

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 5/09
5134398**

BETWEEN WENSLEY DEVELOPMENTS
 LIMITED
 Applicant

AND MICHAEL JOHN BOULGARIS
 Respondent

Member of Authority: Leon Robinson

Representatives: Dean Kilpatrick, Counsel for Applicant
 Wayne McKeague, Counsel for Respondent

Investigation Meeting: 24 October 2008 at Queenstown

Submissions Received: 10 November 2008
 11 November 2008
 17 November 2008

Determination: 20 January 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Wensley Developments Limited (“Wensley”) seeks to recover overpaid advance commission payments from the respondent its former employee Mr Michael John Boulgaris ("Mr Boulgaris").

[2] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[3] Wensley is a property development company. It employed Mr Boulgaris as a Salesperson at Queenstown from 1 March 2004. The terms of the employment were

recorded in a written individual employment agreement signed by the parties ("the IEA").

[4] The IEA contained this clause on commission:-

2.1 In respect of each and every sale of real estate which has been effected so that the Company is entitled to be paid a Gross Commission the Salesperson will be paid a commission share of 75% of one half of the Gross Commission which has been received and beneficially retained by the Company. Schedule 2 sets out advance payments of commission to the Salesperson which are paid subject to the specific terms as to commission set out below.

[5] Schedule 2 specified payments of \$50,000.00 for each of the months of February, March and April 2004. For all of the months from May 2004 to December 2005 the payment was \$35,000.00.

[6] The IEA contained this clause on sums owing by the Salesperson at termination:-

2.10 The Salesperson now gives written consent pursuant to s5 of the Wages Protection Act 1983 to the Company to deduct from any pay or other monies owing to the Salesperson on termination of employment, any sum which may be owing from the Salesperson to the Company which for the avoidance of doubt will include any sum paid per Schedule 2 which exceeds the amount of commission actually payable to the Salesperson on termination of employment.

[7] Mr Boulgaris resigned from the employment by letter dated 22 March 2005.

[8] The parties met on 5 April 2005 to discuss the details of the termination of the relationship.

[9] A director of Wensley Mr Ross McGregor Wensley ("Mr Wensley") wrote to Mr Boulgaris by letter dated 8 April 2005 confirming the discussions in the meeting held on 5 April 2005. The letter confirmed that:-

- (i) Mr Boulgaris been paid \$535,000.00 commissions in advance but had in fact earned \$339,990.00;

- (ii) Wensley agreed to allow the sum of \$40,000.00 to Mr Boulgaris as a salary payment to cover a period when Mr Boulgaris undertook sales manager duties;
- (iii) The remaining \$155,010.00 would be deducted from future commission earned by Mr Boulgaris with any amount owing to be repaid from the settlement of a purchase by Mr Boulgaris from Wensley (The Club Apartment 202).

[10] Mr Boulgaris responded in a letter dated 15 April 2005 with a compromise. He wrote:-

From my previous letter, you will appreciate that I believe that the availability of the product range is now so significantly behind schedule as anticipated by my employment contract, that I can not make the annual income which was the premise of that agreement.

I don't wish to have an argument about that, nor blame you for it - it is just a simple fact that the ability to create the income, on which the employment was taken up, is simply no longer possible. If I am correct in this, then none of the total \$535,000 I have so far received would be refundable to you.

Regardless, I am prepared to reach a compromise on that and I think that this is to allow a total of \$80,000 reduction in the difference of \$195,010. Whether you wish to allow this as payment for sales manager duties is up to you, but I would be prepared to accept \$115,010 as the amount to be repaid from future commission in the manner suggested.

However it needs to be recorded that this is the ONLY manner in which it needs to be repaid. I am to be given the ability at all times to sell the product (or via any estate agency I work with in the future) so as to earn that commission and is not a debt otherwise recoverable from me.

(original emphasis)

[11] Wensley's general manager operations and marketing Mr Graeme Kruger ("Mr Kruger") wrote by email to Mr Boulgaris on 12 May 2005 rejecting Mr Boulgaris' compromise. Mr Kruger's advice further referred to an adjusted outstanding amount

said to have been agreed at the meeting on 5 April 2005 in the sum of \$163,635¹. This sum was said to be a "debt that is otherwise recoverable if commission revenue does not enable recovery".

[12] Mr Boulgaris wrote to Mr Kruger by letter dated 6 June 2005. The opening paragraph of that advice is this:-

I have had time to consider your views of our settlement and am willing to accept your offer as I do not wish to enter into an argument.

