

Decision No: [2012] NZREADT 65

Reference No: READT 121/11

IN THE MATTER OF a decision under s.111 of the Real Estate Agents Act 2008

BETWEEN **ANN LEE**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 10048)**

First Respondent

AND **DONG (JOHN) CHO**

Second Respondent

AND

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IN THE MATTER OF a decision under s.111 of the Real Estate Agents Act 2008

BETWEEN **DONG (JOHN) CHO**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 10048)**

First Respondent

AND **ANN LEE**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mrs Lee in person
Mr Rea for Mr Cho
Mr Hodge and Ms MacGibbon for the Real Estate Agents Authority

Also in Attendance: Mr Henry Koo, Korean Interpreter

HEARD at AUCKLAND on 3 & 4 September 2012

Introduction

[1] This is an appeal and cross appeal from a decision and penalty decision of the Complaints Assessment Committee dated 30 August 2011 and 4 November 2011 finding Mr Cho guilty of unsatisfactory conduct. No penalty was imposed by the Complaints Assessment Committee.

[2] Mrs Lee was the owner of a property at 12 Artisan Place, Flatbush, Auckland. In late 2010 she wished to sell this property. She contacted Mr John Cho, a Korean agent working for Barfoot and Thompson in Dannemora and spoke with him about selling her property. She asked Mr Cho to bring prospective buyers to her property before any Agency Agreement was signed. It is common ground that in early September 2010 Mr Cho brought a couple to the property who subsequently made an offer to purchase the property for \$710,000. They were apparently prepared to increase this offer to \$720,000.

[3] Mrs Lee was not prepared to accept this offer and did not sign the agreement, nor was any Agency Agreement signed. On or about 24 September Mr Cho brought an Agency Agreement to Mrs Lee who signed it. This agency document shows an appraisal price of “*over \$700,000*”, a listing price of between ‘\$680,000 and \$780,000’ and a search indicator of between \$680,000 and \$780,000. There was no separate price appraisal in another document done for Mrs Lee. There appears to have been no agreement on price. Mr Cho ran a number of open homes for Mrs Lee but the property did not sell. There were discussions between the two of them about why this was so. Mrs Lee did not want to drop the price and wished to maintain the price at \$745,000 (from her earlier higher position). This was because she wanted to receive \$720,000 ‘in her hand’ and the balance would pay Mr Cho’s commission.

[4] There were disputes between Mr Cho and Mrs Lee as to whether Mr Cho had had advertisements for the property approved by Mrs Lee before the flyers were printed. It seems from Mr Cho’s evidence that he put an advertisement for the property with a photograph and the price of \$745,000 on Trade Me. He asked Mrs Lee to look at the ad on Trade Me to see what she thought. He said she did not object and therefore he had flyers printed using these words for the open homes in early October. Mrs Lee’s evidence is that she did not see the flyers or advertisements until the first open home when she was shocked by both the price – \$745,000 – and the fact that it said “*owner’s circumstances have changed. Definitely need to sell as soon as possible*”.

[5] In early January 2011 Mrs Lee executed another Sole Agency Agreement with Barfoot’s which showed a listing price of \$745,000 and search indicators between \$660,000 and \$740,000.

[6] Mrs Lee was also concerned as Mr Cho was [at the request of her solicitor] providing information to Mrs Lee's mortgagees about the sale process in order to stave off a mortgagee sale. Mrs Lee was surprised and concerned to receive a verbal offer from a vendor who said that he understood that she needed to sell and would offer her \$700,000 for her house and all the furniture. This made her concerned that Mr Cho had been discussing her financial difficulties with other potential vendors.

[7] An offer was presented by some clients of Mr Cho (the Yandalls) in April 2011 with a purchase price of \$675,000. Mrs Lee was suspicious of this offer which was faxed to her solicitor (and then to her) who asked her to sign and return it to him. She believed that this was not a genuine offer of purchase. However she signed the agreement but then subsequently withdrew from it when she received an offer on 12 April 2011 from a client of Century 21 for \$690,000. She complained to the Real Estate Agents Authority about Mr Cho on 6 May 2011.

