

Property Update

July 2009

Selling agents beware: is the buyer you find a client of yours?

Introduction

This issue was highlighted in a recent case in New Zealand, *Mark Moncrieff Stevens and Others v Premium Real Estate Ltd SC 23/2008 [2009] NZSC 15*. In that case, a real estate agent was found to be in breach of its fiduciary duty of loyalty due to its failure to disclose to its principal, the seller, its relationship with the buyer. Although the case is from the New Zealand Supreme Court, the equitable principles of fiduciary duty equally apply and section 9 of the *Fair Trading Act 1986* (New Zealand) is the equivalent to section 52 of our *Trade Practices Act 1974* (Cth).

Facts

In February 2004, Mr and Mrs Stevens appointed Ms Riley of Premium Real Estate Pty Ltd (**Premium**) to sell their cliff-top property at 23D Beach Road, Castor Bay, Auckland, New Zealand.

Due to the recent sale of a similar neighbourhood property, the Stevens believed their property was worth \$3 million. Premium was of the opinion that the property was worth less than this.

In April 2004, after only receiving one offer of \$2.2 million, the Stevens decided to put the property out to tender with a closing date of 12 May 2004.

On 21 April 2004, Ms Riley showed a Mr Larsen through the property for a second time. Mr Larsen had previously viewed the property in February, but did not make an offer. Two days later, Ms Riley presented an



offer from the Mahoenui Valley Trust (a trust controlled by Mr Larsen) to the Stevens to purchase the property for \$2.525 million.

The Stevens responded with a counter offer of \$2.8 million. Ms Riley told the Stevens that \$2.575 million was the most Mr Larsen would pay.

During the negotiations Mrs Stevens asked Ms Riley what she knew about Mr Larsen. Ms Riley replied that, despite Mr Larsen's appearance, he had the means to buy. Ms Riley also told Ms Stevens that Mr Larsen and his partner lived in Karaka in South Auckland and that:

'he was finding the travelling too much,

so he was looking for a place closer to his office in Takapuna'.

Ms Riley did not disclose that she knew Mr Larsen had a history of trading in properties, and more specifically, that Mr Larsen often purchased properties on the pretence that they would be for his family home and then resell shortly afterwards, often at a substantial profit. Premium had also previously been involved in a number of these deals, both on the sale and resale. In addition, Ms Riley's daughter worked for Mr Larsen as his personal assistant.

On 26 April 2004, the Stevens agreed to sell the property to the Mahoenui Valley

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Trust for \$2.575 million. At the time of entering into the contract and at settlement (16 July 2004), the Stevens were of the understanding that the property was to become Mr Larsen's home.

Within 3 days of entering into the agreement, Mr Larsen commissioned a valuation of the property. The valuation report valued the property at \$3.57 million. Prior to settlement Mr Larsen re-listed the property through Premium, instructing them that the asking price should be \$3.8 to \$4.8 million.

After settlement, Mr Larsen carried out some works on the property and in November 2004, the property was resold for \$3.55 million. Premium shared in the commission on the re-sale, as another agency was also involved.

The Stevens then commenced proceedings against Premium in the High Court (the equivalent of our Supreme Court) for breach of fiduciary obligations owed by Premium to Mr and Mrs Stevens and for misleading and deceptive conduct under section 9 of the *Fair Trading Act 1986* (New Zealand). The High Court found in favour of Mr and Mrs Stevens and awarded them \$742,050 in damages, being the difference in the sale price and the estimated market value of the property (\$3.25 million) at the date of sale (determined by a valuer at the trial) and the repayment of Premium's commission on the sale.

Premium then appealed to the Court of Appeal. The Court of Appeal, like the High Court, found in favour of Mr and Mrs Stevens. However, the Court of Appeal reduced the amount of damages awarded to the Stevens to \$225,000. The Court of Appeal's valuation of the Stevens' loss was based on the difference between the sale price and the price at which the Stevens'

had indicated they were prepared to sell their property (\$2.8 million). The Court of Appeal also excluded the repayment of Premium's commission on the basis that if the property was sold for \$2.8 million the Stevens would have paid the commission.

Premium appealed to the New Zealand Supreme Court (the equivalent of our High Court) against the finding of liability. Mr and Mrs Stevens separately appealed the Court of Appeal's reduction in the quantum of damages.

Issues

The issues before the Supreme Court were:

- whether Ms Riley (and Premium) had breached her fiduciary duty of loyalty when she failed to inform the Stevens that Mr Larsen was a person who frequently bought residential properties and then resold them shortly afterwards at a profit;
- whether Ms Riley's (and Premium) conduct was misleading and deceptive under section 9 of the *Fair Trading Act 1986* (New Zealand); and
- the quantum damages that should be awarded to Mr and Mrs Stevens.

Judgment

The Supreme Court unanimously dismissed Premium's appeal and found that Ms Riley had deliberately misled the Stevens in regards to Mr Larsen's purpose of acquiring the property.

In doing so, the Supreme Court affirmed the previous judgements of the High Court and the Court of Appeal, that Ms Riley's failure to inform the Stevens that Mr Larsen was a person who frequently bought residential properties and shortly afterwards resold them at a profit, was a breach of her

fiduciary duty of loyalty to the Stevens.

The Supreme Court held that if Ms Riley had correctly informed the Stevens, this would have affected the Stevens' attitude to Mr Larsen's offer and their response to it.

The Supreme Court, by majority, in principle affirmed the High Court's calculation of the loss suffered by the Stevens. The Supreme Court awarded the Stevens \$726,863 in damages, being the difference in the sale price and the estimated market value of the property both net of commission.

The lesson from the case

When a real estate agent is engaged by a party, the real estate agent enters into a fiduciary relationship with that party (the principal).

As part of the fiduciary relationship, the real estate agent must act in good faith and in the best interests of its principal.

In this case, the fiduciary relationship between Ms Riley and the Stevens obliged Ms Riley to disclose information about her previous and potential dealings with Mr Larsen.

That information, in the courts' opinion, was relevant to the Stevens achieving their objectives with respect to the selling of their property. By withholding and concealing that information, Ms Riley created a misrepresentation to the Stevens which was a breach of her duty of loyalty.

Although this case did not specifically discuss this issue, there is sufficient case law which has determined that silence, in some circumstances, can amount to misleading or deceptive conduct. This issue was referred to in our June 2009 Property Update.

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