

Decision No: [2012] NZREADT 14

Reference No: READT 046/10

IN THE MATTER OF

an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

CLAUDENE & HAYDEN GREENWOOD

Appellants

AND

**REAL ESTATE AGENTS AUTHORITY
(CAC 10042)**

First Respondent

AND

LEADERS BAY CITIES LIMITED

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

APPEARANCES

Appellants in person
Ms N Wilde for the first respondent
Ms McDonald Director of the second respondent

HEARD at NAPIER on 26 January 2012

DECISION

Introduction

[1] Mr and Mrs Greenwood appeal a decision of the Complaints Assessment Committee dismissing their complaint against Leaders Bay Cities.

[2] Mr and Mrs Greenwood own a property at 14 Knorp Street, Otane, Central Hawke's Bay. In 2009 they decided to sell this property and they listed it with ReMax (now changed to Leaders Bay Cities Limited). They initially entered into a sole agency with an agent called Anne Porter. Mr and Mrs Greenwood agreed to pay for customised photos on a sign board for the sum of \$100. In return Ms Porter agreed to a fixed commission of \$10,000 including GST and to meet the costs of advertising. The exclusive agency expired on 14 November 2009 but by this date the property had not sold. The listing price was shown as \$395,000.

[3] On 28 September 2009 Ms Porter advised the Greenwoods that she felt that the property was overpriced as the GV was only \$285,000 and the asking price was \$100,000 more than that. Mrs Greenwood told the Tribunal that Ms Porter suggested that their property be listed as a "*price negotiable*" and they agreed to this. In their e-mail to Ms Porter on 1 October said that they expected a new GV to be issued shortly and that they would also seek to have this increased if it was less than \$365,000. They reiterated that \$395,000 was a starting point for negotiations.

[4] The second respondent changed its name to Leaders Bay Cities on about the 8th or 9th of November 2009. Mr and Mrs Greenwood received an undated letter (document 12 of the second respondent's documents) on or about the 8th or 9th of November advising that ReMax would be changing to Leaders Bay Cities Limited. They were advised that the sign board outside their home would be removed and then replaced within five days at ReMax/Leaders' cost. On 11 November Ms Porter e-mailed the Greenwoods and said that she had not had much luck in selling the property and told them that they would be getting a replacement sign in due course. Ms Porter also asked the Greenwoods if they wished Leaders to continue marketing the home. The Greenwoods did not reply and Ms Porter e-mailed again on 20 November again asking for instructions as the listing agreement had "*run out*". She also let the Greenwoods know that she was moving to Tauranga and that if they wanted to continue marketing their property that she would recommend another agent, Jodie Dalton, (also with Leaders) who lived in Otane.

[5] On 22 November Mrs Greenwood said that she realised that they had not paid for the sign and that they would pay for it immediately and e-mailed Ms Porter asking when the sign was being replaced and asked Ms Dalton to contact her. After that first e-mail Ms Porter e-mailed Ms Dalton and said that if the Greenwoods signed up Knorp Street (on a sole agency) they would still get a free sign board. Ms Dalton met with Mrs Greenwood on 2 December 2009. Their accounts of the meeting differ slightly. Mrs Greenwood said they did not discuss ending the general agency (which according to the ReMax/Leaders agency agreement remained on foot for 12 months after the sole agency expired or until cancelled in writing). Mrs Greenwood said she asked for the signage to be replaced and she agreed that they would look at re-marketing the property again in early January. Ms Dalton took from this that she should contact the Greenwoods again in early January and that they wished to remove the property from the market. She advised the Leaders office of this and they removed the listing from their records. Greenwoods' claim that their property however remained listed on the internet during this time with Leaders. The Greenwoods themselves continued to list it on Trade Me. Mrs Greenwood paid the \$100, for the sign board, to Ms Dalton.