[8] She complained about seven matters as follows:

- When signing the Sole Agency Agreement she did not receive a full explanation of the agreement and did not receive the REINZ booklet explaining Agency Agreements.
- The advertised price of the house was changed without her consent.
- There was a forged signature on part of the Agency Agreement.
- Mr Cho's paperwork was unprofessional and he was unprofessional in general.
- False and misleading information was given to others including personal information to agency customers.
- The marketing was not done correctly.
- Mr Cho was generally unprofessional.

[9] The Complaints Assessment Committee considered all these complaints and in its decision of 30 August 2011 dismissed all of the complaints made by Mrs Lee except one. In reaching their decision to dismiss they relied in part upon a letter from Mr Richard Allen, the former solicitor for Mrs Lee who wrote a letter in support of Mr Cho. He described Mrs Lee as being difficult and said she had an unrealistic idea of the value of her own property. The Complaints Assessment Committee found that much of the confusion and difficulty suffered by Mrs Lee revolved around her understanding and knowledge of the market value of the property and she accordingly had an unrealistically high opinion and expectation of the value of her property. The Complaints Assessment Committee found that no written appraisal under rule 9.5 of the Professional Conduct and Client Care Rules was provided and that in failing to do so Mr Cho had engaged in unsatisfactory conduct. In a penalty decision dated 4 November 2011 the Complaints Assessment Committee declined to make an order against Mr Cho other than the finding of unsatisfactory conduct.

[10] Mrs Lee had sought an apology, further training and education for Mr Cho, that her legal fees be paid, that she be paid the sum of \$50,000 and that Mr Cho pay a fine

of \$10,000 to the Authority. She sought an order that Barfoot and Thompson make its business available for inspection and that her costs or expenses incurred in respect of the enquiry or investigation be paid.

[11] Mrs Lee's appeal raises the same seven issues. She also appeals on penalty. This decision explores these issues which are:-

- (1) When signing the Sole Agency Agreement the licensee did not give a full detailed explanation (of the agreement). The licensee did not supply the REAA information booklet.
- (2) The advertised price of the house was changed by the licensee without consent.
- (3) Unprofessional paperwork by the licensee.
- (4) Marketing and marketing advice of a poor standard.
- (5) Providing false or misleading information and disclosure of personal information to agents.
- (6) Unprofessionalism in general.
- (7) Mr Yandall – offer not genuine.
- (8) Penalty – she repeats her submissions made to the Complaints Assessment Committee.

Mr Cho's Cross Appeal

[12] Mr Cho's appeal was against the decision of the Complaints Assessment Committee that he had not given a written appraisal. He submitted that there was no need for an appraisal to be in a separate document. He also submitted that the material provided in the Agency Agreement (and with it) to Mrs Lee was sufficient to discharge his obligations under the Rules and the Act.

Other Matters

[13] In addition in their closing submissions the Real Estate Agents Authority submitted that there were three additional matters which the Tribunal might consider in its determination:

- (i) Potential purchasers were brought through the property and an offer presented prior to a listing agreement being signed (rule 9.15); and
- (ii) Mr Cho put advertising on Trade Me prior to seeking the approval of Mrs Lee of its content; and

- (iii) Mr Cho took on personal responsibilities for Mrs Lee in managing her relationship with the lender, lending her money, selling chattels on her behalf, creating a risk of disputes which may be inimical to his fiduciary duties as her agent.

[14] We will deal with Mrs Lee's appeal first and then the issues raised by Mr Cho's appeal and then those raised by the Real Estate Agents Authority. The Tribunal's approach on this appeal is as set out in *Kacem v Bashir* [2010] NZSC1112 – that is that this Tribunal may reach its own view on the facts or law in this appeal.

Issue (1) – When signing the Sole Agency Agreement the licensee did not give a full detailed explanation.

