

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CIV 2015-004-001201  
[2016] NZDC 14691**

BETWEEN	GRAEME LEGG Plaintiff
AND	AFFILIATED BUSINESS CONSULTANTS LIMITED First Defendant
AND	SUSH GLOBAL SOLUTIONS LIMITED Second Defendants
AND	SULABH SHARMA AND SHEENU CHAWLA Third Defendants

Hearing: 27 July 2016

Appearances: Mr Legg in Person  
Ms Noh for First Defendant (in an observing capacity only)  
Mr P Sills for Second and Third Defendants

Judgment: 9 August 2016

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**DECISION OF JUDGE G M HARRISON**

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## **The issue**

[1] This is an application by the second and third defendants for summary judgment against the plaintiff on the grounds that the plaintiff has no prospect of success against them.

[2] The first defendant has not sought summary judgment against the plaintiff despite allegations in the amended statement of claim (paragraphs 91-98) to the effect that it was obliged to pay Mr Legg a commission for the sale of the second defendant Sush Global Solutions Limited, (Sush) to Finzsoft Solutions Limited (Finzsoft). Ms Noh on behalf of the first defendant attended the hearing in an observational capacity only.

## **Background**

[3] Affiliated Business Consultants Limited (ABC) is a licensed real estate agent. It was retained by the third defendants as directors and owners of Sush to sell that company.

[4] They executed three sole agency appointment agreements in favour of ABC from 9 May 2013, the last agreement providing that the agency would conclude on 11 August 2014.

[5] By an agreement dated 31 October 2012 ABC, and Mr Legg entered into a commission-sharing agreement.

[6] The agreement refers to ABC as “the agent” and Mr Legg as “the licensee”. Clause 2.1 provides, in part:

The agent hereby engages the licensee and the licensee hereby agrees to act in the capacity of real estate licensee and further is hereby contracted as an independent contractor pursuant to s 51 of the Real Estate Agents Act 2008. You agree to register forthwith as an independent contractor pursuant to s 51(2) of the Goods and Services Tax Act 1985, you further acknowledge that at all times prior to your engagement under this contract (if applicable) you have been engaged as an independent contractor from any prior commencement date of engagement as a licensee by the agent. ...

[7] The clause went on to provide that the agent would not be liable to pay Mr Legg any redundancy, or compensation for inability to work owing to ill health or for holidays, and recorded that he was solely responsible for payment of Accident Compensation Corporation levies and all other taxes.

[8] Section 51 of the Real Estate Agents Act 2008 provides:

- (1) A salesperson may be employed by an agent as an employee or may be engaged by an agent as an independent contractor.
- (2) Any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor.
- (3) An agent who engages a salesperson as an independent contractor is liable for the acts and omissions of the salesperson in the same manner, and to the same extent, as if the agent had employed the salesperson as an employee.

[9] It is appropriate at this point to refer to other relevant parts of the Real Estate Agents Act. Section 126(1) provides:

- (1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—
  - (a) the work is performed under a written agency agreement signed by or on behalf of—
    - (i) the client; and
    - (ii) the agent; and
  - (b) the agency agreement complies with any applicable requirements of any regulations made under section 156; and
  - (c) ...

[10] Real estate agency work is defined in s 4 of the Act as:

any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and

[11] “Transaction” is in turn defined as:

- (e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).

[12] These parts of the Act mean that an agent is only entitled to commission if he holds a written agency agreement and must undertake real estate agency work for the purpose of bringing about a transaction.

[13] The three written agency agreements are in the same terms. They are signed by the second defendant and they appoint ABC as the agent to sell the business of Sush, for which ABC would receive a commission of 8 percent of the total purchase price with a minimum fee of \$15,750 plus GST. In all three agency agreements Mr Legg has acted on behalf of ABC, and is described as a salesperson.

### **The sale**

[14] It is clear that Mr Legg worked very hard to try and sell the business of Sush. However, on 31 July 2014 Sush, and Mr Legg, described as “broker,” executed a document of cancellation, which is again an ABC document, whereby cancellation of the agency was accepted. It noted specifically that if any sale was made to any one introduced by ABC, commission might be payable. The agreement went on to list the individuals, and businesses introduced by Mr Legg to the possible purchase of the Sush business.

[15] What is relevant from the point of view of the second and third defendants is that Finzsoft is not specified as being introduced as a possible purchaser by ABC or Mr Legg.

[16] Indeed, Mr Sharma, in his affidavit of 2<sup>nd</sup> March 2016, has attached an invoice from Finzsoft to Sush dated October 2012 indicating a commercial arrangement between the two parties well before the first sole agency agreement was entered into on 9 May 2013.

[17] Having cancelled the agency agreement on 31 July 2014, on 13 August 2014 the sale of Sush to Finzsoft was announced with the sale being completed later that month.

## **The claim**

[18] ABC took steps to recover a commission, but its right to that was refuted by the solicitors for Finzsoft, and by then, its subsidiary, Sush. In May 2015 ABC advised Mr Legg that, despite its efforts to recover commission, its legal advice was that there was “little to no chance of success” if court action was taken. Mr Legg then commenced this action in September 2015.

## **Assessment**

[19] “Where the defendant applies for summary judgment, the position is rather different from an application by the plaintiff. A defendant’s application is similar to a striking out application in that the defendant has to show that the plaintiff cannot succeed. The difference between an application for summary judgment and an application to strike out is that the summary judgment application requires affidavit evidence to be provided. It will therefore be possible to obtain judgment on the basis of material other than that contained in the pleadings. As in the case of an application by the plaintiff, if there are material disputes of fact which cannot be resolved on affidavit, summary judgment will have to be refused.” (McGechan on Procedure, Vol 1, HR 12.2.07.)