[6] On 14 January Ms Dalton e-mailed the Greenwoods and told them that she was also leaving Otane and suggested that Mr David Goldsbury, who was the Central Hawke's Bay agent, would be happy to come and meet with them and have a chat about the "*best way to sell the home*" and give them an updated market appraisal. She again mentioned that if they stayed with Leaders that the sign board would go up for free. On 15 January Mrs Greenwood e-mailed back and said that she would like to re-sign with Leaders, asked that Mr Goldsbury contact them, and said that they would like another sign up as soon as possible. On 21 January Ms Dalton replied apologising for the delay and saying that she had contacted David Goldsbury and that he would phone her to arrange a meeting for the weekend.

[7] On 23 January Mr Goldsbury e-mailed Mrs Greenwood and after an exchange of e-mails they arranged to speak to each other in the middle of the following week. At the

end of the following week on 29 January Mrs Greenwood e-mailed Mr Goldsbury again and said that she had been in to see the Council about whether the property was sub-dividable and was told that it could be sub-divided. She reminded him of the commission agreement that she had had with Ms Porter: (\$10,000 including GST commission and no advertising costs other than the sign). She again asked for the sign board to be replaced. Mr Goldsbury arranged to meet her on Wednesday 3 February. He carried out a formal appraisal on the property and gave it a marketing base of \$315,000 and a range for the property of \$299,250 to \$362,250.

[8] Mr Goldsbury presented this appraisal. He said that Mrs Greenwood was shocked at the level of his appraisal and said that they wanted to list the property at \$395,000. Mr Goldsbury explained the value of marketing and the fact that the market was slow. He asked the Greenwoods to sign the listing agreement. Mr Goldsbury explained that Mrs Greenwood told him that she was not willing to pay for any advertising and wanted a new sign for free. She said that she would consider the pricing and get back to him. On 7 February there was an exchange of e-mails between Mr Goldsbury and the Greenwoods. On 10 February Mrs Greenwood e-mailed Mr Goldsbury saying *"happy to sign up with you on these terms, company will pay for new sign, selling fee will be \$10,000 plus GST"*. She asked about whether or not he would be running small ads in the magazine. She asked about the sign again and confirmed that the asking price was high \$300,000s. There was no further correspondence from Mr Goldsbury. He says that he called her with the intention of making a time to visit them to get the listing agreement signed and had another discussion about price expectations. Mr Goldsbury told the Tribunal that he felt that their price was too high and promotion was critical. He said that Mr Goldsbury said Mrs Greenwood was not happy with his appraisal, she wanted the property listed *"on her terms and her price"* and decided that she would *"leave it for a while"* and did nothing further at that time. He said that Mrs Greenwood did not want to do anything further at this time.

[9] The Greenwoods assert that they advised Mr Goldsbury that they wanted to sign up the listing authority but heard nothing further from him at all. Sometime before 21 February the Greenwoods heard from Robbie Horton who said that Mr Goldsbury had left Leaders and that he would now be marketing their property for them. Mrs Greenwood claimed that Mr Horton said that Mr Goldsbury had left the company but Mr Horton denied this.

[10] Mr Horton completed another appraisal, again with the GV as the marketing base. Between February and March this had gone from \$315,000 to \$330,000. His premium price was \$379,500. Whilst the Greenwoods were unhappy (to say the least) to face a fourth agent, they re-signed the exclusive listing agreement with Mr Horton on 17 March with the agreed commission of \$10,000 including GST. The issue of who would pay for marketing remained uncertain. Mr and Mrs Greenwood asserted that the arrangement that they reached with Leaders in September 2009 was that the marketing would be paid by Leaders. Leaders took the view that that was an arrangement reached with Ms Porter and was only available for the first exclusive agency.

[11] In late March 2010 the sign board was finally replaced. Mrs Greenwood was now feeling somewhat aggrieved. She felt that the entire summer had passed without the sign board on display. She felt that the entire summer had been lost. She told the Tribunal that in a small community properties are often sold by potential purchasers simply coming to the community and driving around. She advised that another property had been sold just down the road on 17 March and achieved a very good price. She felt

this could have been achieved by them if the listing board had been on the property as she had requested on numerous occasions.