[15] Mrs Lee claims that she was not given a copy of the REINZ information booklet and that the Agency Agreement and in particular the price appraisal information was not fully explained to her by Mr Cho. She also says that no agreement was reached on the price at which the property should be listed. Mr Cho says that he did discuss all of these matters with Mrs Lee and took her a Barfoots folder which contained recent and comparative sales information from other properties in Artisan Way, Chateau Place and Mission Heights Drive, all of which were within the vicinity of Mrs Lee's property. The folder also contained the REINZ guide to Agency Agreements [in English not Korean]. Mr Cho said he explained the agreement fully to her in Korean. He also said that his appraisal of the market value of the property was between \$700,000 and \$720,000 but Mrs Lee wanted more.

[16] In her submission Mrs Lee says the appraisal price in the Agency Agreement was explained to her to be the minimum price at which she was accepting or looking at offers.

[17] We do not consider that Mr Cho clearly expressed his view to Mrs Lee as to the price the property would be likely to sell for. We consider that if Mr Cho had given Mrs Lee a written appraisal which gave the market estimate at between \$700,000 and \$720,000 then many of her later concerns may well have fallen away. Mrs Lee genuinely seems to have believed that she should get \$745,000 (or more) for her property. Mr Cho should have made clear for her that this was unlikely, especially when the property was advertised at \$745,000. Mrs Lee should have been aware that she was unlikely to get that exact price. We consider that Mr Cho became too close to Mrs Lee in his desire to assist her out of her difficulties and this perhaps may have clouded his ability as an agent to clearly articulate his view of the appraised price. We therefore consider that the decision that the Complaints Assessment Committee reached (subject to our comments on Mr Cho's submissions on this point below) was correct. The appraised price was not a clear reflection of the likely market price and Mrs Lee did not understand that this price was not the likely sale price. We discuss this point further at paragraph [25] following.

Issue 2 – The advertised price of the house was changed by the licensee.

[18] The Tribunal find that there is insufficient evidence to make a finding on this complaint. We find that Mr Cho did not get prior approval of the advertisement from

Mrs Lee but accept his evidence that he obtained her approval to the advertisement once it was up on Trade Me. We do not believe that there was ever an agreement reached that the property would be advertised for \$780,000. A contemporaneous document (document 59) shows that on 12 October 2010 the price was adjusted to \$745,000.

Issue 3 – Unprofessional paperwork

[19] The Tribunal rejects this complaint. The initial Agency Agreement showed the property as 14 Artisan Place not 12 and there were other minor errors. We do not consider that these are sufficiently serious to require a finding of unsatisfactory conduct against the agent.

Issue 4 – Marketing of a poor standard

[20] There was no evidence led on this point other than that set out under Issue 2. We consider this has been dealt with under Issue 2 and make no finding on this point.

Issue 5 – Providing false and misleading information

[21] Mr Cho had some dialogue with Mrs Lee's second mortgagee Allied Finance. However this seems to have been at the request of her solicitor Mr Allen and if there is fault in this (and we make no finding on this point) then it lies with Mr Allen in asking Mr Cho to assist Mrs Lee. However the tenor of the e-mails from Mr Allen and Mr Cho all seem to be towards assisting Mrs Lee to avoid a mortgagee sale. It is difficult to be critical of such an exemplary aim although Mrs Lee should have been aware of these discussions. We therefore make no finding in respect of the disclosure of personal information. The complaint as to false or misleading information appears to be a misunderstanding about whether or not an Agency Agreement could be cancelled. Mr Cho apparently advised Mrs Lee that she could withdraw the listing at any time but Mrs Lee discovered that she could not cancel the agency. There appears to have been some confusion about the cancellation of a sole agency (which may have consequences of a double commission) and withdrawing a property from sale which a vendor can do at any time. We are not satisfied that the evidence establishes this claim and make no finding on this point. Under this heading Mrs Lee also complains that Mr Cho said that the house needed to be recarpeted and repainted. She complained that Mr Cho arranged for the gardens to be tidied and walls be repainted. Mr Cho did do those things but he says he believed he had Mrs Lee's consent. They were to Mrs Lee's benefit in her quest to sell her house. We make no finding on this point.

