Decision No: [2012] NZREADT 48

Reference No: READT 090/11

IN THE MATTER OF	an appeal under s111 of the Real Estate Agents Act 2008
BETWEEN	**GEORGE BERNARD SHAW**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10062)**
	First Respondent
AND	**LANCE PEMBERTON**
	Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

The appellant in person
Mr Clancy for the First Respondent
Mr Hern for the Second Respondent

HEARD at AUCKLAND on 27 July 2012

Introduction

[1] Mr Shaw appeals against the decision of Complaints Assessment Committee 10062 dated 18 August 2011 which decided to take no further action on Mr Shaw's complaint against Mr Pemberton.

Summary of Complaints

[2] Mr Shaw is a property developer and had had a long standing professional relationship with Lance Pemberton, a member of the Barfoot and Thompson organisation. In December 2003 Mr Shaw was feeling the effects of the international recession and he needed to sell several of his properties. Accordingly on 23 December 2008 he signed a sole listing agency with Mr Pemberton in relation to a property that he owned at 74 Gilles Avenue, Epsom. The property had a registered valuation for $1.610 million done on 11 April 2007 and had a CV of $1.5 million completed some months prior to the listing. Mr Pemberton listed the property and was solely responsible for the advertising. The property was eventually sold on or about 20 February 2009 for $1.375

million. Mr Shaw's evidence was that he was told by Mr Pemberton that this was all that he could get for the property and accordingly signed the agreement without countersigning it. He was prepared to *"let the matter go"* (in his words) until he asked Mr Pemberton for copies of e-mails between himself and the purchasers arising out of a subsequent dispute about the zoning of an adjoining property. He said he then discovered to his horror that in e-mails Mr Pemberton had been advising purchasers that the value of the property was somewhere between $1.3 and $1.4 million. These words were contained in an e-mail dated 12 February 2009 from Mr Pemberton to the buyers where he says *"the best guide regarding the price is somewhere between $1.3 and $1.4 m as I verbally gave to you the other day. Our vendor paid I think $1.3 about five or six years ago"*. Mr Shaw also saw an advertisement for the property which had been inserted in the newspaper in early January 2009 by Mr Pemberton which contained the words at the end of the advertisement "*keen vendor may trade"*.

[3] Mr Shaw also complained that when in February 2009 he signed an extension to the agency agreement which involved him agreeing to commit more money to advertising someone, (not himself) hand altered the listing authority to change the search indicator from $1.4 to $1.6 million to $1.3 to $1.450 million. He says this was done without his authority. He also complains about a subsequent Agreement for Sale and Purchase presented to him by Mr Pemberton for a large block of land that he owned at 13 Alpers Avenue, Newmarket. This was an offer to buy the land in cash and partly in "*ozone dollars*". He complains that if the agreement had been signed, even if it had become unconditional then he would have had to have paid a fee to Ozone of approximately $400,000. During the course of the hearing this complaint slightly widened to include the complaint that Mr Pemberton had not made any enquiries about who the purchaser was and that he had not even taken the purchaser onto the property.

[4] In response Mr Pemberton said that he was always doing the best that he could for Mr Shaw. He said that it was clear right from the beginning of the campaign that Mr Shaw's price expectations were not going to be met. He said that he had been telling him that he would need to consider reducing his price expectations. Mr Pemberton's evidence was that he believed that Mr Shaw had changed the search indicator after a discussion between them. Mr Pemberton said that everything he had done in selling the property was agreed with Mr Shaw. He acknowledged that because of their long relationship Mr Shaw let him place and design the advertising for the property himself. He had not submitted the details of the advertisement to Mr Shaw. He said that Mr Shaw said that he had been unhappy when he had seen the words *"may trade"* as he said he made it clear to Mr Pemberton that his bankers would not let him trade and that he had a need for cash. Mr Hern submitted that in fact a valuation obtained by the purchaser at the time of sale showed that the property was worth only $1.4 million. Thus Mr Shaw did not suffer any prejudice as a result of the alteration to the search indicator.

[5] Expert evidence was led by Mr Pemberton from a Mr Morley. He said that the search indicator had no effect on the sale price as buyers are often prepared to pay more if they wish to secure the property. Mr Morley said it would have been logical when renegotiating the agency agreement in February 2009 for the vendor and agents to review all marketing activities including the asking price. He said that it was reasonable that they would have discussed and reduced their sales indicator by a small margin and reintroduced a marketing budget. He said that at that time the real estate market in Auckland was very volatile and earlier valuations would not have been helpful

in determining price. He said that there needs to be a distinction between the search indicator and the term *"best price"* used in Mr Pemberton's e-mail. Best price he said is feedback from potential buyers following open homes and an enquiry of a buying agent as to where a particular potential buyer sees the property. He said that neither impacted upon the price. He said that inserting the words *"keen vendor may trade"* in an ad does not lower the prestige or stigmatise the value of the property but could attract a range of buyers who are looking to trade but would not affect the value of the property as indicated by a contemporaneous valuation from Prendos.

[6] Under cross examination he accepted that it would be normal for an agent to discuss with the vendor any reduction in their search indicator. He did not accept that *"keen vendor may trade"* was any indication that a vendor would accept any price for the property.

[7] Having heard Mr Morley's evidence, the Tribunal conclude that his evidence on *"best price"* could not be relied upon because it was clear that Mr Pemberton's e-mail was not expressed as a reflection of buyer feedback but was a reflection of what he thought that the property would sell for. When Mr Clancy asked Mr Morley to comment on whether the best price indicator in an e-mail would make it unlikely that anyone would offer more than $1.4 million, he said there were still chances of a purchaser putting in a higher figure depending on the property.

[8] Mr Pemberton said Mr Shaw was desperate for money and wanted the property sold quickly. He was confident he tried to do the very best thing for Mr Shaw. He said he asked him on numerous occasions to lower the price because right from the start of the marketing it was clear they could not get the upper end of the price/search indicator. Mr Shaw put to him that he had only been marketing the property since 14 January and on 5 February 2008 it was too soon to talk about a reduction in the price. Mr Pemberton said "*this is what the market had been telling them*". With respect to the Ozone Property he said that he had put a clause in the agreement that it was subject to the vendor's solicitor's approval. He said he was simply trying to get Mr Shaw a buyer for the property.

Discussion

[9] The issues for the Tribunal centre around the advertisement, the change in the search indicators and the e-mail indicating the best price.

[10] We find that prior to 2008 Mr Shaw and Mr Pemberton had a longstanding and presumably mutually beneficial relationship. By 2008 Mr Shaw admits that he was under financial pressure from the bank to sell as many of his properties as possible and free up cash to reduce his indebtedness. He considered that the property at 74 Gillies Avenue was valuable. We find that he did rely upon Mr Pemberton to place the advertisements for him. However the mutual trust between the two of them was shattered by the discovery of the new e-mails.

[11] These events took place in early 2009, before the Real Estate Agents Act 2008 came into force in effect. We therefore must judge Mr Pemberton by the standards of that time; and, whilst we can find him guilty of offences under the Real Estate Agents Act 2008 we cannot impose upon him a penalty which was not available under the 1976 Act. Having considered all the evidence we find:

(i) Mr Shaw let Mr Pemberton handle the advertising. Under the 2008 Act Mr Pemberton's decision to advertise the property as *"keen vendor may trade"* would not be a proper discharge of his obligations as an agent. In 2008 it was probably foolhardy for him to have advertised the property in this way but given the parties' previous relationship we find that it was the accepted practice of the parties. Mr Pemberton should have checked if *"keen vendor may trade"* was acceptable. However his failure is not a breach of s.72.

(ii) We are uncertain as to who made the change in the search indicator. Clearly there was some discussion about the search indicator but we are uncertain as to when and to what effect. Mr Shaw says that Mr Pemberton did not suggest any need to reduce the search indicator price and that he relied on Mr Pemberton to do the best he could about getting the best value for him. We acknowledge that the reduction in the search indicators would have meant that more potential purchasers looking for a property at a lower end of the indictor would have come to view the property which would potentially have lowered the target market. However as we have said, we have not been able to determine on the evidence who made the alteration to the search indicator and so cannot make a finding.

(iii) We consider the e-mail that Mr Pemberton sent to the ultimate purchaser about price in February 2009 was inappropriate. We find that this was Mr Pemberton giving an indication of price which we think was a clear indication to the purchaser as to the maximum which should be paid for the property. Notwithstanding the evidence by Mr Pemberton that the purchaser was in a competitive arrangement (with the ultimate purchaser believing that he was only one of other bidding parties), this e-mail would have had a clear impact on the way that the eventual purchaser pitched his offer. We think that this was detrimental to Mr Shaw. We think that the price indicator should have been discussed and agreed with Mr Shaw prior to making any statement to the purchaser. We prefer the evidence of Mr Shaw that the price indicator was not discussed. An agent's duty is to his client to make a sale. This is true under the 1976 and 2008 Acts. We find that this conduct by Mr Pemberton amounts to unsatisfactory conduct under s 72 of the Act.

The Ozone Agreement

(iv) We do not find that there was any misconduct or unsatisfactory conduct by Mr Pemberton in respect of the Ozone Agreement. Mr Pemberton produced an agreement for Mr Shaw which he rejected. We do not think that the law in 2008 or now requires an agent to vet purchasers or necessarily to ensure that they have seen the property before making an offer. Clearly "o*zone dollars*" was an unusual term to have in the contract and it was properly rejected by Mr Shaw. However there was some protection in the Agreement for Sale and Purchase with the right of the vendor's solicitor to approve it. We therefore do not uphold Mr Shaw's appeal in this respect.

Relevant Law

[1] The charge relates to the defendant's conduct prior to the commencement of the 2008 Act on 17 November 2009. Section 172 of the 2008 Act therefore applies and provides as follows:

> **172 Allegations about conduct before commencement of this section**
>
> (1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—
>
> (a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and
>
> (b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.
>
> (2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the **[Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred]**. (emphasis added).

[2] In cases where the licensee who has been charged was licensed or approved under the 1976 Act at the time of the conduct (which the defendant was), and has not been dealt with under the 1976 Act in respect of the conduct (which the defendant has not), s 172 creates a three step process:

Step 1: Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

Step 3: If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made by this Tribunal.

[3] Looked at in the round, a charge relating to pre-17 November 2009 conduct falls to be determined in accordance with the disciplinary standards set out in ss 72 and 73 of the 2008 Act in the same way as a charge about post-17 November 2009 conduct (**Step 2**). However, there are two requirements under s 172 which limit its retrospective effect:

(a) complaints outside the jurisdiction of the 1976 Act are also outside the jurisdiction of s 172 (**Step 1**);

(b) only orders which could be made under the 1976 Act may be made under s 172 (**Step 3**).

[4] Each of the three steps, as they apply to this case, will be addressed in turn.

[5] **Step 1 – Could the matter have been complained about or charged under 1976 Act?**

[6] Under rule 16.2 of the Rules of the Real Estate Institute of New Zealand Incorporated ("REINZ Rules"), made under s 70 of the 1976 Act, any person could complain to REINZ. Following investigation of a complaint, REINZ could take one of a number of steps, including referring a matter to the Real Estate Agents Licensing Board (rule 16.13.5).

[7] Mr Shaw could have complained under s 99 of the Real Estate Agents 2008.

[8] **Step 2**: as set out above we find that the complaint as it relates to the price indicator amounts to unsatisfactory conduct under s.72.

[9] **Step 3**: The 1976 Act could suspend and cancel Mr Pemberton's licence or fine him up to $750.

Penalty

[10] We have modified the decision of the CAC to take no action. We find Mr Pemberton guilty of unsatisfactory conduct. We fine him $400 as a fine is the only appropriate penalty available under the 1976 Act we consider that this sum adequately reflects the level of misconduct under s.72.

[11] The Tribunal draw the parties' attention to s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 13th day of August 2012

_____
Ms K Davenport
Chairperson

_____
Ms J Robson
Member

_____
Mr G Denley
Member