

**BETWEEN**

**ACS**

**APPLICANT**

**AND**

**ZXJ**

**RESPONDENT**

Date of Order:

12 July 2011

Referee:

Referee Perfect

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the claim is dismissed.**

## **Facts**

[1] The Respondent engaged the Applicant as the real estate agent for his property [in Auckland] and signed a sole agency agreement. The sole agency period ran from 12 November 2009 to 15 January 2010. The property did not sell during this time, there having been no offers presented, and the Respondent took it off the market.

[2] On 4 February 2010, the Respondent reached an agreement for sale and purchase of his property with the GDs. They were a couple that had moved into a neighbouring property [on the same road] on 30 November 2009, as tenants.

[3] The sole agency agreement states: “If during the period of your sole agency (or subsequently in the case of a purchaser introduced in the period of this sole agency) a sale is effected by me (the owner), by you (YU Real Estate Ltd) or by another agent, I will pay you commission calculated as below...”.

[4] The Applicant claims that the GDs were introduced to the Respondent’s property during the sole agency period by its advertising signage on the Respondent’s property and that the Respondent is therefore liable to pay commission, reduced to \$15,000.00 for the purposes of falling within the jurisdiction of the Disputes Tribunal. The Respondent disputes that YU Real Estate Ltd’s sign constitutes an effective introduction. There is no disagreement about the fact that there was never any contact between the Applicant’s agent and the GDs.

## **Issues**

[5] The issues to be decided are:

- (i) Whether or not the GDs were ‘introduced’ to the Respondent’s property by YU Real Estate Ltd’s advertising sign; and
- (ii) Whether or not commission is payable by the Respondent.

## Law

[6] The relevant law is the general law of contract and the case law referred to by the parties.

## Decision

[7] I find that there was an ‘introduction’ of the GDs to the Respondent’s property by YU Real Estate Ltd’s advertising sign on the property. They are likely to have seen the sign when moving into the neighbouring property and before much, if any, contact was made with the Respondent. That is, the GDs would have been aware that the Respondent’s property was for sale.

[8] I have considered the three cases put forward by the Respondent in this matter, and I rely in particular on the judgment of Harrison J in *Brandon v Baywide Realty Ltd* [2006] BCL 304, where he said:

There is no doubt that an introduction alone will not be sufficient to justify an agent’s claim for commission. It must establish that its work was an effective, not the exclusive, cause of sale (*The Real Estate Centre Ltd v Chamberlain* (supra) at p12). The Court considers the connection between the introduction and the eventual sale and whether there has been a break in the chain of causation sufficient to destroy it. The authorities establish that the agent does not have to satisfy a high threshold to succeed (*Harcourts Group Ltd v McKenzie* (supra)). The fact that the terms of the two contracts, for example, may be materially different is not determinative. The inquiry is whether “what the agent has achieved was relevant in effect and in time to the eventual purchase” (*Lewis v Wong* (supra) at 535-536). Or, put another way, can it be said that the agent’s introduction was no longer instrumental or effective in bringing about the sale (*Harcourts Group Ltd v McKenzie* (supra) at 6-8).

[9] The Applicant argued that the case law presented was irrelevant, saying that the cases are distinguishable on the facts because all of them involved personal introduction by an agent, whereas this case involves introduction by advertising signage. It is accepted that the facts are different but I do not accept the Applicant’s contention that they are therefore distinguishable. The general principles from the *Brandon* judgment above are relevant and I have applied them to the facts in this case: that is, was the sign an effective cause of the sale and was there a connection between the GDs seeing the sign initially and the eventual sale? Was the sign instrumental in bringing about the sale?

[10] I find that commission is not payable as the introduction by the advertising sign was not an effective cause of the eventual sale (that is, the Applicant (via its sign) did not 'effect' the sale as per the wording of the agency agreement), for the following reasons.

[11] Firstly, in this case the neighbours' knowledge that the Respondent's property was for sale through seeing the sign was unavoidable because they moved into the property next door during the period that the Applicant's sign was erected at the front of the Respondent's property. However, this knowledge was incidental during the sole agency period because on the available evidence I accept that the neighbours, during that entire period, were not in the market looking to purchase any property. The evidence on which this finding is based is that the GDs had signed a fixed term tenancy agreement for 18 months on 24 November 2009 (the sole agency period ran from 12 November 2009 to 15 January 2010), and their own property in [the North Island] did not sell until 22 January 2010 (their sale and purchase agreement is dated 13 January and it went unconditional on 22 January). Evidence of these dates was provided at the hearing.

[12] Secondly, the sign was not even an effective cause of the eventual sale, because the GDs moved into [the neighbouring rental property] on 30 November and YU Real Estate Ltd's sign had been erected on 23 November. The fact that the sign introduced the GDs to the property is an accident of timing. The GDs happened to move in a week after the sign had been erected. They also made contact with the neighbours immediately because of the moving truck blocking the Respondent's driveway, and in the following weeks and months had more social contact with the Respondent including having dinner at his house. It was inevitable that they would discover that the Respondent's house was on the market, given this contact, regardless of whether or not the Applicant had had a sign on the front lawn. In addition, importantly, they did not become prospective purchasers until after the end of the sole agency period and the causative chain of the introduction to the eventual sale was therefore broken. The sign was not at all instrumental in the sale. The cause, according to the evidence, was a change in the GDs' circumstances after the end of the sole agency period.

[13] The Applicant has also argued that there was an intention on the part of Respondent to avoid the commission and that the GDs had been prospective purchasers prior to the end of the sole agency period. A letter from the Applicant's solicitor to the Respondent dated

27 April 2010 makes reference to “The fact that the parties carefully engineered an agreement which was entered into subsequent to the termination of the agency period, ...”. I do not accept that argument for the following reasons.

[14] Firstly, the Applicant has referred to a conversation relayed to her from another agent, but has produced only a typed and unsigned letter (apparently from that agent) despite being given the opportunity, via an adjournment, to bring this agent as a witness to the hearing. I can therefore place no weight on the letter tabled in evidence.

[15] Secondly, all the evidence presented by the Respondent in relation to the GDs’ fixed term tenancy and the dates of their [North Island] house sale point to there being no attempt to avoid the commission and no consideration given to purchasing any property until after the sole agency period had ended.