IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-005936

	BETWEEN	JIREH HOLDINGS LIMITED Appellant
	AND	YAYOI SOTOISHI Respondent

Hearing: 23 February 2011

Counsel: A Swan for Appellant
R J Thompson for Respondent

Judgment: 4 March 2011

JUDGMENT OF FOGARTY J

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[1] The appellant appeals against a decision of the District Court, Judge B A Gibson, awarding Ms Sotoishsi judgment for the balance of unpaid commission due to her as agent for Jireh Holdings Limited.

[2] The respondent, Ms Sotoishi, is a licensed real estate agent. The essential trial issue was whether or not she had been appointed as agent by Jireh Holdings Limited before or after performance of her work on Jireh's behalf.

[3] Section 62 of the Real Estate Agents Act 1976 provides:

> **62 Real estate agent to have written contract of agency**
>
> No person shall be entitled to sue for or recover any commission, reward, or other valuable consideration in respect of any service or work performed by him or her as a real estate agent, unless -
>
> (a) He or she was the holder of a licence as a real estate agent under this Act or the holder, or the partner of a holder, of a licence as a real estate agent under the Real Estate Agents Act 1963 at the time of the performing of the service or work; and

(b) His or her appointment to act as agent or perform that service or work is in writing signed either before or after the performance of that service or work by the person to be charged with the commission, reward, or consideration or by some person on his or her behalf lawfully authorised to sign the appointment.

[4] This is the current form of a statutory provision which has a long history back into the beginning of the 20th century and which can be found in a number of counterpart common law jurisdictions, particularly Australia.

[5] There is no express written agreement executed by Jireh Holdings Limited as vendor appointing Ms Sotoishi as agent, let alone also agreeing to pay her commission.

[6] There are, however, numerous documents signed by Jireh Holdings Limited which refer to Ms Sotoishi as having made the sale. The essential question in this case always has been, in the District Court and here, whether or not such documents suffice. The relevant sale and purchase agreements did not follow the Auckland District Law Society form. They were relatively simple agreements headed "Particulars of Sale", identifying: the vendor, the purchaser, the date of the contract, the unit being sold, the purchase price and making provisions for payments of deposit. As an aside, I suspect their simplicity was to encourage execution by purchasers residing offshore in Japan. On the first page of these simple agreements there is handwritten outside the boxes of printed terms or terms to be completed the note: "Sale by Y. Sotoishi".

[7] On completion of a sale Jireh Holdings would write a congratulatory letter to the purchaser, enclosing their receipt for the deposit, and reminding them of the next obligation to make a payment and containing the following sentence:

> Should you any queries, please do not hesitate to consult the Sales Consultant Yayoi Sotoishi at 021-747-143.

[8] Ms Sotoishi carried a business card identifying her as the Japanese Sales and Marketing representative of the Tony Tay Group. On the back of that card there is a list of the Tony Tay Group of companies and included in that list is Jireh Holdings Limited. Ms Sotoishi did sign a sales representative agreement with Tony Tay and

Associated Limited, which is the first named company on the back of her card under the general heading "Tony Tay Group of Companies". That sales representative agreement is indisputably an appointment of her as agent in compliance with s 62(b) of the Act. It appoints her as agent to sell a property known as Crown Lynn Condominiums "*and any other property that belonged to us*". It is common ground that Jireh Holdings Limited is not a subsidiary of Tony Tay and Associates Limited. Further, the sales in respect of which she is seeking commission are not sales of properties which are owned by Tony Tay and Associates Limited. There is a mass of evidence showing that Ms Sotoishi worked hard making sales, including for Jireh Holdings Limited and was constantly recognised by Jireh Holdings Limited as having made sales on their behalf.

