BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 38

READT 083/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**MR G**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10069)**
	First respondent
AND	**MS M**
	Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at ROTORUA on 11 June 2012

DATE OF DECISION: 13 July 2012

REPRESENTATION

The appellant on his own behalf
Mr S Wimsett, counsel for the first respondent Authority
Mr T Grimwood, for second respondent licensee

DECISION OF THE TRIBUNAL

Introduction

[1] The Appellant appeals a 29 July 2011 decision of Complaints Assessment Committee 10069 to take no further action against licensee the second respondent.

[2] The appellant is a licensee and director of X X Services Ltd (X Realty), which trades in real estate as part of the LJ Hooker Real Estate group. The second respondent (the licensee) worked for X Realty from 3 November 2008 until 27 February 2011 when she resigned after having been suspended pending a workplace investigation into her conduct.

The Committee's Decision

[3] The Committee found that, in respect of an alleged misappropriation by the licensee of $380 paid by a client for vendor funded advertising, that $380 was in fact *"owed to [the licensee]"* who had paid that sum for the client. The Committee noted that X Realty's processes to collect money for vendor funded advertising were *"haphazard at best, and left room for error or doubt"*.

[4] In respect of an allegation against the licensee about a colleague's work book found in the licensee's personal bag, the Committee noted a lack of evidence as to how the book came to be in the bag.

[5] Some relevant extracts from the Committees decision are:

> *"The complaint was that the licensee had misappropriated stolen money belonging to Hookers, and had stolen workbooks and correspondence from other sales people.*
>
> *The complainant alleged that the licensee had received vendor funded advertising and had lodged it into her own bank account. He alleged that the licensee deposited $380.000 of vendor funding into her own bank account. Further, the complainant alleged that a "number of incidents with regard to the loss of people's property – there was a groundswell of suspicion" etc. "A work book belonging to a work colleague was found in the licensee's personal bag ....*
>
> *The Committee unanimously agreed that the complainant's allegation of the misappropriation of $380.00 by the licensee was unfounded. In the complainant's own witness statement (page 40) he states "now this amount had been deducted from [the licensee's] commission payments whilst she was still working here, so yes the $380.00 was owed to her". It would appear to the Committee that, the processes by LJ Hookers to collect vendor funding, were haphazard at best, and left room for error or doubt.*
>
> *The allegation that the licensee was a thief was based on the finding of a book in the licensee's bag that belonged to another sales person. The licensee was not present when LJ Hooker searched her bag. It was not proven how the book came to be there. No complaint was laid with the police."*

The Issues

[6] The appellant contends that the Committee failed to address at least two key issues raised in his complaint, namely, that the licensee altered a listing agreement after it was signed by the client, and that the licensee removed or retained keys for properties listed with X Realty after she left employment there.

Further Background

27 X Place

[7] The appellant alleges that the licensee altered a copy of the agency agreement in respect of this property after it was signed by the client vendor. The appellant provided two copies of the agreement which appear to show that particulars were

added to the office copy after the client had signed, including purported agreement on the part of the client to pay $380 in marketing fees.

[8] The licensee seems to have accepted adding information to the agreement after it was signed by the client, but stated that she did so only as a note to herself and had no intention of seeking payment from the client for advertising. Her oral evidence to us expanded that as we record below.

[9] It was noted that Rule 9.10 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 provides that a licensee must not submit an agency agreement to any person for signature unless all material particulars have been inserted into the document.

14A X Drive, 4 X Road and 33 X Place

[10] The appellant alleges that the licensee presented X Realty clients with personal invoices in respect of advertising costs relating to the above three properties after the licensee had left employment with X Realty. At least one of the invoices made reference to referral to Baycorp should the invoice not be paid.

[11] The licensee admits that she did present invoices directly to vendors in respect of the X Drive and X Road properties, but not X Place. She states that she had paid for advertising for those two clients and was entitled to try and recover those costs. She states that she was not aware that X Realty policy was that clients should pay that company for advertising and that company would then reimburse salespeople where appropriate.

4 X Place and 6g X Place

[12] The appellant alleges that the licensee retained keys for these properties after she left the employment of X Reality.

[13] The licensee accepts that she retained the key for 4 X Place, but states that she intended to return this to the vendors directly, with whom she had a good relationship; and this issue is dealt with in her evidence to which we refer below.

