Decision No: [2011] NZREADT 14

Reference No: READT 076/10

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**SAMUEL ROGERS**
	Appellant
AND	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10028)**
	First Respondent
AND	**BERNARD AND JAN McGILLEN**
	Second Respondents

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Judge M F Hobbs - Chairperson
Ms J Robson - Member
Mr G Denley - Member

Hearing: 4 July 2011

APPEARANCES

The Appellant in person
Michael Hodge for the first respondent
The Second Respondents in person

Introduction

[1] This is an appeal by Samuel Rogers ("the appellant") against the decision of Complaints Assessment Committee 10028 ("the Committee") pursuant to s 89(2)(b) of the Real Estate Agents 2008 ("the Act") that the appellant engaged in unsatisfactory conduct pursuant to s 72(a) of the Act which provides:

> *"**72 Unsatisfactory conduct***
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
>
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee."*

[2] The appellant is an approved salesman who at the material time was employed in that capacity by Full Circle Realty Limited Ray White Northwood.

[3] The second respondents complained to the Committee that the appellant:

(a) Failed to disclose a proposal for a high density development directly opposite the property for which the second respondents had signed a Sale and Purchase Agreement.

(b) Misrepresented in the negotiations for the property that there was a multi-offer situation in order to achieve a higher price for the property.

(c) Presented the property unprofessionally, appeared as if he had no specific knowledge of the property and made no effort to show the property during their private viewing.

[4] After hearing the complaint the Committee concluded that complaints (a) and (b) were established on the balance of probabilities and that the appellant's conduct was accordingly unsatisfactory. The Committee ordered that he be censured.

[5] The appeal is by way of rehearing, s 111(3) of the Act and after hearing the appeal the Tribunal may confirm, reverse or modify the determination of the Committee.

[6] In accordance with the decision in the Supreme Court *Austin, Nichols & Co v Stitchting Lodestar*[1] the Tribunal should arrive at its decision in accordance with its opinion notwithstanding that this may involve an assessment of both fact and degree.

Material facts considered by the Committee

[7] The second respondents wished to buy a property in Prebbleton, Christchurch. They contacted Jackie Wither an agent they knew who worked for Harcourts. Ms Wither took the second respondents to an open home at No. 3 Birchwood Manor, Prebbleton.

[8] The second respondents met the appellant at the open home where he was taking people's names. It appears the second respondents liked the property and had a further viewing with the appellant. The second respondents complained that they asked the appellant a number of questions about the property which they expected as a real estate agent he should have been able to answer but he was not able to.

[9] Nonetheless the property met the second respondents' requirements and they decided to put in an offer. On Monday 21 September 2009 the second respondents were apparently told that it was a multi-offer situation and that all offers were to be presented two days later on Wednesday 23 September at 5.00 pm.

[1] [2008] 2 NZLR 141

[10] The property had been advertised for offers over $495,000 and initially the second respondents' maximum price was $500,000, however the second respondents said that they were initially told there were to be around four offers which were then revised to three. The second respondents decided to put in a stronger bid due to the multi-offer and put in an unconditional offer of $530,000.

[11] At 4.30 pm on the afternoon of the Wednesday when the offers were to be presented the second respondents were spoken to by another agent and told that there was now not going to be a multi-offer and did they want to adjust their offer. The McGillens adjusted their offer accordingly down $5,000 to $525,000 to meet the deadline for the offer, which they believed was still 5.00 pm, and this offer was accepted.

[12] A week before the date of possession on 3 December 2009 two neighbours opposite the second respondents' new property visited and confirmed that the second respondents were the purchasers of 3 Birchwood Manor. They asked if the second respondents were aware of their intention to develop residential units across the road and Mr McGillen advised them that they were not so aware. The visitors advised Mr McGillen that the vendors had signed the resource consent and left documents about the development for the McGillens to read.

[13] The second respondents looked at these documents and discovered that a high density development of which they had no knowledge was to be developed directly opposite the house they had purchased and were taking possession of in a week's time.

[14] The second respondents then called Ms Wither at Harcourts and made enquiry about the situation and were told that Ms Wither was aware of the potential subdivision and that it had been on the go for a number of years and needed all residents in the immediate vicinity to give consent which to her seemed to be unlikely.

[15] The second respondents advised Ms Wither that there was no way they would have considered the property if they had thought a high density subdivision was going to take place across the road. Mr McGillen expressed his irritation that the appellant and the vendors had not mentioned the subdivision to him.

[16] The second respondents then called the appellant and informed him about the visitor they had spoken to and queried why he did not disclose such a significant development. Mr McGillen said that he would be discussing the situation with his lawyer. Mr McGillen said that the appellant was happy to work with the McGillens to resolve the issue, was happy to discuss it with their lawyer and even mentioned the possibility of compensation. The appellant suggested that Ms Wither should share the blame for non disclosure as she knew of the development.

[17] The Committee was told that the appellant then called Ms Wither who then called the McGillens and Mr McGillen said she had agreed that perhaps she shared some blame for non disclosure of the potential development.