[9] The trial Judge was not impressed by evidence of Mr Chin (who was writing on behalf of Jireh Holdings Limited and describing himself as the sales and marketing manager) where he was disputing that Ms Sotoishi was acting as its agent. The Judge found, relying on the documents that I have briefly summarised, that the requirement in s 62(b) had been satisfied. His reasoning is captured in paragraph [8] of his judgment:

> [8] Mr Chin's evidence was that was not on his view a letter that contradicted what he said in his evidence-in-chief, namely that he had never been employed in any capacity by the second defendant and was only every employed by the first defendant, notwithstanding the description as the second defendant's sales and marketing manager and the fact that it was written on the second defendant's letterhead. He said it was merely a template letter, although he acknowledged that his signature appeared on it. That clearly is nonsense and I reject that evidence. The letter has been written on behalf of the second defendant and acknowledges the appointment of the plaintiff as the second defendant's agent. However, that letter was written in 2006 after the transactions for which the balance of commission is sought had been entered into. Those transactions were entered into between September 2003 and August 2005, but the agreements for sale and purchase in respect of each transaction have been produced in part and show the agreements signed by both the purchaser and the vendor, namely the second defendant, with an acknowledgement that the sale was effected by the plaintiff. In my view this satisfies the requirement in s 62(b) of the Real Estate Agents Act 1976, namely that there is an acknowledgement in writing that the plaintiff has been appointed before or after the performance of that service to undertake the work as the second defendant's agent. The second defendant clearly is the party charged with commission. Mr Chin said the arrangement between the defendants was that the first defendant would meet any commission payments owed to the plaintiff in respect of the sale of units owned by the second defendant, but no

> agency agreement or contract was ever produced which confirmed any arrangement between the first defendant and second defendant, and having regard to the view that I take of Mr Chin's evidence, I reject it.

[10] In *M McKillop Limited v Borthwick* [1976] 2 NZLR 482 McKillop who was the holder of a licence as a real estate agent, sought to recover commission against Borthwick. A conditional sale fell through which was on a printed form of the Real Estate Institute, which would have appointed McKillop as the agent. A new agreement was prepared using the same type of printed form but the name of McKillop was not inserted as the agent the vendor appointed. The failure to have his name inserted was at the heart of the litigation. There was no doubt in substance McKillop had been the agent of the vendor and he was always understood to be the agent of the vendor.

[11] I find the reasoning of Somers J very pertinent to this case:

> A convenient starting point in New Zealand is *Looney v Pratt* [1919] GLR 231. In that case the agreement of sale expressly acknowledged the payment of the deposit, "(the receipt whereof by Sydney Pratt as authorised agent of the vendor) is hereby acknowledged by the vendor". Subsequently, the plaintiff (who was claiming the part of the deposit retained by the defendant as commission) wrote to his solicitor advising that he had withdrawn the property from sale. On the letter he wrote, "I sent a copy to Pratt". There was no evidence that Pratt received the copy. That letter was held to be a recognition by the plaintiff that the defendant was his agent. Cooper J said:
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> > "It is, I think, a sufficient appointment if it is founded on a writing signed by the principal before the transaction is completed, or if it can be gathered from any written document afterwards signed by the principal. In my opinion, the clause I have quoted from the agreement signed by the plaintiff on the 4th May and the letter I have referred to constitute a written admission by Looney that Pratt was his agent employed by him to sell the property mentioned in the agreement . . ." (ibid, 232).
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> *Looney v Pratt* proceeds, I think, on the footing that a writing which refers to an appointment is sufficient. It is perhaps a curious commentary that in *Roach v Hough* [1926] St R Qd 24 it was suggested that *Looney v Pratt* ought not to be extended.
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> In *Campbell v Lindsay* [1933] NZLR 588 a letter from the agent's solicitors claiming his commission was answered by the vendor's solicitors with their client's assertion that the commission as claimed was not earned or payable until the sale was completed. The inference that commission would be payable constituted an acknowledgment of appointment and the statute was held satisfied. It will be observed that the vendor's solicitor's communication was to the agent's solicitors, which is to say, to the agent himself.

In *R H Rothbury Ltd v Gibbs* [1957] NZLR 590, TA Gresson J considered certain correspondence, adverted to the observation in *Roach v Hough* concerning the limits of *Looney v Pratt*, and said:

> "The necessity for an appointment in writing as a condition precedent to the recovery of commission is statutory, and has been well understood by land agents and others for many years. In my view, the Court should, therefore, be slow to undermine the efficacy of the statute by inferring or implying authority to act as agent from letters or documents written after the sale of the property concerned, particularly if to do so involves straining of the words or context. The absence of a written appointment is, in my opinion, fatal to the respondent's claim" ([1957] NZLR 590, 593).

