Decision No: [2011] NZREADT 8

Reference No: READT 070/10

IN THE MATTER OF	s 111 of the Real Estate Agents Act 2008
BETWEEN	**CAROL WETZELL**
	Appellant
AND	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10032)**
	First Respondent
AND	**HAMILTON MAC VICAR**
	Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Judge M Hobbs - Chairperson
J Robson - Member
G Denley - Member

Hearing: 4 May 2011

Appearances: Tim Rea for the appellant
Michael Hodge for the first respondent

Decision: 6 May 2011

DECISION

Introduction

[1] This is an appeal brought by Carol Wetzell, a licensed salesperson, under the Real Estate Agents Act 2008 ("the Act") against a determination of a Complaints Assessment Committee 10032 ("the Committee")

(a) Finding that the appellant had engaged in unsatisfactory conduct in her dealings with the complainant Hamilton Mac Vicar (decision dated 5 November 2010) and

(b) Ordering Ms Wetzell to pay the sum of $4,575 to Mr Mac Vicar (decision dated 9 December 2010).

[2] Mr Rea for the appellant has made extensive submissions addressing eight issues including a further ground of appeal but in essence we consider we need only consider two of those:-

(a) Did the appellant at the material time engage in unsatisfactory conduct? and

(b) Did the Committee make a mistake of law in finding it had jurisdiction to impose the penalty it did relying on s 93(1)(f) of the Act?

Background

[3] On 20 November 2008 the second respondent listed his property at 33 Seacliff Avenue, Devonport for sale with Barfoot & Thompson. The appellant was a salesperson for Barfoot & Thompson acting on the sale.

[4] The listing agreement was for a sole agency from 20 November 2008 to 30 January 2009 (first listing agreement). The commission structure specified in the first listing agreement was 4% on the first $200,000, 2% on the next $300,000 and 1.5% on the balance.

[5] The sole agency was extended on two occasions through to 10 April 2009, at which point the sole agency was not renewed and the first listing agreement reverted to a general agency. The property was advertised on Trade Me during this period.

[6] In or about September 2009 the second respondent contacted the appellant suggesting that the advertisement on Trade Me be removed and then relisted so that the property would show as a new listing so that it did not appear to have been languishing on the market.

[7] At this time the appellant took steps to have the second respondent sign a new listing agreement with Barfoot & Thompson. When asked by the Committee's investigator why a new listing agreement was necessary the appellant answered:

> *"Because at Barfoot & Thompson if you wanted a new listing number the property must be withdrawn for at least a month. This is to prevent listing numbers being changed merely to freshen up the listing. So during that month there is no listing authority. Not even a general authority. The whole thing was at his own request because he thought the listing number made his listing look stale. This is the first one I have ever done just to freshen up a listing so that is why I talked to Head Office to see what procedure I had to follow. I was advised by Head Office that I could take it off the internet for a month then relist it as a new listing with an updated number. After learning how to do this I got back to Jock (Mr Mac Vicar) and explained this and he was fine with that".*

[8] The second respondent signed a new listing agreement for a sole agency with Barfoot & Thompson on 4 October 2009 (second listing agreement) the circumstances of this were again explained by the appellant in her interview with the Committee's investigation:

> *"We agreed I would write a new listing for him and drop it in his letterbox as I live not far from him. He told me he would sign it and would leave it in his letterbox the next morning so I could pick it up. It wasn't there so I came to the office and phoned him and he asked me to send it to him by fax which I did and he returned it by fax without any questions and with one month's sole agency.*
>
> *Question: Did you inform Mr Mac Vicar on the change of commission rates?*
> *Answer: It was never discussed; it was recorded on the sole agency form I faxed in. It is not a procedure to get customers to sign next to the commission rates".*

[9] The second listing agreement provided for an increased commission at the rate of 3.95% on the first $300,000 and 2% on the balance.

[10] In his complaint to the Committee the second respondent alleged that the appellant had told him that the commission rates under the first listing agreement would continue to apply. The second respondent also alleged that in a subsequent conversation the appellant apologised to him for failing to alter the commission rates on the second listing agreement saying it was too late to do anything about it but that she was prepared to pay partial compensation out of her own pocket. The appellant denied such conversations took place and told the Committee investigator she was absolutely certain that she never had any conversation with the second respondent about commission rates when the second listing was signed.

[11] On 6 February 2010 an agreement for sale of the property was concluded by Barfoot & Thompson for $1,350,000. The Agreement for Sale and Purchase specified the commission structure in accordance with the second listing agreement at 3.95% on the first $300,000 and 2% on the balance.

[12] On 9 February 2010 Barfoot & Thompson released the deposit on the sale of the property to the second respondent, less the commission calculated in accordance with the second listing agreement. The Committee found that the net effect of the changes to the Commission structure was that the second respondent was required to pay an additional $6,862.50 to Barfoot & Thompson as commission on the sale of the property.

[13] The appellant made no approach to her managers about reducing the commission to the level payable under the first listing agreement.

[14] From this outline of events it can be seen that there was a conflict between the appellant and the second respondent as to what was or was not said about the time the second listing agreement was signed on 4 October.

[15] In its decision the Committee at paragraph 4.8 acknowledged the conflict but made no attempt to resolve it because at paragraph 4.5 it concluded that the appellant had a positive duty to draw to the second respondent's attention the change in the commission rates.

[16] There is no basis in law for asserting the existence of such a duty either under the general laws of contract or the law of agency and the Committee was in error in so finding. Furthermore the second respondent was aware the rates had been changed and was perfectly capable of confirming that by reading the new listing form.

