

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 17

READT 067/11

IN THE MATTER OF

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

BETWEEN

CHRISTINE RUSSELL

Appellant

AND

**REAL ESTATE AGENTS AUTHORITY
(CAC 10057)**

First respondent

AND

MARIANNE HOEN

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

HEARD at WELLINGTON on 23 March 2012

DATE OF DECISION: 20 April 2012

APPEARANCES

The appellant on her own behalf
Ms N Wilde, counsel for the Authority
Mr P C Gilbert, counsel for second respondent

DECISION OF THE TRIBUNAL

The Issue

[1] Was the licensee real estate sales-person guilty of unsatisfactory conduct as set out in para [5] below?

[2] Essentially, the appellant considers that the licensee has been guilty of unsatisfactory conduct as the real estate agent who sold her house in Karori, Wellington. The appellant appeals against the 27 April 2011 decision of Complaints Assessment Committee 10057 to take no further action in respect of her complaint against the second respondent.

The Statute

[3] Section 72 of the Real Estate Agents Act 2008 defines “*unsatisfactory conduct*” 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 –

- (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.*

“Misconduct” is defined in s.73 of that Act as follows:

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee’s conduct –

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
- (c) consists of a wilful or reckless contravention or –*
 - (i) this Act; or*
 - (ii) other Acts that apply to the conduct of licensees; or*
 - (iii) regulations or rules made under this Act; or*
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee’s fitness to be a licensee.”*

[4] The parties referred to some rules referred to contained in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 and, particularly, Rules 9.2, 9.16 and 9.17 which read respectively:

“9.2 A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure ...

9.16 A licensee must not advertise any land or business on terms that are different from those authorised by the client.

9.17 When authorised by a client to incur expenses, a licensee must seek to obtain the best value for the client.”

Background

[5] The evidence became somewhat detailed but the appellant’s complaint against the licensee is that, while the licensee was acting as the appellant’s agent for the sale of her Karori home, the appellant advised her of only one interested buyer when there was another interested buyer; sabotaged the four weeks advertising agreed upon for the property by cancelling it after two weeks when it had been paid for by the appellant; and made no contact with the appellant after the appellant had made a verbal complaint to her.

The Committee was able to set out the material facts in terms of the complaint quite succinctly as follows:

“Christine Russell’s complaint

- 2.1 *Christine Russell (the complainant) placed her property in Karori, Wellington on the market with Marianne Hoen acting as the agent. Sometime prior to 13 June 2010 Ms Hoen brought an offer of \$376,000 for the property to the complainant which she declined. The complainant states that she wanted to wait for the four weeks of marketing to run its course.*
- 2.2 *The complainant states that they were constantly pressured to sell the house by the agent. The property was sold for \$376,000 in late June. After the sale the complainant states that whilst she was walking the dog she ran into a neighbour (Emeny) who made her aware of the interest he had in buying the complainant’s house. She states that the neighbour told her that the agent had told him that there was already an offer of \$400,000 on the property (and that their budget was under \$400,000).*
- 2.3 *After talking with the neighbour the complainant states that she complained to the agent that they were pressured into selling the house and of the Emeny’s interest in buying the house. She states that the agent told her she “was talking rubbish and there was no other interested buyer”. The complainant complains that after this she had no further contact from the agent.*
- 2.4 *The complainant further complains that the advertising agreed for the property was cancelled after two weeks (on 19 June 2010) when the agent assumed the property was nearly sold, when in fact there may have been other buyers interested.”*

[6] The Committee also set out the licensee’s response rather succinctly as follows:

“Ms Hoen’s response

- 2.5 *Ms Hoen (the licensee), in her response states the ultimate purchasers of the property initially made an offer of \$390,000 subject to conditions including a builders report. Due to concerns raised in the builders report they did not proceed with the offer. She states that she had also received an inquiry from the Emenys who viewed the property twice but conveyed that the property was of no interest to them as it required modifications and the “buyer inquiry” range was beyond their financial budget.*
- 2.6 *Ms Hoen confirmed that the advertising was held for five weeks (and partly paid by her) after which there were no other interested buyers. She then resumed communication with the initial buyers who after a second builder’s report made an unconditional offer of \$375,000. Ms Hoen denied applying any pressure on the complainant and stated that she gave the complainant five days to consider the offer. Ms Hoen also offered to reduce her fee by \$1,500 which the complainant accepted.”*

