



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 467

APPLICANT SC

RESPONDENT N Ltd

The Tribunal orders:

The claim is dismissed.

Background

1. In 2015, SC was a commercial real estate broker contracted to N Ltd [City 1].
2. In August 2015, N Ltd [City 2] (Mr D) entered into a sole agency agreement with Q Ltd for the sale of a commercial building at [Address]. N Ltd [City 1] (SC) worked with Mr D as the local agent.
3. SC prepared a detailed information pack for potential purchasers.
4. In September 2015, XZ phoned SC to enquire about the building.
5. SC and XZ had previous dealings together. SC had been a commercial real estate broker in [City 1] for 30 years. XZ is a well-known [City 1] businessman and investor.
6. SC provided XZ with an information pack. They had several conversations about the property.
7. N Ltd conducted a tender, but the property did not sell during the sole agency period, which ended on 15 November 2015.
8. The listing was opened to other agencies, including M Ltd [City 1]. Mr I was a commercial broker at M Ltd [City 1] at that time.
9. In or around May / June 2016, Mr I encountered QZ at a local lunch bar. Mr I mentioned the [Address] property to QZ. QZ was interested. Mr I provided QZ with a tenancy schedule, a seismic assessment and a (2010) valuation.
10. QZ is XZ's son. At that time, QZ and XZ were directors of Z Ltd, an accountancy firm in [City 1] with premises on [street].
11. On 1 July 2016, N Ltd presented offers from three entities – S Ltd, T Family Trust, and HY. S Ltd and Mr T were clients of Z Ltd.
12. On 2 July 2016, the property was sold to A Ltd for \$4.9m. Mr I put forward the offer from A Ltd and negotiated the deal.

13. QZ is the sole director of A Ltd. B Ltd is the sole shareholder.
14. B Ltd was set up as a bare trustee to hold assets on behalf of Z Ltd clients. Its directors were QZ, XZ, and NQ. Its shareholders were the six directors of Z Ltd.
15. In October 2016, N Ltd issued an invoice to Q Ltd seeking commission on the sale. Q Ltd denied that any commission was owed to N Ltd. N Ltd withdrew its invoice and has taken no further steps to recover commission from Q Ltd.
16. On 19 December 2019, SC filed a complaint with the [Professional Body] about QZ's conduct in respect of the purchase.
17. The [Professional Body] Disciplinary Tribunal conducted a hearing on 16-17 March 2021. On 28 June 2021 the Tribunal released its final determination. Of relevance to this claim, the Tribunal found that:
 - a. The assets of A Ltd, including this property, are held by B Ltd on behalf of three Z family trusts.
 - b. The purchase was "effectively funded" by XZ.
 - c. QZ "failed to identify actual and/or potential conflicts of interests" that arose by virtue of his being a director of Z Ltd and a director of A Ltd.
18. SC's claim in this Tribunal seeks \$30,000 on the grounds that:
 - a. N Ltd was entitled to commission on sale under the terms of its contract with Q Ltd; and
 - b. He is entitled to a percentage of that commission under the terms of his contract with N Ltd.
19. The hearing took place in [City 1] on 11 August 2023. Both parties attended the hearing. Mr H represented N Ltd.

The contracts

20. The contract between Q Ltd and N Ltd states that N Ltd is entitled to commission if:

The property or any part of it is sold, directly or indirectly:

- (a) By [N Ltd]; or
- (b) Through the instrumentality of [N Ltd]; or
- (c) To any person introduced to the property by [N Ltd]; or
- (d) Where this is a sole agency:
 - a. To any purchaser introduced to the property (whether by [N Ltd], another agent or otherwise) during the sole agency irrespective of when that purchaser entered into a binding contract

21. SC's contract with N Ltd states that he is entitled to commission per the "commission schedule". The schedule does not contain any operative clauses. It gives percentage commission rates according to the type of listing (general, sole, and auction). It states:

In all cases what is fair and reasonable will prevail and in the event of dispute the company's decision will be final and binding

Issues and law

22. The issues are:

- a. Was the property sold through the "instrumentality" of N Ltd, or to a person introduced to the property by N Ltd?
- b. If N Ltd was contractually entitled to recover commission from Q Ltd but elected not to recover it, is SC entitled to commission from N Ltd?

23. The commission clause in the N Ltd / Q Ltd contract uses wording that is common in the industry. Similar wording has been considered in commission disputes that have come before the courts, both in residential and in commercial sale or lease contexts.

