



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Toovey v Lake Macquarie Conveyancing Pty Ltd [2015] NSWCATCD 116
Hearing dates:	11 August 2015
Date of orders:	11 August 2015
Decision date:	02 October 2015
Jurisdiction:	Consumer and Commercial Division
Before:	J A Ringrose – General Member
Decision:	1. The Tribunal declares that the sum of \$487.34 is not due and owing by Robert Toovey to Lake Macquarie Conveyancing Pty Ltd in respect of conveyancing services.
Catchwords:	Liability for payment for conveyancing services to licenced conveyancer – whether works authorised.
Legislation Cited:	Conveyancers Licencing Act 2003 ss. 36, 37, 38, 41 and 51.
Category:	Principal judgment
Parties:	Robert Toovey (applicant) Lake Macquarie Conveyancing Pty Ltd (respondent)
Representation:	The applicant appeared in person Ms Berry appeared on behalf of the respondent
File Number(s):	GEN 15/38115
Publication restriction:	Nil

REASONS FOR DECISION

APPLICATION

- 1 By an application filed on 15 June 2015 the applicant sought an order that he was not required to pay a sum of \$487.34 which was claimed by the respondent for conveyancing services and in particular for the preparation of contracts for the sale of his property at Belmont North. He claimed that after he had received but not signed, a document described as a cost agreement, he cancelled the sale and the conveyancing

services before any agreement had been signed or returned to the respondent.

- 2 The matter was listed for directions when both parties were required to provide evidence and the matter ultimately came before me on 11 August 2015. On that date representatives of both parties attended and detailed oral reasons were detailed for decision which I then handed down to the parties. The respondent has requested written reasons which are published hereunder.

RESPONDENT'S SUBMISSIONS

- 3 It is claimed that on 1 November 2013 the applicant approached the respondent and provided information in relation to a proposed sale of his house at Belmont North. It would appear that the details were recorded on an instruction sheet which also quoted the price for conveyancing services at \$850.00 plus GST plus disbursements.

- 4 On 4 November 2013 the respondent, through Ms Berry, wrote to the applicant enclosing a cost agreement in duplicate for perusal and requesting that it be signed and returned to the office. She also invited the applicant and his wife to contact the office of the respondent if they had any questions.

- 5 The cost agreement which also bore a date 4 November 2013 provided that professional costs for acting would be \$850.00 but should the retainer be terminated prior to the exchange of contracts or should the property not be sold within six months of the initial instructions, then the charge would be a sum of \$250.00 plus disbursements. It was noted that that payment would be deducted from the final tax invoice once the property is sold. It provided further that in the event that the sale was terminated after the exchange of contracts but prior to completion that it would be charged at a rate of \$225.00 per hour for the time spent in relation to the matter to the point of termination of the agreement plus disbursements. Disbursements were noted to be copies of title searches, common drainage diagrams, attendance to exchange contract, settlement fee and all other matters including a s 149(2 certificate) estimated to be a total of \$375.00.

- 6 The agreement also contained the following term 9;-

“Acceptance of this offer

9 We will begin work promptly when you notify acceptance of this offer, which you may do by signing and delivering to me the attached duplicate.”

- 7 From annexure C to the respondent's evidence it appears that the respondent took steps to make all necessary enquiries for the preparation of a contract from relevant government departments on 4 November 2013, that being the same date in the letter and the cost agreement was forwarded to the applicants.

- 8 On 13 November 2013 the respondent wrote to the applicant and his wife, thanking them for their instructions to act and noting that a copy of the contract for sale had been forwarded to Love Realty, so that marketing of the property could begin. A copy of the contract was also apparently attached to that letter forwarded to the applicant. A copy of a letter dated 13 November 2013 to Love Realty includes a handwritten notice in the

following terms;-

“On 24/3/15 Dylan spoke to Perri from Love Realty who advises this matter is on hold. It is noted that the enquiry was made some 16 months after the contract was forwarded.”

Following receipt of that information it would appear that the respondent wrote to the applicant and his wife on 24 March 2015 enclosing a tax invoice for the costs incurred in preparing the contract for marketing and noting that once the property was sold the amount paid on the tax invoice would be deducted from the final tax invoice. The interim tax invoice included professional costs for acting in relation to the proposed sale of the property at Belmont North in a total sum of \$275.00, together with disbursements in a claimed sum of \$212.34 representing a total balance due of \$487.34.

- 9 In response to that communication it is clear from the records of the respondent that the applicant immediately wrote to the respondent and advised;-

“please refer to your dated 4 November 2013 and note that the acceptance was never sent to your office. After supplying some details to your office, a phone call was made shortly after indicating that we were not going through with listing the property with Love Real Estate. I hope this clears any misconceptions”.

- 10 10 On 25 March 2015 Ms Berry, on behalf of the respondent, wrote including the following paragraph;-

“there are no notes on our file from you at any time to suggest that you did not want us to proceed with preparation of the contract and indeed our letter of 13 November last was clearly an indication to you that we had in fact followed your instructions and provided the contract to the real estate agent that you told us would be listing the property.”

- 11 11 Evidence was produced in relation to communications between the parties after March 2015 and a copy of a Residential Tenancy Agreement in respect of the property at Belmont North was provided indicating that the property was the subject of a 24 month agreement commencing on 29 April 2013 and ending on 28 April 2015.

APPLICANT'S EVIDENCE

- 12 12 Mr Toovey produced documents similar to those produced on behalf of the respondent. He stated that on about 1 November 2013 he approached the respondent in regard to drawing up a contract for the sale of his property at Belmont North. He noted that the company was recommended by Love Realty.