In *Brunette v Simpson* [1958] NZLR 292 McGregor J spoke of the writing as evidencing an appointment but in that case, and in *Campbell v Lindsay*, the correspondence was between agent and principal through their respective solicitors and constituted [1958] NZLR 292, 296) a definite acknowledgment of appointment by the principal.

In *E A Wood and Co Ltd v Rice* [`964] NZLR 496 McGregor J observed that the requirements of s 25 of the Land Agents Act 1953 are evidentiary and are requirements as to written proof of the contract of agency. In so describing the effect of the Act I do not think McGregor J was concerned with the point in issue here. His observation was directed to the requirement of a writing and not its form or nature.

Finally, I refer to *Markham v Dalgety Ltd* [1974] 1 NZLR 192 (CA). There, after referring to the observations of TA Gresson J in *R H Rothbury Ltd v Gibbs* which I have set out above, McCarthy P said:

> "The Judge's remarks were directed especially to circumstances arising after the sale of the property, but I believe the warning to be equally pertinent to the situation before or at the time of sale. If Dalgetys intended to look to the appellant for their commission, their right to do so should have been put beyond all doubt, either by obtaining the signature of the appellant to a form of authority to sell, or by incorporation in the documents of sale of a sufficiently explicit statement" ([1974] 1 NZLR 192, 195-196).

I think that of the cases in New Zealand that I have referred to only *Looney v Pratt* really supports an approach of the type adopted in the Statute of Frauds. *Campbell v Lindsay* in effect involved direct correspondence between the agent and principal and relating as it did to past services could readily be viewed as an acknowledgment of a direct type. *Brunette v Simpson* is similarly explicable.

The object of s 79 of the Real Estate Agents Act 1963 is no doubt in part to avoid the danger of perjury (*Thornes v Eyre* (1915) 34 NZLR 651, 660) and so obviate false claims, but also an endeavour to put an end to arguments about claims for commissions. Primarily I think the provision is for the benefit of those employing real estate agents. For myself I think nice distinctions and a jurisprudence having the nature of that which used to

surround the Statute of Frauds and now surrounds the Contracts Enforcement Act is to be avoided. No doubt there will be occasions when an agent will not receive his just reward. But in this field the prospective claimants are licensed, are limited in number and are perfectly capable of obtaining the necessary writing to protect themselves.

The provisions of s 79 refer to an appointment to act as agent, etc. They are prospective in their language. But they cannot be exclusively so read because the writing may be signed after the performance of the service or work. In that case the appointment cannot in truth be other than an acknowledgment of the past fact.

I am of the opinion that the statute requires the appointment itself to be in writing. I do not think I should seize on any writing evidencing an appointment, as a letter from vendor to purchaser. That, of course, does not mean that the word "appointment" need be used, nor that any formality need be present. I accept the view of Richards J in *Juttner v Riedel* [1937] SASR 466 that:

> ". . . there is an important difference between the language of the section and that of sec 4 of the Statute of Frauds and of sec 4 of the Sale of Goods Act. Under the Statute of Frauds it is sufficient if 'the agreement . . . or some memorandum or note thereof' is in writing; and under the Sale of Goods Act it is sufficient if 'some note or memorandum in writing of the contract be made'; but the Land Agents Act requires that 'the appointment to act as agent' be 'in writing', which, it is arguable, means 'made by means of writing'" (ibid, 476).

The agent must in my view be able to point to a writing which appoints him. The statute, in short, means what it says. In so putting the matter I recognise that I am not following *Looney v Pratt* [1919] GLR 231. That case has been the subject of judicial comment. And I recognise too that I am not following the actual expression contained in a number of other cases. I am, however, encouraged in the view I have expressed by the observations (already referred to) in *R H Rothbury Ltd v Gibbs* [`957] NZLR 590 and *Markham v Dalgety Ltd* [1974] 1 NZLR 192, and because I do not think the point has previously been the subject of consideration in New Zealand. I have the impression it has gone by default.