24. Having reviewed the relevant decisions, I summarise the principles / approaches as follows:

- a. A claim for commission, either on the basis of 'instrumentality' or 'introduction', cannot rely on mere introduction, or on actions that were a minor or secondary contribution to the final sale¹. An agent is only entitled to commission if his or her actions were the "actual and effective cause of the sale"².
- b. If an agent makes an effective (not 'mere') introduction during the agency period, the agent will be entitled to commission even if the sale is concluded after the agency period (if the contract provides for this) and under the influence of other factors, unless those other factors amount to a break in the chain of causation³.
- c. Whether the agent's actions were instrumental, and whether the chain of causation was broken, is a matter of fact and degree that can only be considered on a case-by-case basis.

Findings

25. In the decisions summarised above (and cited below), the factors that arguably diminished the agent's instrumentality, or that broke the chain of causation, were the passage of time, and the involvement of other agents in the conclusion of the final sale.

26. Those elements are present here. There is also another element present in this case, which is complexity around whether the person whom SC arguably introduced to the property, XZ, was the eventual purchaser.

27. Mr H argued that SC did not introduce the property to XZ and that in any event XZ was not the purchaser. Mr H submitted that:

- a. The building is opposite the Z Ltd offices on [street]. XZ could see the 'for sale' sign that N Ltd put up on the building.
- b. XZ made an enquiry with SC out of curiosity.
- c. SC never showed XZ around the building.

¹ *Capel v Krebs* (1971) MCD 214

² *Simpson & Walton v Williams* HC Wellington CP626/91, 12 November 1991

³ *Harcourts Group Ltd v McKenzie* (1994) ANZ ConvR 272, *Albany Real Estate Ltd v Vousden* (1998) ANZ ConvR 131

- d. XZ has extensive knowledge of commercial property in [City 1] and the information pack that SC provided to him did not assist him.
- e. XZ did not put forward an offer on the property. He indicated that he was not interested at the advertised price.
- f. QZ was introduced to the property by Mr I.
- g. QZ is the sole director of A Ltd.
- h. The focus of A Ltd is the acquisition of commercial property on [street].
- i. B Ltd is a holding company. XZ's only involvement with B Ltd was in his capacity as a (then) director of Z Ltd. XZ had no input into the operation of A Ltd.

28. SC submitted that:

- a. Although he did not show XZ around the building, that is not unusual for XZ. XZ's focus is on "the numbers", which he gained an understanding of via the information that he (SC) provided in the information pack.
- b. Mr I gave very limited and (in terms of the valuation) out of date information to QZ, and it is unrealistic to believe that QZ relied upon this information and not upon advice and guidance from XZ.
- c. The findings of the Disciplinary Tribunal show that XZ was not only involved in a passive way as a shareholder of B Ltd. The Tribunal showed that B Ltd held its ownership of A Ltd on behalf of three Z family trusts, and XZ is a trustee of one of those trusts. The Tribunal also showed that XZ "effectively funded" the purchase.

29. I accept the factual findings of the Disciplinary Tribunal that are relevant to these proceedings, in particular that the beneficial owner of A Ltd is three Z family trusts, and that XZ "effectively funded" the purchase of [Address].

30. The question is whether SC's actions were the actual and effective cause of the sale, and whether there was a break in the chain of causation from SC's interactions with XZ to the concluded sale.

31. My finding is that there was a break in the chain of causation, and that SC's actions were not the actual and effective cause of the sale.

32. The actual and effective cause of the sale was QZ's decision to purchase the property.

33. Advice from his father was almost certainly a factor in that decision, but QZ is not XZ, and QZ made the decision to purchase on the basis of a wide range of information and factors, including the information given to him by Mr I.

34. QZ's connection with the purchaser in this instance is much stronger than XZ's. QZ was (and is) the sole director of A Ltd. QZ was a beneficiary of all three of the family trusts, and the principal beneficiary and trustee of one of them.

35. Therefore I find that:

- a. The purchaser was not XZ.
- b. QZ was the effective decision maker of the entity that purchased the property.
- c. QZ was introduced to the property by Mr I.

d. The property not sold through the instrumentality of N Ltd or to a person introduced to the property by N Ltd during the sole agency period.

e. N Ltd is not entitled to recover commission on the sale.

36. Having made that finding, it is not necessary for me to address the second question of whether SC would be entitled to a share of the commission per his contract with N Ltd.

37. The claim is dismissed.

Referee: Nicholas Blake

Date: 23 August 2023



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact. Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.