- 13 13 He agrees that he received a cost agreement from the respondent on or about 4 November 2013 and he referred in particular to explicit instructions which were contained in paragraph 9 of that agreement to the effect that work would be commenced after acceptance of the offer had been notified by signing and delivering the cost agreement to the respondent.

- 14 14 He noted that having read the agreement he and his wife decided not to go through with the sale and the contract and that the decision was made due to the costs and conditions. The agreement was never signed nor was it ever returned as directed and he also contacted Love Realty and informed them that they would not be proceeding. No sign has ever been erected outside his property nor has there been any advertisement of the property. He did not hear back from Lake Macquarie Conveyancing and concluded that the agreement had been cancelled, until a letter was

received on 24 March 2015 claiming the sum of \$487.34. He referred to a letter of 24 March 2015 reminding Lake Macquarie Conveyancing of cancellation instructions but he denied receiving any letter on 13 November 2013 indicating the contract had been completed.

- 15 15 By 22 May 2015 threats of debt collection had commenced and on 5 June 2015 an email was received from Aston Reid Lawyers threatening that if the outstanding amount was not paid steps would be taken which could affect the applicant's credit rating.

DECISION

- 16 16 Although the applicant seeks an order that he is not obliged to make a payment to the respondent, it is clear that the respondent bears the onus of establishing that it is entitled to a payment at least on a prima facie basis. It is necessary therefore for the respondent to demonstrate that he had received authority from the applicant to prepare a contract and further that it had complied with the requirements of the *Conveyancers Licencing Act 2003* to the extent necessary to recover costs.

- 17 17 Section 41 of the *Conveyancers Licencing Act 2003* provides;-

41 effect of non-disclosure of matters related to basis of costs

(1) if a licensee fails to make a disclosure to a client in accordance with this division of the matters required to be disclosed by s. 36 in relation to costs, the client need not pay the costs of the conveyancing work.

(2) a licensee who fails to make a disclosure in accordance with this division where matters required to be disclosed by s. 36 in relation to costs may not maintain proceedings for the recovery of the cost."

- 18 18 Subsection (2) of section 36 prescribes the matters which are to be disclosed to a client in a cost agreement and these include;-

- (a) the amount of the costs if known
- (b) if the amount of costs is not known, the basis of calculating the costs,
- (c) the billing arrangements
- (d) the clients right under Pt 4 in relation to the Hearing of disputes about the fees by the Tribunal.
- (e) any conflict or beneficial interests of the kind required to be disclosed by the regulations.
- (f) any other matter required to be disclosed by the regulations.

- 19 19 It is clear that the initial instruction sheet, apparently taken on 1 November 2013 does not establish that the applicant was advised of matters required under s 36 of the Act or any of the matters set out in paragraphs 3 to 10 of the costs agreement. It is clear that these matters were only addressed when the letter dated 4 November 2013 was forwarded to the applicant and his wife.

- 20 20 It is significant to note that the respondent commenced to incur the cost of disbursements on 4 November 2013 at a time when there was no basis upon which it could be inferred that the applicant and his wife had been provided with the information required under the Act or in fact that they had received it.

- 21 21 It is further significant to note that annexure A (2) to the respondent's material is a

letter from Love Realty which was apparently faxed to the respondent on 31 October 2013 at 8.21am. That letter includes the following paragraphs;-

“Re contract requests - ... Belmont North

We have listed the above property for sale and are eager to commence marketing once we have the contract. Could you please prepare the original and counterpart contracts for the property to enable us to exchange in accordance with the following details and forward the same to Love Realty.

Please confirm our clients' instructions prior to ordering vendor disclosure documents.”

The basic details of the property were then set out but it appears clear from the material provided by both parties that the only instruction to prepare a contract was from the agents, which was given at a time before the applicant had even attended and spoken with the representatives of the respondent.

22 22 The significant cause and the cost agreement document is cl 9 which provides as follows;-

“Acceptance of this offer

9 we will begin work promptly when you notify acceptance of this offer which you may do by signing and delivering to me the attached duplicate.”

Neither the cost agreement nor the letter forwarding the cost agreement suggest that authority to commence the preparation of the contract had been given prior to the letter of 4 November 2013 by the applicant or his wife.

23 23 It appears that the respondent has acted on instructions of the real estate agent who did not have the authority to bind the applicant and his wife in relation to instructions for preparation of the contract for sale. The letter from the real estate agent clearly suggests that instructions should be verified before preparation of documents commences. The structure of the *Conveyancers Licencing Act 2003* envisages that costs cannot be recovered until after a cost agreement which complies with the Act, has been delivered. Section 37 of the Act requires that the cost disclosure be made before or when the licensee is retained to carry out the work and the only apparent proviso to that requirement is where circumstances suggest that it is not reasonably practical to make the disclosure before the licensee is retained. There is no evidence available to suggest that it would not have been practicable to make the disclosure and then commence the work. Clause 9 of the cost agreement clearly suggests that work would not be commenced until acceptance of the terms of the Costs Agreement was signified by the return of a signed copy of the agreement to the respondent.

24 24 In this matter I am satisfied that the respondent commenced work purportedly on behalf of the applicant without obtaining the necessary authority to do so and accordingly no costs or disbursements are recoverable from the applicant and I make the order sought in the application.

J A Ringrose

General Member

Civil and Administrative Tribunal of New South Wales

2 October 2015

I hereby certify that this is a true and accurate record of the reasons for decision of the

Civil and Administrative Tribunal of New South Wales.
Registrar

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Decision last updated: 30 October 2015