The Appeal

[18] On 9 January 2011 the appellant filed a Notice of Appeal with this Tribunal.

[19] At a Directions Conference held on 1 April 2011 the Tribunal made a number of orders including directions that the appellant file and serve his Briefs of Evidence by 9 May 2011 and that the second respondents file and serve their Briefs of Evidence by 23 May 2011. These directions by the Tribunal were not complied with and neither the appellant nor the second respondents filed Briefs of Evidence before the hearing of the appeal.

[20] At the hearing the Tribunal agreed to allow both the appellant and either of the respondents to give oral evidence before it and the Tribunal then proceeded to hear evidence from both the appellant and Mr McGillen.

Evidence

[21] The appellant's evidence added little to the material before the Committee contained in the Bundle of Documents produced by Counsel for the Committee pursuant to the Direction Conference.

[22] It appears that the property was listed through Amie Thompson an agent with Ray White, although Ms Wither from Harcourts and the appellant were both involved in marketing the property.

[23] This arrangement is apparently known as a *"work in"* situation and in this case the commission was shared between the three agents – 80% split between Amie Thompson and the appellant with 20% for Ms Wither.

[24] The appellant confirmed that he knew of the proposed subdivision which was originally proposed to be of eight sections but which was subsequently increased by a further nine sections to a total of 17.

[25] The appellant gave us no explanation for his failure to advise the McGillens of this simply saying that it didn't really enter his head to do so and rather suggested that Ms Wither and Ms Thompson were at fault.

[26] As far as the "*multi offer*" complaint was concerned the appellant's evidence again added nothing to the material in the Bundle of Documents.

[27] We are satisfied that by his own admission there was never an offer for the property from anyone other than the McGillens. At best there were only three other people interested in the property who although expressing their interest did not ever make an offer.

[28] It is plain that the McGillens were told there was a multi offer situation and while the evidence is not conclusive it appears that Ms Thompson was the agent who told them.

[29] In any event the appellant said in evidence that he and Ms Thompson made it clear that all offers would be presented at 5.00 pm on Wednesday 23 September 2009 following an open home and that Ms Wither was aware of that.

[30] It appears that at about 4.30 pm on 23 September Ms Thompson called Ms Wither to advise her that there was no longer a multi offer situation.

[31] The McGillens were advised of this and reduced their offer although their final offer was still more than they had originally intended, brought about Mr McGillen said because of the pressure of time they were under with the deadline of 5.00 pm that day.

[32] Mr McGillen in his evidence was referred to his original complaint to the Committee dated 25 February 2010 which contained the following statement:

> "At the time of negotiations Sam represented that this was a multi offer situation with several offers being presented to the vendors. We received one hour's notice that in fact only our offer would be presented."

Mr McGillen said that statement was not correct in naming the appellant as the agent who told them about the multi offer situation.

[33] In the end result we are satisfied the McGillens became aware of the existence of multi offers which affected the price they paid for the property even if it wasn't the appellant who told them.

[34] We agree with the submission of Mr Hodge that as one of the agents acting jointly for the vendors the appellant cannot disassociate himself from the action of his co-agents Ms Wither and Ms Thompson – they were individually and collectively responsible for information supplied to the McGillens in the course of negotiations.

[35] Unfortunately we did not have any independent and qualified evidence relating to the *"work in"* practice of agents to consider but it is abundantly plain to us that it is a practice which in this case led to confusion and has the potential to do so in all cases where it is adopted without clear and concise documentation for the benefit of a potential purchaser.

Conclusion

[36] The onus rests on the appellant to show that the Committee was wrong to come to the conclusion it did in finding the appellant's conduct was unsatisfactory in relation to the two complaints: failure to disclose the proposed subdivision and misrepresenting the multi offer situation.

[37] The Tribunal is in no doubt that the appellant has failed to discharge that onus.

[38] As we have said the appellant's evidence added little or nothing of relevance to the material before the Committee. We are left with the clear impression that the appellant's attitude towards his obligations as an agent were cavalier and fell far short of the standard to be expected of a reasonably competent licensee.

[39] On his own admission he failed to disclose the existence of the proposed subdivision and his failure to advise the McGillens that at no time were there any offers other than theirs is both incompetent and unsatisfactory.

[40] We should record that when looking at his conduct as a whole the Tribunal gave consideration to referring the matter back to the Committee with a direction to lay charges of misconduct under s 73(a) of the Act.

[41] The appeal is dismissed and the determination of the Committee confirmed as to the finding of unsatisfactory conduct but it is modified as to penalty because the conduct of the appellant occurred prior to 17 November 2009 with the result that s 172 of the Act applies and as an approved salesperson and not a licensee no penalty can be imposed on the appellant.

[42] In accordance with s 113 of the Act the Tribunal advises the parties of the right to appeal this decision to the High Court pursuant to s 116 of the Act.

DATED at WELLINGTON this 12th day of July 2011

Judge M Hobbs
Chairperson

_____
Ms J Robson
Member

_____
Mr G Denley
Member