[20] The above statement encapsulates the various case authorities on applications by defendants for summary judgment against plaintiffs.

[21] Unfortunately for Mr Legg, particularly because of his efforts to sell the business, none of his causes of action can succeed, because he does not hold a written agency agreement signed by or on behalf of Sush.

[22] As I have detailed in [4], the written agency agreements are with ABC. Mr Legg executed that agreement on behalf of ABC as its salesperson, but to describe him as a salesperson does not assist his position because that does not mean he is an employee of ABC but simply that he is “a person who holds, or is deemed to hold, a current licence as a salesperson under this Act”, to quote the definition in s 4.

[23] The commission-sharing agreement of 31 October 2012 between ABC and Mr Legg confirms that he is an independent contractor and so can bind ABC as its agent, but not claim to be an officer or employee of ABC. Even if that were the case only ABC could endeavour to recover commission, and at this point it has made overtures in that regard, but has not commenced Court action.

[24] That being so, Mr Legg cannot succeed against the second and third defendants. Section 126(1) is clear where it provides:

An agent is not entitled to any commission ... unless the work is performed under a written agency agreement ...

[25] It is not as if Mr Legg was instrumental in bringing about a sale of the business but did not have a written agency agreement to do so. The agency agreement is with ABC and was in any event cancelled before the business was sold to Finzsoft.

[26] Against that background I turn to consider the various causes of action raised by Mr Legg in his amended statement of claim of 11 February 2016.

**First cause of action: sole agency commission**

[27] There is no doubt that there was a written sole agency agreement, but there can be no doubt that the agreement was with ABC and that as an independent contractor Mr Legg has no basis at law to rely on it. That cause of action cannot succeed.

**Second cause of action: effective cause of sale**

[28] I accept that if a properly appointed agent introduces a purchaser during the period of the agency, even if a sale to that purchaser occurs after the fixed term of the agency, commission would ordinarily be payable.

[29] In this case the document of 31 July 2014 cancelling the agency does not nominate Finzsoft or any of its personnel as having been introduced to Sush as a potential purchaser.

[30] Mr Legg raised the possibility that a Mr Shennan of Geni joined Finzsoft at about the time of the purchase. Geni is one of the businesses recorded in the cancellation document as having been introduced as a potential purchaser. Were it not for the fundamental inability of Mr Legg to claim commission, summary judgment against him may not have been appropriate on the basis that there could be a dispute of fact on this issue requiring determination at a substantive hearing. But, even if an introduction of the ultimate purchaser had been made by Mr Legg, he could not succeed in the absence of an agency agreement. He cannot succeed on that cause of action.

### **Third cause of action: third defendants' personal guarantees**

[31] Any personal guarantees given by the third defendants to pay commission were given to ABC and not to Mr Legg. That cause of action cannot succeed.

### **Fourth cause of action: Plaintiff's Privity of contract**

[32] Section 4 of the Contracts (Privity) Act 1982 provides:

Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:

provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

[33] The three agency agreements, which are all in the same terms, in the section headed "Commission Schedule and Recovery Rights" make provision for payment of commission to ABC only. Mr Legg is not referred to. It is not possible to read the agency agreements as intending to confer a benefit on Mr Legg. The commission agreement of 31 October 2012 is clear confirmation to the contrary in that any commission recovered by ABC is to be shared according to the method of calculation set out in that agreement.

[34] That cause of action must also fail.

### **Fifth cause of action: unjust enrichment**

[35] The essential pleading on this cause of action appears at cl 88 of the amended statement of claim. It reads:

The plaintiff provided the second defendant with something of value. He added value to the company and did all of the sole agency work on the express understanding that he would receive remuneration for his efforts and as such payment is due based on the principle of quantum meruit.

[36] There is real doubt that the principle of unjust enrichment has the status of a cause of action in New Zealand. *Real Cool Holdings Limited v Northpower Limited* [2012] NZHC 1604 at [37]-[38].

[37] In any event even if a cause of action was available, it is confounded by the agency agreements in favour of ABC, any benefit from a sale in favour of Mr Legg coming from the commission agreement with ABC.

[38] As far as quantum meruit is concerned, a restitutionary claim to recover remuneration for services performed arises in two instances:

- (a) Where services have been provided under a contract which is subsequently found to be void or unenforceable for reasons;
- (b) Where services are provided in anticipation of a contract being concluded, which ultimately is not concluded. *Villages of New Zealand (Pakuranga) Limited v Ministry of Health* [2006] 8 NZBLC 101/739 at [72].

[39] The present case does not fall into either category. Here, the contracting party was ABC and not Mr Legg. This cause of action cannot succeed.

### **Conclusion**

[40] Because the claim is fundamentally flawed by the absence of any commission agency agreement between Mr Legg and the second and third defendants, none of the causes of action against them as pleaded in the amended statement of claim can



succeed. For that reason also, no amendment to the pleadings can rescue the position for Mr Legg.

[41] Summary judgment is therefore granted in favour of the second and third defendants, and the claims against them are dismissed. They are entitled to costs on a 2B basis and disbursements to be approved by the registrar.

[42] The claim against the first defendant is adjourned to the next available case management conference to determine what, if any, further directions are required.

G M Harrison  
District Court Judge