Issue 6 – Unprofessional in general

[22] There is no evidence to support this claim. The Tribunal rejects this claim.

Issue 7 – Mr Yandall

[23] We consider that the offer from Mr Yandall was a genuine offer and we do not think that there are any grounds for Mrs Lee's concerns. We make no finding on this claim.

Mr Cho's Appeal & REAA's issues

[24] Mr Cho through his solicitor now accepts that there was no compliance with rule 9.5 and rule 9.15 of the Client Care Rules.

Issue 8 – Penalty

[25] The Tribunal refers to paragraph [40].

[26] Mr Rea also submitted that giving an appraisal is not in itself real estate agency work but is preliminary to real estate agency work. Mr Rea did accept that the provision of a written appraisal is a prerequisite to the performance of real estate agency work. However he submitted further that while failure to give an appraisal or an inadequate appraisal may be a breach of rule 9.5, but it will never in itself be capable of amounting to unsatisfactory conduct if it is not real estate agency work. He therefore submitted that if no real estate agency work is subsequently performed by the licensee there will be no proper finding of unsatisfactory conduct. Mr Rea acknowledged that because Mr Cho's evidence was that he brought a purchaser to the property and submitted an offer prior to obtaining a written Agency Agreement that he was acting on Mrs Lee's behalf. Thus he accepted that the Tribunal could modify the decision of the Complaints Assessment Committee so as to find that Mr Cho engaged in unsatisfactory conduct by showing the property without having secured a written Agency Agreement contrary to rule 9.15 and without having given a property appraisal in writing.

[27] He concluded by submitting that the conduct was at the lower end of the unsatisfactory conduct scale and Mr Cho should be given credit for his diligence, good intentions and the difficult circumstances involved in the client relationship. He submits that the decision of the Complaints Assessment Committee to impose no penalty is appropriate.

Real Estate Agents Authority

[28] Mr Hodge for the first respondent submitted that:

Rule 9.5 of the Rules provides that:

“An appraisal of land or a business must be provided in writing to a client by a licensee, must realistically reflect current market conditions, and must be supported by comparable information on sales of similar land in similar locations or businesses”.

Mr Hodge submitted that when read together with rule 9.8 the written appraisal must be given to the client before or at the same time as an agent invites the client's signature on an Agency Agreement. The commissions calculation referred to at rule 9.8(a) therefore could not be provided without the appraisal having been given.

[29] Mr Hodge submitted that:

“From a practical perspective, therefore, it is no great imposition to require this information to be provided in writing to the client (it is not suggested that the brief analysis required must be at the level expected of a registered valuation).”

[30] He submitted therefore that both the comparable sales information coupled with the agent's brief analysis must be provided in writing as part of the appraisal because this:

- (a) is work the agent must do anyway and provides proof to the client that the work has been done;
- (b) best accords with the wording and intent of rule 9.5; and
- (c) best accords with the purpose of the Real Estate Agents Act 2008 (Act) of promoting and protecting the interests of consumers.

[31] Finally he submitted that Mr Cho breached his obligation as an agent because:

“Mr Cho gave evidence that he provided comparable sales information to Mrs Lee. It was not suggested Mr Cho gave Mrs Lee a brief analysis in writing of what conclusions he drew from this in relation to the value of Mrs Lee’s property.

More importantly the circumstances of this case, on Mr Cho’s evidence he appraised the property as being valued between \$710,000 to \$720,000 in September 2010. However, this was not reflected in the agency agreement. Instead the appraisal figure was simply stated as “\$700,000+”, which did not reflect Mr Cho’s actual appraisal of value and gave Mrs Lee no real clarity at all.

Mr Cho’s evidence was that in January 2011 he appraised the value of the property between \$720,000 to \$730,000. Again, this is not what was set out on the appraisal, which stated a figure of “\$745,000”. This was not Mr Cho’s appraisal of value. Rather, it represented the minimum price Mrs Lee wanted to achieve from the sale.