[17] The Committee could have resolved the conflict by applying s 88 of the Act and hearing evidence on oath from both parties but this was not done.

Approach on Appeal

[18] This is a general appeal by way of rehearing. The principles set out in the Supreme Court's decision in *Austin Nichols & Co Inc v Stichting Loadstar*[1] therefore apply. We accept it is for the Tribunal to consider the facts afresh and reach its own view on the merits of the case, even where that involves assessments of fact and entails value judgements.

[19] It is for this Tribunal to come to the conclusion on the facts before it rather than considering whether or not the views reached by the Committee were reasonably available to it or whether the Committee was right or wrong.

[20] Because the appeal is by way of rehearing under s 111(3) of the Act, any of the parties could as of right require evidence to be heard by this Tribunal on issues that were before the Committee. See *Trenwith v Badiei*[2].

[21] In the present case counsel for both the Committee and the appellant elected not to call evidence and the second respondent advised the Tribunal he would not be calling evidence and would take no part in the appeal.

[22] The appeal therefore proceeded on the basis of legal argument only on the issues contained in the written determination of the Committee together with the record of correspondence and other matters contained in an agreed bundle of documents.

Issue 2(b)

[23] It is convenient to deal first with the issue of the penalty imposed by the Committee and that can be dealt with very shortly.

[24] The Tribunal has no doubt that the alleged unsatisfactory conduct of the appellant was limited solely to the period up to and including the signing of the second listing agreement on 4 October 2009.

[25] To find as the Committee did that the appellant's alleged unsatisfactory conduct was somehow connected to the time when the commission was actually deducted by Barfoot & Thompson on 9 February 2010 is untenable. There was nothing the appellant as an employee salesperson could do at that point apart from her goodwill

[1] [2007] NZSC 103
[2] [1996] DCR 9

offer to give her share of the commission to the second respondent and in any event nothing the appellant did or did not do at that point could be considered as *"real estate agency work"*.

[26] It should be noted that the second respondent's complaint was based almost entirely on his version of the events surrounding the signing of the second listing agreement on 4 October 2009.

[27] Section 172 of the Act provides as follows:-

172 Allegations about conduct before commencement of this section

(1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—

(a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and

(b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.

(2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.

[28] We are therefore satisfied that the order made by the Committee under s 93(1)(f) was made entirely without jurisdiction on the basis that the conduct complained of took place prior to 19 November 2009 when the 2008 Act came into force so s 172 of the Act applies to the present case and the appellant was not and never has been a licensee.

[29] Indeed for the reasons set out in our decision in *CAC v Downtown Apartments Ltd & Anor*[3] no orders could be made against the appellant as a salesperson in the event of a finding of unsatisfactory conduct.

Issue 2(a)

[30] We now turn to consider the issue of unsatisfactory conduct as alleged against the appellant.

[31] Section 72 of the Act regarding unsatisfactory conduct reads as follows:-

"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—

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(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or

(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or

(c) is incompetent or negligent; or

(d) would reasonably be regarded by agents of good standing as being unacceptable."

[32] The appellant relied on the decision of the High Court in *Nightingale v Barfoot & Thompson Ltd*[4] for the proposition that a vendor/client is contractually bound to pay commission pursuant to a listing agreement irrespective of whether the commission clause was specifically drawn to the vendor/client's attention.

[33] That case involved an allegation by a vendor that Barfoot & Thompson was unable to rely on its agency appointment contained in a clause in the general terms of sale where the provision had not been drawn to the vendor's attention. At paragraph 30 Venning J observed that:

> *"Mr Nightingale had the opportunity to read the clause when the agreement was first presented to him by Mr Godfrey. The fact that the appellants chose not to read it and have subsequently signed the agreement cannot assist them. In the absence of fraud or misrepresentation people are bound by writing to which they have put their signature whether they have read its contents or have chosen to leave them unread".*

[34] Mr Hodge for the Committee argued that *Nightingale* was distinguishable from the present case because the second respondent had been told that the second listing was required solely for the technical purpose of refreshing the listing number. In those circumstances the appellant needed to do more to draw the second respondent's attention to the new commission structure but we are not persuaded to accept that submission.

[35] In the context of this case it is we think significant that the Committee came to the conclusion that the actions of the appellant in not drawing the second respondent's attention to the change in the commission rate were inadvertent and there is as already stated no evidence before the Tribunal as to any assurances given to the second respondent by the appellant.

[36] The issue for this Tribunal is of course to decide whether or not the appellant's conduct in failing to draw the second respondent's attention to the change in commission structure fell short of the standards that a reasonable member of the public is entitled to expect from a reasonably competent licensee pursuant to s 72(a) of the Act.

[37] It seems to the Tribunal that while the failure on the part of the appellant to draw the change in commission rate to the attention of the second respondent was not perhaps *"best practice"* and agreeing as we do with the Committee that the actions of the appellant were inadvertent we cannot conclude that the appellant's conduct was unsatisfactory in terms of s 72(a) of the Act.

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[4] Unreported HC Akld 22/10/09 Venning J CIV-2009-404-4073

[38] Accordingly the appeal is allowed and the determination of the Committee is reversed. The Tribunal orders pursuant to s 89(2)(c) that no further action be taken with regard to the complaint of the second respondent.

[39] 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 6th day of May 2011

_____
Judge M Hobbs
Chairperson

_____
J Robson
Member

_____
G Denley
Member