Summary of Complaints

[12] Mrs Greenwood's first complaint to Leaders was made on 17 March 2010, the date on which they re-signed the sole agency. The complaint was that the property was listed with Leaders (then known as ReMax) in September 2009 and the marketing of their home had been delayed over the summer. She asked what Leaders would propose to remedy this complaint. Ms Domney (the branch manager) replied that Leaders would have the photo sign board replaced at their expense and said that if they wanted to list with another agency she would reimburse them the \$100. Mrs Greenwood did not accept this proposal. She said that she did not feel that a sign board that they had already paid for was compensation for the marketing opportunity that they had missed over summer. She asked whether Leaders wanted to rediscuss it or whether or not they should go to the Real Estate Agents Authority.

[13] A meeting was set up for 21 April 2010. This meeting lasted a mere four minutes. The parties have different recollections of these four minutes. The Greenwoods claim that Ms Domney entered the meeting and told them that their property was overpriced and that they would not sell it at this price. The Greenwoods claim that this was the first time that they had heard this. Mrs Greenwood said that the appraisal from Mr Horton had been \$330,000 to \$379,500 which they were very happy with. Ms Domney said that if the service had not been up to expectations then they should have gone elsewhere and handed them a letter terminating the agency agreement. Ms Domney agreed that the meeting was four minutes long but felt that the service given to the Greenwoods had been excellent. She said that they had unrealistic price expectations and that they were not prepared to work with Leaders in marketing the property to achieve the best value. She said that she did not believe it was appropriate for Leaders to pay for the marketing of the property.

[14] After this meeting the Greenwoods complained to the Real Estate Agents Authority. The Complaints Assessment Committee decided to take no further steps on their complaint.

The Tribunal's Decision – CAC Awarded

[15] The parties all felt very passionately about what had happened and who was to blame. The Tribunal's job is to take from this evidence the issues relevant to its determination and to decide how the appeal should be determined. The issues are:-

- (i) Was Leaders carrying out "*real estate agency work*" between November and March 2010?
- (ii) Was there any failure by Leaders Bay Cities in the way in which it carried its work for the Greenwoods?
- (iii) If so was this failure which is sufficiently serious to amount to professional misconduct or unsatisfactory misconduct?

[16] Submissions were filed on behalf of the appellants by counsel and on behalf of the second respondent by their solicitor and it was supplemented by submissions from the

parties themselves. Mr Bigio for the Greenwoods submitted that the conduct of Leaders was inappropriate and that they were in breach of a number of the Rules under the Real Estate Agents Act 1976. He submitted that whilst the sole agency ended on 14 November 2009 a general agency was in place for a period of one year after that time. This was not terminated. He further submitted that no current market appraisal was given by Leaders when the property was listed in September 2009, which was a breach of the then existing REINZ rules, Rule 13.1. He submitted that Leaders failed to honour its own commitment to replace a sign board within five working days, it failed to respond in a timely manner to requests from the Greenwoods to replace the two signs, it prepared inadequate market appraisals, it attempted to resile from previously made agreements with the clients – first the replacement sign and then the terms and conditions of the second sole agency and it made an unsubstantiated and unjustified cancellation of the second sole agency. He submitted this conduct fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee and is therefore unsatisfactory conduct.

[17] In reply the solicitors for the second respondent deny that there was any unsatisfactory conduct. They submitted that that was consistent with the parties' behaviour and industry standards at that time. There was no agency agreement between the parties after the oral cancellation of the agency by Mrs Greenwood in early December 2009. They submitted that there was no agency agreement in place again until mid March 2010 and thus there was no real estate agency work to which the sections 72 and 73 of the Act would apply. Factually they submitted that there were significant differences in view between Leaders and the Greenwoods as to the price at which the property should be marketed. They submitted that the appellants' own conduct was unreasonable and that they should have signed with another agency rather than continue to assert that Leaders were taking the wrong steps. They submitted that there had been no breach of the rules by Leaders and that their conduct at all times was satisfactory.