[7] The Committee then set out its basic reasoning as follows and concluded that it could not find unsatisfactory conduct, certainly not misconduct under the Act and, therefore, decided to take no further action on the complaint:

“In the Committee’s view the question is as to whether there was another genuine interested buyer and whether they were given an opportunity to put an offer in on the complainant’s property.

The complainant identified the Emenys as the other interested party. The Emenys confirmed to the Authority that they were interested in the complainant’s property. However, they understood the interest to be around \$395,000 and believed that the property was beyond their budget. The licensee too, confirmed that she indicated the price range to the Emenys and that they were not interested.

The Committee notes that the ultimate buyers were initially interested in this price range also, offering \$390,000 which they did not proceed with. The Emenys also provided evidence that the licensee indicated a price in this range (and thus was out of their price range) but acknowledged that the licensee did come to them and ask them if they were going to put an offer in. In the Committee’s opinion it was still reasonable at this point for the licensee to market the property in the range she had indicated to the vendor (complainant). The Committee acknowledges that whilst the Emenys were an interested party they were also given the opportunity to put an offer in on the property.

After no further interested parties were found the licensee went back to the original buyer. Negotiations were entered into at this point, with the new offer reflecting an adjustment to the price of the property based on a builder’s report. In the Committee’s opinion the complainant was given sufficient time to consider this offer which they ultimately accepted. ...

The Licensee provided a schedule of advertising. There is no evidence that this advertising did not occur. In the Committee’s view the schedule clearly shows the advertising for the agreed period.

The Committee does not see any evidence of conduct that could be considered unsatisfactory or fall within the definition of misconduct under the Act. On this basis the Committee has decided to take no further action on this complaint.

Whilst there is insufficient evidence for a finding of unsatisfactory conduct, the Committee would like to point out that when licensees are asked to provide a response to a complaint made against them it is important for that licensee to answer comprehensively to avoid any misunderstanding.”

[8] As Mr Gilbert put it for the licensee, that decision of the Committee seems to have been on the grounds that the other possible interested party, despite being given every opportunity to do so, did not make an offer for the purchase of the property; and that, after no further interested parties were found, the licensee went back to the original prospective buyer and gave the complainant sufficient time to consider a second reduced offer from that buyer, which the licensee eventually accepted after much thought; and that a schedule of advertising established that advertising had proceeded for the agreed period.

[9] We heard much more evidence than did the Committee of the Authority but we come to the same conclusion as did that Committee.

Our Coverage of Facts

[10] On 19 May 2010 the appellant listed her Karori home with Leaders Real Estate (1987) Ltd and signed the Vendor Funded Marketing Authority with a buyer enquiry over \$395,000 and a sole agency contract for 90 days. The property was to be marketed between \$380,000 to \$405,000 and be advertised with the "Dominion Post" for four weeks and with "Property Press" for three weeks and the cost of this advertising was to be paid for by the appellant in advance. The licensee is employed with Remax Leaders at Karori, and has been for the past 12 years, and was the agent who attended to the appellant.

[11] At the outset, the appellant felt she should achieve \$410,000 for the Karori property but the licensee convinced her and her husband that its marketing value was about \$395,000. Accordingly, that seemed to be the targeted price and there were the usual signs, flyers, and newspaper advertising.

[12] Remax required that there be a seven day period from commencement of marketing before it would take offers for the property. Within that seven day period, neighbours (Mr and Mrs Emeny) contacted the licensee and expressed interest in the property, and were shown around it on a Friday. They seemed rather interested and had their children view the property, but the children were generally unenthusiastic about their parents purchasing the property.