It is submitted that had Mr Cho complied with rule 9.5, Mrs Lee may have adjusted her expectations about the price she would obtain from the sale, or alternatively she may have declined to instruct Mr Cho if she considered he was wrong about the property’s value. Either way, the problems which bedevilled this agent/client relationship may have been avoided.”

[32] The Real Estate Agents Authority concluded by submitting that the breach of rule 9.5 amounted to unsatisfactory conduct regardless of fault. Mr Hodge submitted that the absence of fault would resonate in the penalty not the finding.

Discussion

[33] Was the failure to provide a written appraisal in breach of rule 9.5 real estate agency work? The Court of Appeal in *R v Aylwin* [2008] NZCA 154 said:

“The preferred approach to statutory interpretation is to begin, as we have done with the words of the statute interpreted in accordance with the scheme and purpose of the legislation. Reference to the legislative history can then be used as a check on and to bolster the construction.” [58]

[34] The Tribunal adopt this approach. As the Tribunal have said before the principal purpose of the Real Estate Agents Act 2008 is set out in s 3 as follows:

“The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

The Act achieves its purpose by:-

- (a) *Regulating agents, branch managers and salespersons:*
- (b) *Raising industry standards:*
- (c) *Providing accountability through a disciplinary process that is independent, transparent and effective”.*

[35] It is against this background of statutory interpretation and the scheme and purpose of the legislation that the Tribunal must interpret the meaning of real estate agency work. The real estate agency work is defined as *“any work done or services provided in trade on behalf of another person for the purposes of bringing about a transaction”*. Those words are very general and the Tribunal must consider whether the provision of an appraisal required by rule 9.5 fall within the definition? Rule 9.5 says that:

“An appraisal of land or a business must be provided in writing to a client by a licensee, must realistically reflect current market conditions and must be supported by comparable information on sales of similar land.”

Contrary to Mr Rea’s submission it is the Tribunal’s view that:

- (i) Every case must always be assessed on its facts; and
- (ii) That an interpretation consistent with the purpose of the legislation must be applied by us; and
- (iii) Preliminary work such as appraisals can still fall within the definition of real estate work because they are for the purpose of bringing about a transaction.

[36] In this case we have no doubt that Mr Cho’s failure to provide an appraisal which realistically reflected current market conditions and was supported by comparable information was real estate agency work. This breach of rule 9.5 amounts to unsatisfactory conduct. We therefore uphold the decision of the Complaints Assessment Committee on this point.

[37] Further bringing clients to Mrs Lee’s property without a signed Agency Agreement in early September 2009 was also real estate agency work and in breach of rule 9.15. While Mrs Lee and Mr Cho seem to have been less concerned with the breach of rule 9.15 we find that bringing a client to the property without an Agency Agreement and tendering an offer is a breach of rule 9.15. The purpose of providing that an Agency Agreement must be entered into before a licensee can offer or market a property is for the protection of both parties. It cannot be waived at the insistence of a client and we find that this failure is a breach of s 72 and is unsatisfactory conduct.

[38] We therefore modify the decision of the Complaints Assessment Committee by including this finding.

[39] **Conclusion**

- (i) The Tribunal therefore modifies the decision of the Complaints Assessment Committee by adding a finding that Mr Cho was in breach of rule 9.15 and this amounts to unsatisfactory conduct.

- (ii) The Tribunal upholds the Complaints Assessment Committee's finding that Mr Cho was in breach of rule 9.5 in not providing an appraised market price for the property and that this amounts to unsatisfactory conduct.

Penalty

[40] The Tribunal consider that in all the circumstances of this case the Complaints Assessment Committee reached the correct decision on penalty and that no further penalty should be imposed upon Mr Cho. Our observation is that Mr Cho did everything that he could to sell Mrs Lee's house and whilst ultimately unsuccessful has been put to an enormous amount of stress and strain. While he was in breach of the rules we consider that in all the circumstances of this case a fair outcome is for there to be no penalty to be imposed upon Mr Cho other than the findings of unsatisfactory conduct set out above.

DATED at AUCKLAND this 26th day of October 2012

Ms K Davenport
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member