[14] In respect of 6g X Place, the licensee states that the key was in her drawer at X Realty and, without her knowledge, was taken out and put in a car by a colleague when the licensee left X Realty.

A Summary of the Licensee's Evidence at the Hearing Before Us

[15] First, the licensee confirmed her brief of evidence which we had received on 10 May 2012. She is currently working as a courier driver, but regards herself as a real estate agent by trade and began work in that capacity in February 2008 with Remax until that office went into receivership in November 2008; and she then went to X Realty. She was suspended from X Realty by its proprietor, the appellant, on 21 February 2011. She resigned from it on 27 February 2011 and moved immediately to Harcourts at X but had that position terminated on 9 March 2011. She then suspended her real estate agent's licence because, she put it, *"as I wanted to clear my name"*.

[16] The licensee referred to the appellant having made three complaints against her, first that she changed the details on a retained listing authority *"which was different from the one retained by the client* – as she put it to us*"*; second, that she was recovering *"outstanding vendor funding"*; and, thirdly, that she retained keys for two properties after her termination with X Realty Ltd.

[17] She emphasised that when she first commenced work for X Realty she received no induction instructions and there was no manual for her, so that she simply operated as she saw things were done at X Realty.

[18] She said that, with regard to *"the workings of vendor advertising"*, either the vendor paid for the advertising, *"up front"* or once invoiced. An invoice was issued regardless of whether the particular property was sold or withdrawn from the market. The licensee said that the appellant stressed that agents must cover the advertising costs if the vendors did not pay the invoice for the advertising; so that, if a vendor did not pay on receiving the invoice, the licensee would pay and then try and recover the money from the vendor. She preferred that the vendor did not pay the advertising invoice until the property had been sold or withdrawn from the market.

[19] The vendors of 27 X Place, referred to above, had paid a considerable amount of advertising when the licensee became their agent so she said she would pay and meet any advertising and on the listing agreement no amount was recorded for that. She was confident that the property would sell readily. However, as she put it in her evidence-in-chief, the morning after listing their property she went to her office to put the paperwork in order and *"without thinking I wrote on the listing form, that I had retained, the amount of $380 in the advertising space, purely to remind myself of the cost"*. In his complaint about that, the appellant had stated that the licensee had not told him about that advertising arrangement, but she says she would have if the appellant had responded to her efforts to discuss her resignation from X Realty.

[20] The licensee stated that she had found X Realty to be disorganised in collecting vendor funding of advertising, or even in invoicing that, which is why she would have added the $380 onto the copy of the listing agreement to remind her that she was to pay it.

[21] Another situation referred to by the licensee about advertising related to another property where the advertising cost $777.25 which the licensee paid for on the basis that the vendors reimburse her $380 of it. However, they withdrew their home from X Realty in November 2010 and sold it privately, but were reminded that they needed to pay the $380 to the licensee. Because they had not paid by 15 February 2011, X Realty charged the licensee for it. On 6 March 2011 she took a $380 invoice to one of those vendors at his place of work. That vendor said that he would pay the appellant but the licensee advised him that she had paid for it herself in the meantime. On the following Saturday, the licensee again called on that (husband) vendor who then said he needed to borrow the money from his mother, but the licensee seems to have never been reimbursed for that $380 advertising contribution. With regard to another property, the appellant had also paid $380 for advertising on behalf of the vendor and she had sought to recover that also.

[22] Inter alia, in her evidence in chief she stated:

> *"32. It is not my understanding that it was a company requirement for the vendor finance to be paid by the vendor into X Realty and then X Realty would reimburse the salesperson. I was never told that I could not request payment direct from the vendor"*.

[23] The licensee then referred to confusion between her and X Realty over advertising invoices and commissions.

[24] In terms of the allegation that she retained the keys of two particular properties, the licensee put it that, with regard to the first property, she had a very good rapport with the vendors. After an open home at their property on the day after she resigned from X Realty, she had her personal assistant remove keys to that property from a lock-box because the licensee intended to take back the key, explain her resignation to the vendors, and then return the lock-box to X Realty for a refund. Things seemed to get delayed in that the appellant was difficult to communicate with and the vendors had other commitments at the time.

[25] Eventually on 4 March 2011, the licensee received a text from one of the vendors as to the whereabouts of the key. The licensee then asked if she should bring the key over to that vendor who replied that the licensee keep it until a particular meeting arranged for Monday, 7 March 2011. Inter alia, on 5 March the appellant emailed the licensee asking about the key and was advised of the position by her.

[26] There seemed to be an inference from the appellant that the licensee might be holding the key to facilitate those vendors following her to Harcourts and he required that the key be returned to X Realty by 12.00 pm on Monday, 7 March 2011. When it was not, the appellant rang the licensee's new principal at Harcourts and complained. Despite the relaxed attitude of those vendors, the licensee's new principal at Harcourts asked her to return the key to the appellant *"to keep the peace"*. After further communicating with the vendors, the licensee did that.

[27] The licensee emphasised that she believed those vendors were at all times happy that she hold the key and return it to them on Monday, 7 March 2011.

[28] The other allegation about a key came down to the fact that the licensee had kept a spare key and garage remote to another property in her drawer at X Realty *"in an envelope long forgotten"*. This came about because that property had been withdrawn from the market in December 2010 and let.

[29] The licensee was cross-examined carefully by both counsel. There seemed to be no doubt that the first property in issue, regarding $380 advertising being added to a carbon copy of a listing agreement, was listed on the basis that the vendors pay no advertising costs. The licensee seemed to be saying that she wrote in the $380 on X Realty's copy meaning that she was to pay the $380 and to remind her of that. We understand it was to come from her share of commission.

[30] She said it was often her practice to pay the advertising and recover it herself direct from the vendor client and she endeavoured to do that in one of the cases mentioned above because she could not communicate with the appellant about some other arrangement for her to be reimbursed.

[31] In general, the cross-examination of the licensee confirmed her evidence in chief. She thought it was perfectly normal to keep a spare key in her drawer and mentioned that there was a lock-box at that property for any agent to obtain a key.

[32] The licensee emphasised that procedures for agents at X Realty were very confused and she was not at all confident that her employer would collect and reimburse her the advertising she had paid for and, indeed, on some occasions she had needed to write off that type of debt.

[33] By the end of the evidence, there seemed to be no dispute that the licensee had altered X Realty's copy of the listing form for 27 X Place so that it differed from that signed by the property owners. It seemed that a listing was not formalised by X Realty until the appellant himself checked that all written details were in order. With regard to the 27 X Place agency/listing agreement, the appellant was concerned that the firm's copy of it did not cover who paid for advertising so that the licensee felt obliged to make an appropriate addition to the firm's copy which, apparently, was a carbon copy. There were some other discrepancies between the prime copy of the listing agreement held by the prospective vendors and that held by X Realty and the second respondent seemed unable to explain them. They seemed to be:

> *"Commission of 19,491,000 is based on the sale price of $500K inclusive of GST and fees."* [alongside general remarks]
>
> *"Please ring Maurice first"* [alongside inspection details]
>
> *"Y"* [for key in letter box]
>
> *"And the reference to "$380" as the sum agreed to be paid by vendors for advertising."*

[34] It seemed that if the appellant did not think the listing agreement was in order, he required the agent to go back to the vendors and make and initial corrections. It also seemed that the vendors were to keep the carbon and X Realty would retain the top copy. In any case, the licensee admitted that various fairly minor items had been added to the firm's copy of the listing agreement by her and she seemed puzzled that she had not then gone back and altered the copy held by the vendors and had them initial those alterations.

Evidence of the appellant

[35] The appellant's concern, as a citizen and proprietor of a real estate agency, is that a listing form signed by prospective vendors had subsequently been altered and not referred back to the owners for correction.

[36] The matters of collection of advertising expenses and removal of keys, referred to above, did not seem to greatly concern him by the end of the hearing; except that (as already covered) he was concerned that two of the three issues he had complained about were not specifically referred to in the decision of the Committee. However, he seemed to be alleging that the licensee had not followed his firm's process for collecting advertising expenses.

[37] Part of the appellant's concerns about keys seemed to be that he considered the licensee to be holding keys and failing to *"dialogue"*, as he put it, with him and that the relevant property owners were concerned that the keys were not secure in their view. As we have already indicated, we inferred that the appellant was also concerned that a former agent of his might control keys to properties listed by his firm. (X Realty), when she had left that firm.

Discussion

[38] As covered above, the Committee made a determination under s.89(2)(c) of the Real Estate Agents Act 2008 (the Act) to take no further action on this appeal.

[39] Section 111 provides a right of appeal to the Tribunal for any person affected by a determination of a Complaints Assessment Committee (CAC), including any determination under s.89. The appeal is by way of rehearing and, after hearing the appeal, this Tribunal may confirm, reverse, or modify the determination of the CAC.

[40] Appeals from CAC decisions to make (or not to make) findings of unsatisfactory conduct under s.72 of the Act will normally be regarded as general appeals, with the appellant being entitled to judgment in accordance with the opinion of this Tribunal, even where that opinion involves an assessment of fact and degree and entails a value judgment – *Kacem v Bashir* [2010] NZFLA 884; *Austin, Nichols & Co v Stichting Lodestarn* [2008] 2 NZLR 141; *Jones v CAC 10028* and *Shekell* [2011] NZREADT 15.

[41] We have before us the information which was before the Committee, as well as the further material filed by the parties for the purposes of the appeal, and oral evidence was given in person at the hearing as we have covered above. We are entitled to take all that material into account in coming to our own decision as to whether or not the licensee is guilty of unsatisfactory conduct.

[42] Some aspects of the complaint relate to conduct of the part of the licensee that is not real estate agency work as defined at s.4 of the Act (for example the colleague's work book found in the licensee's bag). It was put that, nevertheless, conduct that does not involve real estate agency work may engage the disciplinary provisions of the Act, but only at the more serious level of misconduct under s.73. We agree, although non real estate agency work may breach the Professional Conduct and Client Care Rules.

[43] With respect of allegations of misconduct, the options open to a CAC are to refer a charge of misconduct to this Tribunal or to determine to take no further action. An appeal from a decision to take no further action in respect of a misconduct allegation should be narrower in scope than an appeal from a decision to make (or not to make) findings of unsatisfactory conduct. Decisions to refer (or not refer) misconduct charges are of a different nature to determinations on the evidence as to whether unsatisfactory conduct has been established. As the Tribunal noted in *Brown v Complaints Assessment Committee 10050 and Wealleans* [2011] NZREADT 42:

> *"[26] ... [the Act] give the CAC both a disciplinary function (it can make orders of unsatisfactory conduct) and a screening function when it determines to refer charges to the Tribunal.*

...

[28] ... Under s.89 the Committee may make three determinations: that the complaint be considered by the Disciplinary Tribunal or that it has been proved on the balance of probabilities that the licensee has engaged in unsatisfactory conduct (s.72) or a determination that the Committee takes no further action ... Thus s.89 clearly separates the role of the CAC into these three tasks and gives it additional powers when a finding under s.72 is made. There is a right of appeal from each of these three tasks but the right of appeal must reflect the nature of the determination which is being appealed"

[44] We would only interfere with a CAC decision not to refer an allegation or situation of misconduct to us where we consider that the CAC was plainly wrong not to do so.

[45] We agree with Mr Wimsett that we should take a different approach on appeal depending on whether the allegations under consideration involve unsatisfactory conduct in respect of real estate agency work or misconduct. In respect of the aspects of the appellant's complaint which allege misconduct, we should be slow to interfere with the Committee's decision not to lay charges unless we conclude that the Committee was plainly wrong. In terms of the allegations of unsatisfactory conduct, we must reach our own view, based on the evidence presented at the hearing and all the other material filed.

[46] Counsel for the licensee, Mr Grimwood, submitted that her actions do not amount to unsatisfactory conduct as defined in the Act. He put it that a reasonable member of the public would consider that her adding $380 to her retained copy of the listing agreement would not mislead the vendor in any way and it was only a reminder that she needed to pay it herself and there is no issue of misrepresentation or dishonesty.

[47] He added that the licensee had agreed to pay the advertising fee when invoiced so that her actions in leaving herself a note on the listing had no affect whatsoever on them. We observe that, whatever her intention, she had amended a copy of the listing agreement to show the vendors as liable for the $380 advertising cost. The other alterations were of an administrative nature and harmless, but did purport to alter a document also.