[13] On the following Monday or Tuesday, the licensee called on Mrs Emeny at the home of one of her children where she was babysitting grandchildren. That was, mainly, as a social visit because that particular house had belonged to the licensee some years previously and Mrs Emeny had offered a nostalgic visit to it for the licensee. However, in the course of that visit, the licensee was asked by Mrs Emeny if anyone was interested in the Karori property of the complainant at the \$395,000 (or perhaps \$400,000) price mark. Mrs Emeny says that the licensee then shrugged as if to say "yes" so that Mr and Mrs Emeny let their interest lapse because they felt \$395,000 was much too high a price for them. That seemed to relate both to their financial position and to their knowledge that at least \$20,000 worth of renovation work remained to be done on the Karori property, although her husband is a handyman and the vendors had carried out much renovation work to the property in recent times.

[14] However, the licensee says that, on that occasion, she simply told Mrs Emeny that she, the licensee, had four interested parties seemingly at about that price (\$395,000) but nothing might come of all that and that Mrs Emeny should make an offer.

[15] From the evidence we have heard, it seems to us that not only did Mrs Emeny not make an offer, but she made it rather difficult for herself to be contacted by the licensee.

[16] A few weeks later the property sold at \$375,000. The ultimate purchasers had offered \$390,000 a few weeks previously but subject to a builders report. In fact, they obtained two builders reports. These caused the complainant vendor to accept a sale price of \$375,000 and the matter was settled in the usual way.

[17] A few weeks after settlement Mrs Emeny came across the appellant (the complainant vendor) in a Karori street and ascertained that the property had been sold for \$375,000. That caused Mrs Emeny to indicate to the appellant that she would have paid at least \$380,000 or even \$385,000 had she had the opportunity.

[18] The appellant also says that she was very much bullied and pressured by the licensee into dropping her price to, and signing a sale contract at, \$375,000.

[19] That was the background which led Mrs Russell to lay a complaint with the Authority. There are some further related facts and issues with which we deal with below.

Salient Aspects of the Oral Evidence before Us

[20] We note that Mr and Mrs Emeny were seeking to buy a suitable residential property in Karori. They seemed to have arranged quite substantial bank finance but say they would not have gone over \$400,000 as a purchase price. Also, at the outset of the saga, the licensee had told Mrs Emeny that she had another property suitable for them (Mrs Emeny and her husband) in the area and would get in touch with them; but Mrs Emeny says she did not do so and Mrs Emeny seemed to be putting it that she did not think that the licensee was efficient.

[21] Mrs Emeny emphasised to us that she and her husband would have bought the Karori property from the appellant within the range of \$375,000 to \$395,000 *"if we had got some guidance from Ms Hoen"*. However, she got the impression there were higher offers than her budget; and she maintains that Ms Hoen never came back to see her about her interest in purchasing the appellant's property.

[22] In cross examination, Mrs Emeny explained that she did not make an offer at the very outset because the real estate firm would not take offers for seven days from listing. Mrs Emeny admitted to Mr Gilbert (counsel for the licensee) that the licensee had not directly said that she had actual offers over \$400,000.

[23] Mrs Emeny admitted to Ms Wilde (counsel for the Authority) that the remaining renovation work required on the property would cost a minimum of \$30,000 and, possibly, \$50,000 to \$60,000 but said that she and her husband would have *"stretched"* to \$380,000 and probably \$385,000 as a purchase price in the circumstances. Again, Mrs Emeny said *"I felt I should have got some guidance from Ms Hoen"*. Mrs Emeny seemed to know that the vendor (the appellant) was seeking \$395,000 but insisted *"we needed guidance and I expected that from a real estate agent"*.

[24] Mr Emeny gave corroborative evidence to that of Mrs Emeny, although much of his evidence seemed to be hearsay which he had gained from Mrs Emeny. He did indicate that Mr and Mrs Emeny had sold at least six houses previously in the course of their marriage and so understood real estate processes. He asserted that he and Mrs Emeny did not offer \$385,000 for the property *"because we wrongly assumed Ms Hoen had offers over that price"*. He seemed to think that Ms Hoen should have done more to get a higher price for the vendor appellant complainant.

[25] There was extensive evidence from Ms Hoen, the licensee, and careful cross-examination of her. Indeed, the appellant/complainant was able to handle her case with quite some skill.

[26] It was clear that the licensee knew that the appellant vendor thought that the perfect buyer would be a handyman and that the vendors (Mr and Mrs Russell) did not really wish to accept less than \$395,000 for the property and considered that it was worth \$410,000.

[27] At one stage the appellant seemed to be criticising Ms Hoen for not arranging proper photographing of the property. However, Ms Hoen seems to be a competent

photographer and the appellant did not wish to be involved in the expense of “*open View*” photographing or videoing so that Ms Hoen took photographs for advertising purposes.

[28] The appellant put it firmly to Ms Hoen that Ms Hoen knew that the appellant and her husband were in a vulnerable situation and needed to leave Wellington for Westport quite urgently and that Ms Hoen bullied them into accepting a lower offer at \$375,000. Ms Hoen very firmly denied such conduct. She went into quite some detail to justify her overall handling of this sale and firmly denied applying any pressure to Mr and Mrs Russell and pointed out that they were given considerable time (about five days) to decide between themselves whether to accept the offer of \$375,000. It emerged that, possibly, they could have accepted a private offer for that amount and were advised by Ms Hoen to do so if they could but, inexplicably, they did not and seem to now regret that.

[29] Inter alia in the course of her quite extensive cross examination, Ms Hoen stated “*don’t shrug*” (with regard to Ms Hoen calling on her while she was baby-sitting as covered above) and that she had simply told Mrs Emeny that she had interest in the property from four parties, which she then did. She said the question put to her by Mrs Emeny was whether she had buyer enquiry at \$395,000 and she said that she had because she did, but she never said she had four offers. Also, she completely denied all bullying.

[30] The licensee said that she first showed prospective purchasers the Karori home on 2 June 2010 and also on 8 and 11 June 2010 but the comments of the interested people were much the same, namely, that the house needed too much work. There were a number of open homes.

[31] Apparently, the Emenys were shown the property on about 4 June 2010 but told an offer could not be made until Monday 7 June as Leaders had a seven day downtime policy after a property was first listed before an offer could be made. This was to give all prospective purchasers an opportunity to inspect the property rather than just present the vendor with the first offer made. At the time the licensee showed Mr and Mrs Emeny the property, there had been three people expressing an interest prior to them. The licensee kept records in an open home register and seemed to communicate appropriately with the appellant vendor complainant.

[32] The ultimate purchasers made an offer of \$390,000 on 13 June 2010 subject to some conditions and one was that they obtain a satisfactory builder’s report. That conditional offer was accepted but, due to the nature of the builders reports obtained, the contract was cancelled on 25 June 2010. However on that day, because there was no further interest, those prospective purchasers made an unconditional offer at \$375,000. An open home went ahead on Sunday 27 June 2010 and Mr and Mrs Russell (the vendors) had from at least Saturday 26 June to consider the \$375,000 offer which they accepted on Wednesday 30 June 2010. It seems they then referred to their having received a private offer in the past at \$370,000 to \$375,000, which Ms Hoen suggested they pursue, but they decided to accept the offer at \$375,000 presented through Ms Hoen.

[33] We note, that after they had considered the \$375,000 offer for five days, Ms Hoen offered to reduce her commission by \$1,500 and pay \$189.32 towards advertising “*to see whether that would help them reach a decision*”; and Mr and Mrs Russell accepted that offer and the contract was completed.

[34] A short time after the property was sold, the purchasers requested another inspection. Ms Hoen offered to and took them to the property. In the course of that visit, Mrs Russell informed Ms Hoen that she intended to lodge a formal complaint concerning

the way Ms Hoen had handled the sale as real estate agent. Ms Hoen, disappointed, immediately advised her manager and had no further contact with Mrs Russell. This was because the manager took over the matter on the basis that the real estate agency felt it inappropriate that Ms Hoen have any further contact with Mrs Russell as a complainant.

Discussion

[35] There was quite some confusion over why the agreed advertising campaign had not quite been carried out. Simply put, it seems that it was intended that there be a four week advertising campaign in "the Dominion" commencing on 5 June 2010. That was implemented for the weeks of 5 and 12 June 2010 but, due to a misunderstanding between the licensee and her personal assistant, the week of 19 June was overlooked. Although the week of 26 June 2010 was appropriately arranged with the Dominion, when the licensee came to arrange for the further week (i.e. a fourth week) she was obliged to take a further two weeks because of the newspaper's particular advertising process structure and she, therefore, paid for the final week herself. This meant that there were five weeks of advertising from 5 June 2010 but excluding the week of 19 June 2010. The property sold on 30 June but the advertising could not be cancelled after 28 June 2010.

[36] Perhaps, Ms Hoen could be a little forceful, dominant, and pressurising from time to time, but we cannot be sure about that. She seemed to us to be a little assertive. She appears to be an experienced and competent agent which, probably, requires a certain amount of firmness and confidence.

[37] Simply put, we find that Ms Hoen marketed the property in a sensible and proper manner. She may have put some slight final pressure on Mr and Mrs Russell to sell at \$375,000. She would have realised that they were very keen to sell and move to Westport. It seems a little gracious of her to have reduced the commission significantly, and contributed towards advertising, to help them make that decision of sale at \$375,000.

[38] When the work covered in the two builders reports is taken into account, effectively, Ms Hoen had achieved a sale for the appellant and her husband rather close to their desired price of about \$395,000. Looking at the matter as objectively as one can at this stage, the \$375,000 price obtained by Ms Hoen for the complainants seems a fair price or value.

[39] We think it possible that Mr and Mrs Emeny could, perhaps, have been manoeuvred or massaged into offering \$380,000 for the property or, perhaps, \$385,000; but that is very much conjecture and, despite their candid evidence to us, seems to be based on hindsight.

[40] We commend Mrs Russell (the appellant) for her stand on this matter which, we accept, she has taken in terms of her view of the public interest. She has given much sensible thought and effort into presenting her case and compiling documents. Nevertheless, we feel she has misunderstood or misinterpreted the overall situation. When we stand back and consider all the evidence objectively, we consider that Ms Hoen cannot be criticised in any substantive way and seems to have marketed the property in a competent manner.

[41] The advertising confusion was simply due to a human administration error which Ms Hoen did her best to remedy in a fair manner.

[42] We appreciate that Mr and Mrs Russell found themselves under emotional stress at the point on 30 June 2010 when they agreed to sell their Karori home at \$375,000. Frankly, that was probably a fair outcome for them. Mr and Mrs Emeny seem good people who have become confused with the knowledge of hindsight.

[43] It should be clear from the above that we do not find any breach of the Client Care Rules.

[44] The above facts do not reveal any unsatisfactory conduct and, certainly, no misconduct on the part of the licensee.

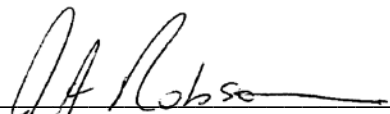
[45] We dismiss the appeal and confirm the finding of the Committee of the Authority that no action be taken against Ms Hoen.

[46] As already indicated, although we dismiss the appeal we appreciate the good faith manner in which Mrs Russell has brought this case. We feel she seeks to highlight the requirement of utterly transparent and fair dealings by real estate agents and has not been motivated by a desire for compensation, although it seems she would have liked some modest compensation for her perception of a loss.

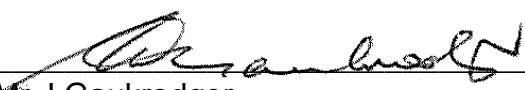




The seal is circular with the text "REAL ESTATE AGENTS" at the top and "DISCIPLINARY TRIBUNAL" at the bottom. In the center is a coat of arms featuring a crown, a shield with various symbols, and two figures flanking the shield.



Ms J Robson
Member



Mr J Gaukrodger
Member