from the consciousness of the purchasers. His position is that the decision earlier made and aborted, was revived by the new and unexpected opportunity. The concept of revival suggests that there was still something to revive.

There is some evidence which bears on the question. Mrs Lunam said that she realised who the Hannahs were when they telephoned. She denied that there was any question of simply taking the commission off the earlier price on the price negotiation and emphasised that she really just wanted to resolve the situation and go to join her family. Mr Hannah said that he and his wife were not aware that the house in the advertisement was the one that they had earlier contracted to buy. He said that the area they particularly wanted was Akina and that they had concentrated their search there. He said that the property had been re-inspected. He said (at p.29):-

"As to if it was suggested to me that I wouldn't have brought the property unless I had earlier seen it when I was with Harcourts - that is rubbish, I would have brought it on that visit the second time because it was what I was looking for. As to in my mind, to what extent if any is there a connection between my earlier having seen the property in 1993 and my decision to go ahead and buy the property in February of 1994 - there is no connection because we had lost houses before dealing through real estate agents through one way or another and when we lost this house, it (w)as none of my business



why it was taken off the market or anything at the time, that we thought it is nothing new, it had happened before and so we kept on looking."

He also denied that there had been any question of the commission reducing the price. He confirmed that there had been no changes to the house in the intervening period. Although as recorded it is a little difficult to follow, the evidence suggests that under cross-examination he confirmed that the inspection of and decisions concerning the property when introduced to it by the appellant, would not have had any bearing on buying it at the time that it was ultimately bought. He said had February (the second occasion) been the first time he had seen the house, he would have bought it anyway.

All of the authorities in one way or another, express the test as involving some degree of causation between the original introduction and the ultimate purchase. In the McKenzie case (supra), the original introduction clearly had at least a residual effect. The Judge accepted that if it had not been for the knowledge the parties had of the previous sale and interest in purchase, the coincidental meeting would not have resulted in the purchase which ultimately took place. The Judge considered that without the mutual knowledge that the property was for sale and the interest of the purchasers, the coincidental meeting could not have led even to negotiation.

Here, the property had been taken off the market, the agency terminated or at least an attempt made to terminate it and both parties had totally changed their plans. The re-negotiation commenced because the respondents advertised the property privately. It was as a result of that advertisement that the Hannahs returned. They did not return because of the original introduction. In the McKenzie case (supra), the Judge saw the ultimate transaction as having developed from the initial introduction. That is not the situation here. There is no suggestion

in the McKenzie case, that the property had been taken off the market. Mr Hardy puts an emphasis on the shortness of time between the two transactions, but that of itself cannot be decisive. It is an indicator and may well have a bearing on whether or not the transactions are related. The shorter the time, the more likely that they are, but it is controverted in this case by the clear evidence that not only had the earlier transaction come to an end, but the respondents had determined not to proceed at all with a sale. The question may be asked whether there was one transaction or two? Was the contract which ultimately resulted, a somewhat unexpected culmination of an existing process or was it a completely separate transaction, in no way contributed to by the appellant? No doubt Mr Hardy is right when he says that the approach which the purchasers, the Hannahs, had originally adopted was such that they had already obtained the basic information which led to their decision to purchase, but that is not enough unless it provides a nexus in itself. If the Hannahs had gone round to the respondents and asked them to re-consider, then that would have been a matter of great significance, but in this case they went to an unidentified house because it was in the area in which they were looking and re-commenced negotiations from there.

If this had been merely a device adopted by the parties to avoid the payment of commission, then the appellant would have been entitled to succeed, not because a device was adopted, but simply because the cause or nexus remained in place. Here, the cause of purchase was said to be a desire to live in the particular area which led to the following up of an advertisement which had no connection with the appellant or the earlier arrangement. There is nothing in the decision to suggest that the Judge had any doubts at all about the *bona fides* of the respondents and the Hannahs, or the evidence which they gave.

Causation is always a difficult concept however it is expressed, but when the matter is looked at in the round, I think that if the question was asked - Did you buy that house because you were introduced to it by Harcourts? - the answer would undoubtedly have been, "No, we bought it because we were led to it by the subsequent and completely unrelated advertisement." That answer must of course be tested objectively and it was the view of the District Court Judge after hearing the witnesses and the evidence adduced, that that properly recognised the nature of the ultimate transaction. That amounts to a determination of fact.

In my view therefore, the appeal cannot succeed and it will be dismissed. The respondents are entitled to costs, which I fix at 1,500 dollars.

RJ Jolla J

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