[48] With regard to the X Drive property, the licensee gave the vendors an invoice for the advertising cost of $380 because that had been deducted from her commission. The appellant seemed concerned that the $380 should have been paid to his firm which would have then paid it to the licensee. In fact, it was deducted from her commission.

[49] With regard to the property at X Road, the appellant complains that the licensee gave the vendor her bank account number for the vendor to deposit $380 of advertising fees owed by the vendor, but the appellant admits that same had been deducted from the licensee's commission. We note that the appellant maintains that he had explained to the licensee a number of times that such payments must first be remitted to his firm; although the licensee denies ever having received such instruction. We understood that X Realty (or Hookers) does have an induction manual but, apparently, it was never given to the licensee and, in any case, it merely says that any vendor funding left outstanding and not collected by the salesperson

will be paid for by the salesperson; and there is no indication that such money must first go through the firm.

[50] Mr Grimwood submits that it is immaterial whether such fees go first to the firm or direct to the agent when it was the agent's debt. He agreed that it would have been unprofessional of the licensee to approach a vendor for advertising costs unless the vendor was liable and they had been deducted from commission to that agent/licensee.

[51] There was also reference to an advertising fee issue regarding a property at X Place. The allegation is that the licensee approached the vendors for an advertising fee but the vendor denies that and says that, in any case, that vendor should have received an invoice from X Realty but never has.

[52] We feel that the appellant is being pedantic in a situation which he helped confuse. It does seem that, at material times, the licensee had received no formal instruction, written or verbal, about the firm's procedures to collect advertising fees and felt she was responsible to do that and had personally invoiced vendors in the past with no comment from the appellant.

[53] It does seem that the procedures at X Realty which were to be followed by the licensee, when she was an agent there, were rather vague and uncertain. We accept Mr Grimwood's submission that there has been no element of dishonesty or misappropriation of money. Any money the licensee sought to recover was owed to her because, in effect, her employer had assigned the debt to her by taking it from her commission. In terms of s.72 of the Act there is no issue of unsatisfactory conduct and, certainly, not of misconduct under s.73.

[54] Similarly with regard to the issues set out above regarding keys, Mr Grimwood is probably fair in putting it that the licensee was concerned to return the key of X Place to the owners as soon as possible and they knew that was the situation and were not particularly concerned; but that the issues seemed to have been whipped up somewhat by the appellant. With regard to the key of X Place, that was simply spare (with a remote to a garage) and long forgotten and not sought by the owner.

[55] We agree that the said issues of collection of advertising expenses and keys do not come within the Act's definitions of 'unsatisfactory conduct' and, certainly, are not 'misconduct'. Very simply put, on these two issues we accept the licensee's explanations regarding so called issues about keys and that it was understandable that she sought to recover advertising costs because they had been deducted from commissions due to her from X Realty. Also, that firm's protocol regarding advertising costs seemed somewhat vague and ad hoc.

[56] However it is concerning that the licensee altered a listing agreement after it had been completed. That is at least unsatisfactory conduct, even in the context of her wanting the agreement to be in order for her employer to sign off, and even in her, apparently, meaning that the main alteration was merely as an aide memoire to herself, and the fact that the other additions were rather minor and she, apparently, overlooked having them initialled as corrections by the vendors. Indeed, altering a listing agreement as the licensee did, or altering any document, would normally involve a real estate agent/licensee in misconduct.

[57] In terms of the Committee determining that the complaints did not amount to either unsatisfactory conduct nor misconduct and, therefore, dismissing them, we record that we have heard extensive evidence as to the detail of these complaints which was not put before the Committee.

Outcome

[58] We find that the complaint against the licensee about her altering a listing agreement must be upheld, and we find that complaint to be proven. Accordingly, the appeal succeeds to that rather limited extent.

[59] In terms of penalty, when we stand back and absorb the above, we make an order under s.93(1)(a) of the Act *"censuring or reprimanding the licensee"*. Accordingly, we deal with this matter by way of censure against the licensee due to her alterations to the listing agreement as outlined above. In all the circumstances, we order the suppression of the second licensee's name and of any details which might identify her.

_____
Judge P F Barber
Chairperson

_____
Ms J Robson
Member

_____
Mr J Gaukrodger
Member