[13] By facsimile advice dated 13 September 2007, Wensley's lawyers wrote to Mr Boulgaris' lawyer to bring to the lawyer's attention his client owed a debt to Wensley of \$163,635.00.

[14] Mr Boulgaris' lawyer replied by letter dated 30 November 2007 advising Mr Boulgaris did not believe any monies were owing.

[15] Wensley's lawyers made formal demand of Mr Boulgaris through his lawyer by letter dated 19 December 2007.

[16] Wensley filed an application for summary judgment against Mr Boulgaris in the District Court. The Court held the dispute was founded on an employment relationship and struck the application out².

The merits

[17] Mr Boulgaris defends Wensley's claim against him saying that nothing is owing because "of the wrong projections given to [him] to induce his employment". He argues the sales anticipated by the parties and as set out in Schedule 2 of the IEA did not eventuate such that he was unable to earn the commissions expected. Mr Boulgaris articulates his defence this way³:-

¹ As a result of a sale at 704 *The Beacon* not being confirmed.

² unreported, District Court Queenstown, CIV-2008-059-000024, 3 July 2008, Doherty DCJ

³ Paragraph [17] Further Statement in Reply 18 September 2008

The reason I say that I do not owe any "refund" to Wensley's is because what they paid me is the minimum they represented I would earn. That representation was backed up by their projections. Those projections were reckless and untrue and designed simply to persuade me to take up employment with them. As they represented that I would be earning at least the \$535,000 per annum (i.e. over my time with them) that is the remuneration to which I am entitled.

[18] With respect, whether or not that was so cannot not assist him now.

[19] Whatever the veracity of the projections they were only ever forecasts. Mr Boulgaris appreciated that. It remains undisputed that he continued to receive advance payments on commissions that he had not actually earned. Spending the money was not the correct response if he disputed the projections.

[20] Mr Boulgaris cannot complain about representations made to him. The IEA makes no guarantees in relation to any quantum of commissions. Schedule 2 is not a representation of commission to be earned. Rather, it is a schedule of advance commissions paid to him. Nor can any such pre-contractual terms be relied on by him. The IEA contains these further terms:-

21. *Completeness*

21.1 *The parties agree that all the terms of the employment are contained in this document and that no other terms apart from those implied at law, form part of this agreement.*

22. *Acknowledgement*

22.1 *The Salesperson and the Company acknowledge that this agreement was negotiated fairly. The Salesperson has read this agreement and understands and accepts it. The Salesperson has been given the opportunity and has had sufficient time to take independent advice about its contents before signing this agreement.*

[21] Mr Boulgaris was aware that he was being paid more than he was earning. In September 2004 it became clear to him that anticipated sales were seriously behind schedule. He wrote to Wensley's management by letter dated 29 September 2004:-

The present situation does concern me as you will note from the spread sheet attached if my income is based purely on commission earned, based on the completion dates and my advancements, I will end up being substantially in debt to the company and this is clearly not an option.

...

Your comments on this matter would be greatly appreciated.

[22] None of the witnesses gave any evidence of any kind of response or resolution to the issue Mr Boulgaris had expressly raised. I think it right and reasonable to therefore find that there was no response or any resolution of the issue. As is plainly obvious, that is unfortunate now.

[23] I find that there is no merit in Mr Boulgaris' defence for the reasons I have set out above. In the end I consider this employment relationship problem is resolved by simple accord and satisfaction. I find that there was an accord and satisfaction as is demonstrably apparent from the correspondence between the parties being the advices of 8 April, 15 April, 12 May and 6 June 2005.

[24] Mr Boulgaris accepted he owed the sum of \$163,635.00 in his letter dated 6 June 2005. He accepted the position put to him by Mr Kruger. In this equity and good conscience jurisdiction he ought to be held to that acceptance and ought not be permitted to resile from it.

The determination

[25] For the reasons I have set out above, **I find that Mr Boulgaris is liable in debt to Wensley in the sum of \$163,635.00. I give this determination now as judgment accordingly.**

[26] Wensley claims interest. As it has stood out of the sum due to it I think it fit that it should have interest. **I order Michael John Boulgaris to pay interest on the judgment sum of \$163,635.00 at the rate of 6% from 25 August 2008⁴ to the date of payment.**

[27] I direct that any certificate of decision issued from this determination is to immediately served on Mr Boulgaris personally.

⁴ The date of lodgement of the statement of problem.

Costs

[28] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Kilpatrick is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr McKeague is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority