BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 21

READT 082/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**MICHAEL HARVEY**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10063)**
	First respondent
AND	**PATRICIA KELSALL**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD at NELSON on 5 April 2012

DATE OF DECISION: 26 April 2012

APPEARANCES

The appellant on his own behalf
Ms H F McKenzie, counsel for first respondent
No appearance for second respondent

DECISION OF THE TRIBUNAL

The Issue

[1] Did the appellant engage in unsatisfactory conduct by disclosing information about a property which might be confidential personal information of a client (the complainant second respondent)? The appellant has appealed the Authority's finding that he is guilty of unsatisfactory conduct in the circumstances outlined below.

[2] The alleged information was set out in the following part of an article in the Nelson Mail newspaper, under the heading *"Property Watch"*; in mid to late October 2010:

*"**Mapua house sales rise***

Mapua house sales have suddenly picked up after "sagging a bit" during winter, Ray White Mapua agent Mike Harvey says. A three-bedroom home at 24a Tahi St that has been on the market with various firms since 2002 has just gone under contract after its price was reduced from $640,000 to offers over $580,000. It has a Rateable Value of $740,000. Mr Harvey said the price reduction attracted five offers. Meanwhile, two other "real Mapua-type properties" that had been on the market for about five months over winter both sold for $460,000 without any price reduction, Mr Harvey said. "They were good-quality, three to four bedroom homes with garages. Both of those were out-of-town buyers relocating here for lifestyle. We are attracting people who are specifically looking to live in Mapua."

[3] Section 72 of the Real Estate Agents Act 2008 defines *"unsatisfactory conduct"* as follows:

*"7**2 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."

[4] Ms McKenzie (counsel for the Authority) helpfully set out background to this appeal as follows:

*"**3 Factual background***
Summary of complaint
3.1 The Licensee is an agent for Ray White Mapua. In May 2010, the complainant appointed three agents, including Ray White Mapua, to sell her property by way of general agencies. On 19 July 2010 Ray White Mapua, with the Licensee as the listing agent, was appointed as the sole agent for the property.

3.2 The Licensee writes property-related articles for the Nelson Evening Mail. The short piece which is the subject of the first complaint was published in mid-October 2010 and relevantly reads: [as set out above]

3.3 These submissions refer to the above excerpt as an "article" notwithstanding that it is more in the nature of a snapshot of commentary on the current state of house sales in the Mapua area. It appears alongside some other small pieces in a column titled "Property Watch".

3.4 The complainant alleged that the remarks were partly inaccurate (for the purposes of these submissions, primarily in relation to the amount of time the property had been on the market and to her price expectations) and involved personal information which should not have been published. In her letter of complaint dated 9 March 2011, the complainant writes that

"[she] did not discuss the article that Mike Harvey gave to the Nelson Evening Mail in fact even agent Phil Neal (also Ray White Realty Mapua) knew nothing about it until I phoned him and complained about the breach of confidentiality." In a File Note, an investigator from the Real Estate Agents Authority records that the complainant told him that her property had been on the market for between 3 and 4 years but not continually during that period. It had generally been taken off the market during the colder months for between 3 and 6 months. The complainant further disputes that she agreed to the property being marketed at "offers over $580,000".

3.5 There was a conditional agreement for $602,500 in September 2010 which did not proceed because its conditions of the sale of a property and finance were not satisfied. It appears this contract was cancelled by the purchasers on 23 December 2010. There had been an auction on 12 August 2010 which it seems had not generated interest.

3.6 The complainant still had her property listed with the Licensee as at mid-October [2010] when the article was published and it remained thus for approximately three weeks after publication. Being upset about the publication, the complainant discussed it with the Licensee and Ray White Mapua withdrew its services. The complainant then listed her property with Harcourts.

3.7 She contends that when she subsequently listed her property with Harcourts, the Licensee told her to "go and list with Harcourts. Go and list with your dumb friends around the corner". She further alleged that the Licensee said that he was "sick of" her. These alleged comments relate to the second complaint which is not understood to be at issue at appeal."

Further Background

[5] We emphasise that there was the following material development in the appeal hearing before us. It became clear that the appellant licensee had not written the article in question but had responded to a telephone call from a well known Nelson Daily Mail journalist on property matters as he had been doing about twice a month for a number of years.

[6] The stance of the appellant is simply that all the information in the newspaper article was already well in the public arena, was available to the newspaper from its own records, and was well known to anyone living in the area who took any type of interest in the property market.

[7] The property had been to auction unsuccessfully in early October 2010. The article was written by the journalist and published by the newspaper a few weeks after that auction due to the journalist having telephoned the appellant, as the listing real estate agent, to ascertain whether there had been developments towards the sale of the property since the auction.

[8] It is clear to us that the appellant, who gave evidence and was carefully cross-examined before us, has been proud of his record up till now of no complaints being made against him as a real estate agent for over 12 years. He is a highly successful agent selling about 45 to 50 houses per annum.

[9] Part of the appellant's rationale in cooperating with the journalist's enquiries is that such an article would and, seemingly, did attract further buyer interest for his complainant client who, as it happens, had been a friend of his for about eight years until the said complaint was made.

[10] He accepts that one of the agents he employs could have handled that prospective vendor much better than he did, and he has taken steps to remedy that as best he can.

[11] Inter alia, we note that prior to the auction there seem to have been about nine weeks of advertising of the property with many open homes and much of that advertising cost seems to have been paid by the appellant. Indeed, he is still owed $580 from the second respondent's share of that cost.

[12] The appellant points out that, in terms of an offer which was signed by the complainant at $602,500 in September 2010, she took five days to sign it; and, the appellant puts it, that does not indicate that she was under pressure from him or his employee agents who he believes were very patient throughout. We shall comment in general about that particular $602,500 contract below for an entirely different reason than its rather remote relationship to the advertising issue in this appeal.

[13] The appellant feels that the second respondent's complaint has been much encouraged by a nationwide competitor real estate company in the area.

[14] Broadly, the complainant's property had a rateable value of $740,000 and, some years ago, the vendor hoped to have it sold for $750,000. However, she has gradually needed to face market reality so that her asking price was reduced to $640,000. Then there were two offers of $580,000. It is understood that recently the second respondent sold it privately for $560,000 or thereabouts. That is a little puzzling because, back in October 2010, there seems to have been a firm offer for $580,000 available through the appellant but part of his strategy was to increase that level on the basis of the $602,500 offer already mentioned.

[15] It seems that the journalist rang the appellant with an opening gambit of *"Is there anything interesting for me regarding the local housing market"*. Then the journalist specifically asked about the property at 25A Tahi Street, Mapua, Nelson, in terms of it having been passed in at auction a few weeks earlier.

[16] The appellant noted that it is a common practice for real estate agents to be using the media to help market their housing property stock. He emphasised that while he may have to some extent collated information about the vendor and the property for the journalist, that was information related only to about the previous three months and not to the previous eight to 10 years as had been alleged until the appeal hearing before us.

[17] While the appellant seems a strong personality, we have no reason to doubt his sincerity. We note that he regards the complaint in this case as thoroughly unfair to him, vexatious, and a blot on his land agency career in which he takes much pride.

The Submissions for the Authority

[18] In the usual way we received thorough and thoughtful submissions for the first respondent Real Estate Agents Authority. One of its Complaints Assessment Committees had reasoned, in the course of finding (after a hearing understandably conducted on the papers) that it had been proved, on the balance of probabilities, that the appellant had engaged in unsatisfactory conduct as alleged. We note that the Committee deferred making any decision on publication until a further hearing on penalty. The Committee's substantive reasoning was as follows:

> *"**4. Discussion***
>
> *4.1 The Licensee, in his response to the first complaint, i.e. an alleged breach of confidentiality, does not really address the appropriateness or propriety of what he wrote in the newspaper article but rather seeks to affirm the accuracy of what is there. He concludes this section of his response by saying that he is "completely comfortable there has been no breach of confidentiality". With respect to the Licensee, we disagree.*
>
> *4.2 The first observation we make is that the Committee accepts that the article was written without the prior agreement or consent of the Complainant. There is no tenable argument put forward by the Licensee as to what might be the lawful entitlement to publish this information about his client and the article clearly and obviously constituted a 'publication'.*
>
> *4.3 The only, if fundamental, issues are whether the article did contain material that a) was confidential or 'private' and b) the Complainant was identified. As to issue a), information about an individual's property and her dealings with that property can, in our view, be 'personal' information in relation to which the principles in the 'Professional Conduct and Client Care Rules' (refer para. 3.2 & 3.3) and the Privacy Act are applicable.*
>
> *4.4 More specifically, the content of the article itself included material on price and the history of the attempts to sell the property that were, we conclude, confidential, went beyond anything publicly accessible and the Licensee simply had no business divulging in his article.*
>
> *4.5 The remaining issue under this heading is whether the information in the article was personal in the sense that the individual who was the subject of it was capable of being identified. Again, our finding is in the affirmative.*
>
> *4.6 The specific street address is mentioned. It would have been a quite simple and straightforward process for anyone so minded to discover that it was the Complainant who was being referred to. The fact that the Complainant is not referred to by her name as such is immaterial. We reiterate that she was identifiable. The Committee therefore concludes that the Licensee, in his article, did breach the complainant's rights arising out of her professional relationship with the agent to confidentiality and privacy and Mr Harvey's obligations in this regard. If the article had been published without reference to the address, the Complainant would not have been identifiable and our finding would be different.*
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> *4.7 Our decision is different as regards the other complaint i.e. alleged abusive language which we intend dismissing. Firstly, the Licensee*

denies using the language alleged by the Complainant and we are unable to find, as a fact, in the light of this conflict, whether the words suggested were actually used. Secondly, there would appear to be, we have to say, a certain vagueness in the Complainant's recall of what was said, especially with respect to the possibly more serious suggestion that Mr Harvey said he was "sick" of her. Thirdly, if the language alleged had been used, that would have been, in our view, quite unprofessional and inappropriate. However, the Committee could not, we think, go so far as conclude that such language crossed the line so as to justify the serious finding that the Licensee had been guilty of 'unsatisfactory conduct'."

[19] As already indicated, more extensive evidence was adduced to us than was put to the Committee.

[20] Ms McKenzie very helpfully set out various principles relating to what comprises confidential personal information. Inter alia, she set out Rules 9.21 to 9.23 inclusive of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which read:

*"**Confidentiality***
9.21 A licensee must not disclose confidential personal information relating to a client, unless –
- *(a) the client consents in writing; or*
- *(b) the licensee is required by law to disclose the information; or*
- *(c) disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the licensee by the client.*

9.22 Where a licensee discloses information under rule 9.21(b) or (c), it may be only to the appropriate person or entity and only to the extent necessary for the permitted purpose.

9.23 A licensee must not use information that is confidential to a client, for the benefits of any other person or of the licensee."

[21] Ms McKenzie then pointed out that those Rules do not define *"confidential information"* and referred to rules applying to lawyers where *"confidential information"* is defined and put it that was a guide to us. She submitted that information acquired in the course of a particular professional relationship, even if widely known or a matter of public record, will nevertheless be confidential information. We agree that that can be so, as can the mere collation of such information. Ms McKenzie also referred to helpful parts of the Privacy Act 1993.

[22] Inter alia, Ms McKenzie noted that Rule 9.21(a) permits the disclosure of confidential personal information relating to a client where the client consents in writing. She put it that whether or not the complainant second respondent consented to the disclosure of the information as published in the Nelson Evening Mail article will be a factual matter for us. Indeed, she referred to the precise wording of the agency agreement entered into between the second respondent and the appellant as follows:

"6.8 Clauses C(1)(c) and (m) of the agency agreement are noted. These provide:

> *C ...*
> *1. The client acknowledges and agrees:*
>
> *...*
>
> *(c) to the listing information and particulars of the sale of the property being passed to any persons for marketing purposes and statistics compiled and distributed by any source utilised by Ray White.*
>
> *...*
>
> *(m) to the information contained in this agency agreement and the property description sheet, and the price for the sale of the property being passed to and used by:*
>
> - *Any person or organisation for the purpose of marketing of the property for sale;*
> - *Any person or organisation for the purpose of the statistics compiled and distributed by Ray White or any source utilised by Ray White;*
> - *Any services provider associated with Ray White, including but not limited to utilities providers, mortgage providers and insurance providers, for the purpose of the service provider marketing their services in connection with the property."*

[23] Ms McKenzie submitted that, via the newspaper article, the licensee conveyed confidential private information about the dealings with the complainant's property, namely, that it had been on the market for a long time (arguably allowing for an inference that it was not a good property); and that the sale price had been reduced in order to get a contract for the property. She submitted that while the provisions in the agency agreement between the parties may constitute consent to disclosure of information regarding the fact of the property being under contract, they do not cover the sort of information that could be taken from the article.

[24] Ms McKenzie also put it that the timing of publication of the article appears to have been when the second respondent held a conditional contract for sale of it at $602,500, but that did not proceed for reasons beyond her control (i.e. apparently that the prospective purchaser could not sell another property and, therefore, could not obtain finance). This was at a time when the complainant second respondent was actively marketing her property.

[25] Ms McKenzie also submits that the newspaper article may have suggested to the public at large that the property had been very difficult to sell and required a large price reduction. She argued that the appellant should not have published such information without the second respondent's written consent, that such information was potentially detrimental to the future sale of the property and, in any case, was confidential, personal information and its disclosure required written consent from the second respondent complainant.

[26] Ms McKenzie added that it is for the appellant licensee to show that the information was, in fact, publicly available and that, while it might be possible for an individual to search public records and for media to ascertain the history about attempts to sell the property, the appellant had drawn together in one place discreet pieces of information about the property and this went beyond the provision or repetition of publicly available information.

[27] These submissions for the Authority are very sensible in general terms.

[28] We also received very helpful additional oral submissions from Ms McKenzie who then put it that the issue is whether confidential information was provided to the Nelson Daily Mail by the appellant without the written consent of the second respondent. That is the issue. However, Ms McKenzie accepted that there had to be a shift in the complainant's stance because it is now clear that the appellant had not himself written the article which, apparently, so offended the second respondent complainant.

Our Views

[29] Obviously, licensees must be extremely careful in conversing with journalists about the sale history efforts of a property and prospects of sale.

[30] Having stood back and absorbed the evidence before us, which is much more extensive than that available to the Committee of the Authority, our attitude is that we cannot be satisfied on the balance of probabilities that the appellant's conduct has been unsatisfactory.

[31] We are not at all convinced that the appellant's conduct in issue falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee. That conduct does not appear to us to contravene any provision of the Act or its regulations or rules. We do not think there is anything incompetent or negligent arising from the appellant's said conduct, nor do we consider that his conduct should reasonably be regarded by agents of good standing as being unacceptable.

[32] It seems to us that he responded to questions from the journalist with a view to obtaining some realistic free advertising for 24A Tahi Street, Mapua, to attract further interest in selling that property at a realistic price, and to put pressure on about five people who, at that time, were rather interested as prospective purchasers but not at the figure which the vendor complainant regarded as high enough. Also, the so-called confidential information of concern to the complainant was not difficult to obtain and could have been collated by the journalist from records she had available at her newspaper.

[33] Accordingly, we allow the appeal.

[34] There is another aspect on which we comment. We have the strong impression from this case that there exists the following concerning practice apparently regarded as acceptable in the real estate industry. It seems that if there are a number of prospective purchasers, one may be encouraged/massaged to enter into a rather high price for a property but protected by the insertion of wide conditions in the purchase offer. However, that offer is used to put pressure on the other interested purchasers to significantly increase their previous realistic offers. Depending on the

precise nuances of such an activity, it could well constitute unsatisfactory conduct, including breach of the said Professional Conduct and Client Care Rules, e.g. Rule 6.4 reads: *"A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client,"* or Rule 9.2 which reads: *"A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure."* It could also constitute misconduct or even fraud, and breach of the Fair Trading Act 1986.

[35] Let the industry be warned that it may well be a dangerous practice to create some sort of semi-bogus front runner offer to attract increases of offers from known prospective purchasers. In this case, such a front runner situation was described to us as a *"sacrificial lamb practice"*. Essentially, the point seems to be that a high offer is obtained from a person who could not possibly fulfil the protective financial conditions of the purchase contract, but that high price in that conditional contract is used to endeavour to seduce other interested parties into a significant increase in their price offers. Generally speaking, that must at least be improper conduct, if not fraud.

[36] As already indicated this appeal is allowed. We do not think that a non-publication order or any other order is appropriate, but we reserve leave to apply.

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Judge P F Barber
Chairperson

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Mr G Denley
Member

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Mr J Gaukrodger
Member