(Emphasis added)

[12] Mr Thompson sought to distinguish this judgment on the basis that *McKillop* is a case where there were only one or two transactions whereas here Ms Sotoishi had been acting for years in numerous agreements for the Tony Tay Group, some of the deals involving this company as vendor. He relied on evidence of her relationship with Mr Chin and her understanding that she would be acting on the group of companies in such matters as her card. She sought to distinguish both *Markham v Dalgety* and *McKillop* as cases of a single transaction.

[13] I do not see the reasoning of the Court of Appeal in *Markham*, as cited by Somers J, nor *McKillop* as in any way depending on the number of transactions. *Markham* and *McKillop* have been followed. See Tipping J in *Walsh v Beasley Packard and Chamberlain Limited* HC Christchurch AP 130/87, 15 February 1988.

[14] Mr Thompson was unable to present any other authority to the contrary. I follow *Markham* and *McKillop*, and find that Ms Sotoishi was not appointed by Jireh Holdings as agent.

[15] Alternatively, Mr Thompson argued that this was a case for quantum merit. There is no doubt that Ms Sotoishi would comply with the requirements of a quantum merit claim. Jireh has been enriched at her expense. The question is whether or not it would be unjust to deny restitution of that enrichment. In a broad sense there is a degree of injustice to Ms Sotoishi. She is entitled to reward for what she has done. But, *Markham* and *McKillop* were both cases in which the Court expressed sympathy for the agent. They were both cases in which the Court observed that agents are perfectly capable of protecting themselves by obtaining the necessary appointment in writing. See for example that dictum by Somers J in *McKillop*. There is a similar dictum by McCarthy P in *Rothbury v Gibbs* where McCarthy P said:

> When a real estate agent sets out to find a property for a purchaser and approaches prospective vendors with that object in view, it behoves him, if he wishes to look to the vendor for his commission, to ensure that his right to that commission is not left in a state of uncertainty. …
>
> (at 195)

[16] Were this Court to allow a claim in quantum meruit it would undermine the statutory purpose of s 62(b). That circumstance has to be taken into account in judging the justice of granting the remedy. The Court of Appeal in an obiter comment in *Cornerstone Limited v OPM Financial Solutions Ltd and Ors* CA CA11/05 20 March 2006 has doubted the availability of quantum merit:

> [47] In the absence of full argument, we are reluctant to express any final conclusion on this aspect of the case. Suffice to say there is a substantial argument for the proposition that our Real Estate Agents Act has firmly set its face against the recovery of commission or reward in the case of unlicensed persons carrying out the work of a real estate agent.

[17] As his final argument Mr Thompson relied on misleading and deceptive conduct. He relied on s 9 of the Fair Trading Act. He mounted a subtle argument. He said he was not seeking recovery based on the fact that Jireh Holdings Limited held out his client as an agent and so should honour that holding out. He could see the problems in that from the Court of Appeal case in *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213. Rather, he was arguing that to deny Ms Sotoishi a remedy under s 9 would be to condone dishonest conduct by Jireh Holdings in not agreeing now to pay the commission. I think the answer to that proposition is the same answer given in *McKillop* and in *Gibbs*, namely that the scheme of the legislation is such that licensed real estate agents are expected to protect themselves, have every ability to protect themselves by ensuring that they are properly appointed. They are licensed. Before they are licensed they are educated into the requirements of the legislation. In that sense they cannot be reasonably found to have relied upon loose propositions or commercial propositions by vendors that they are agents. They are expected to protect themselves by obtaining appointment. To allow a claim under s 9 of the Fair Trading Act 1986 would itself also be to undermine the Real Estate Agents Act.

[18] For these reasons the appeal succeeds. The judgment in the District Court is set aside. The appellant is entitled to costs on a 2B basis in the High Court, and costs in the District Court. Leave is reserved to apply to resolve costs issues.

Solicitors:
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