[18] They further submitted that the parties had reached no consensus as to what was agreed and the conduct of Leaders must be examined within that context.

Discussion

[19] Leaders submit that the request by the Greenwoods for a new sign was not evidence of an on-going general agency – simply that the Greenwoods were still thinking of signing a new sole agency.

- (i) They submitted that there was a market appraisal given by Anne Porter and all agents felt properly overpriced.
- (ii) They submitted that the sign was replaced promptly after the agreement was signed in March 2010.
- (iii) Finally Leaders submit that while they cancelled the agreement on 21 April 2010 it was in circumstances where the relationship with the Greenwoods was untenable.

[20] The Real Estate Agents Authority made helpful submissions on these issues.

[21] The Tribunal need to make a number of findings of fact in order to resolve this case.

We find:

- [a] In the context of the time Ms Porter did an adequate market appraisal and wrote and set out her subsequent view on price.
- [b] Leaders' sole agency expired on 14 November. The sign was removed on 8/9 November.
- [c] Leaders promised to replace it within five days but did not do so. They should have done so. The \$100 fee never seemed to be an issue at that time. Mrs Greenwood asked for it to be replaced as offered by Leaders on 22/11/09; 15/01/10/ 29/01/10; early February 2010 and March 2010. It was not replaced until 26 March 2010.
- [d] We find that a general agency existed after the expiry of the sole agency in November 2009. We accept the Greenwoods' claims on this point. We do not find that there was an oral cancellation in December 2009.
- [e] We find that the service received from Leaders from January until March 2010 was significantly less than the service the Greenwoods should have received. The Greenwoods may have been concerned about the price but they were consistently asking for an agent to "re-sign" the agency agreement and replace the sign. They did not receive it. We find that in this the conduct of Leaders fell below that to be expected of a real estate agency in their handling of the issue over the sign.
- [f] We reach no view on the terms of the sole agency which the parties agreed in September 2009 and whether these terms were only for the first sole agency or were to continue. There has been insufficient evidence on this point.
- [g] We accept that a right to cancel an agency agreement on reasonable notice could be implied into an agreement [see *Gu v Du* [2011] NZCA 577- even if this case was about a sole agency we consider that the decision will apply to a general agency too]. However the immediate cancellation that the Greenwoods' received was neither acceptable nor appropriate in this case. We find that in this the conduct of Leaders fell below that to be expected of a real estate agency. Mrs Greenwood's concerns were not addressed and an immediate cancellation amounted to unsatisfactory conduct.

[22] In conclusion we consider that Leaders' overall management of the agency and relationship with the Greenwoods fell short of that to be expected and amounts to unsatisfactory conduct pursuant to s 72 of the Real Estate Agents Act. We therefore quash the finding of the CAC and substitute our view that the conduct amounted to unsatisfactory conduct.

Penalty

[23] We consider that we have heard enough evidence to determine the issue of penalty under s 93. Mr and Mrs Greenwood have not suffered a quantifiable loss because of

these failures but have incurred costs and expenses. We record the Greenwoods' view that the sale of their property did not sell over summer (or at all) because of the lack of a sign board. This cannot be established for the purposes of quantifying a loss.

We order therefore:

- (a) That Leaders apologise to the Greenwoods for their actions as set out above [s 93(i)(c)].
- (b) That Leaders (the licensee) pay a fine of \$2,000 to the Authority [s 93(1)(g)]
- (c) That Leaders (the licensee) pay to the complainants the sum of \$1,500 as compensation for their expenses incurred in the CAC hearing and two appearances in Napier Court with attendant childcare and time off work.

[24] Pursuant to s 113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s 116 of the Act.

DATED at AUCKLAND this 2 day of April 2012

Ms K Davenport

Ms K Davenport
Chairperson



Mr J Gaukrodger

Mr J Gaukrodger
Member

Mr G Denley

Mr G Denley
Member