

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 66

READT 002/12

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **DAVID GRAVES**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 20003)**

First respondent

AND **NICHOLAS LANGDON**

Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at LOWER HUTT on 9 October 2012

DATE OF THIS DECISION 26 October 2012

REPRESENTATION

The appellant on his own behalf
Mr S Wimsett, counsel for the Authority
No appearance by second respondent

DECISION OF THE TRIBUNAL

The Issue

[1] Has the appellant breached s.131 of the Real Estate Agents Act 2008 by his use of a Listing Agreement?

Background to Appeal

[2] At material times the appellant, David Graves, was the sole director of Borders Real Estate Ltd (Borders). Before us the appellant advised that, about a year ago, he sold that company which is now operated by other people. However, he has set up a real estate business called "Tall Poppy" and he has provided us with the form of listing agreement it now uses; and we refer to that in our discussion below. That business is owned by a new company which seems to be called Bulsarc Ltd based in Lower Hutt but operating New Zealand wide.

[3] The complainant, Nicholas Langdon, is a salesperson licensee with Harcourts Tandem Realty Ltd at Orewa. Mr Langdon complained that in 2011 Mr Graves was using a listing agreement which imposed unfair and unnecessary conditions on vendors wishing to terminate the agreement with Borders. He alleged the conditions were such that they breached s.131 of the Act and reg.9.12 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

[4] On 19 December 2011 Committee 20003 of the Authority found that the appellant had engaged in unsatisfactory conduct by using such an agreement and ordered that, among other things, he be censured and cease to use the agreement in the form it was in. Mr Graves now appeals that Committee's decision.

[5] Before the Committee, the appellant submitted that as the complaint did not specifically come from a vendor, the Committee should not be considering the matter. However, s 12 of the Act sets out the functions of the Authority and s 12(1)(m) simply refers to it receiving complaints relating to the conduct of licensees. In any case, the appellant considered that the terms of the agreement were "*vendor friendly*" and were "*printed in plain English in large print*". He emphasised that Borders went to "*extreme lengths*" to ensure that clients understand what they are signing and "*box (for emphasis) certain clauses to draw the vendor's attention*". He referred also to the cool-down period which vendors have to consider the agreement and their ability to refer it to a third party before committing to it.

The Committee's Decision

[6] After conducting an inquiry into the complaint, the Committee held a hearing on the papers and on 19 December 2011 made a determination on the basis of the written material before it. The Committee focused on clauses, 3, 8, 18 and 19 of the agreement as the most relevant to Mr Langdon's complaint.

[7] Clause 3 was emphasised in a box and provided:

'Easy Cancel' Listing Agreement. You can request to cancel at any time for any reason

3) *[I/we agree and/or accept and/or confirm:] that this sole agency agreement commences and concludes as stated on Page One but a request to conclude it any time can be made, if such a request is agreed to by all of the vendor signatories below, subject always to the conditions of this agreement.*

[8] Clause 8 provided:

"Sale signage to be displayed

8) *[I/we agree and/or accept and/or confirm:] that only For Sale Now sale and marketing signage (including 'Open Home' and 'Sold' signs) will be displayed on or near the property during the listing period from its inception until settlement date or until the conclusion of the Borders (sole or general agency) listing period. Further that I/we will not interfere with or adapt For Sale Now signage in any way and will immediately notify For Sale Now of any interference or damage to the signage.*

[9] Clause 18 provided:

“Organising early cancellation of this agreement

18) [I/we agree and/or accept and/or confirm:] that if I/we request to cancel this exclusive agreement prior to the expiration of a 90 day period after listing date, or at any time after that 90 day period if the agreement is renewed, cancellation will not become effective (and Borders’ exclusive agency will continue) until expiration of a period of 7 days after the receipt of; 1) Borders receipt of my/our written cancellation request 2) Borders receipt of any outstanding monies Borders considers is due from me/us whether invoiced or not 3) Borders written granting of my/our cancellation request (from whichever of those three is the later). I/we accept that a revocation or advice from another real estate company as my/our request to cancel this agreement will not be acceptable to Borders and that a direct cancellation request (including the reason) from me/us is Borders’ minimum requirement. I/we will not allow any other real estate agent access to the property under any circumstances or for any reason without first obtaining written agreement from Borders for me/us to do so or until this agreement is formally cancelled by Borders and such written cancellation is received by me/us. I/we accept that failure to observe the above will expose me/us to the likelihood of paying two commission fees in the event of a sale by Borders or another agency.

[10] Clause 19 provides:

“Period of General Agency

19) [I/we agree and/or accept and/or confirm:] that if for any reason this agreement is concluded during the 90 day listing period and I/we still intend to sell the property a 30 day minimum period of General Agency with Borders will immediately follow the expiry of the above-noted 7 day period (continuing thereafter until cancelled in writing unless there exists a ‘live offer’ brokered by Borders in which case the Borders’ General Agency will continue at least until that offer is at an end). During this period of General Agency, provided all general costs or marketing costs considered by Borders to be due for payment have been paid and funds cleared, I/we may enter into a sole agreement with Go4Multi Ltd or a General Agency agreement (only) with any other real estate agencies (see also Clause 8 allowing only FSN signage) ... if the property is not sold by Borders at the end of the 90 day Borders’ sole agency and I/we still intend to sell the property a 30 day period of General Agency will follow during which time no other Sole Agency Agreement shall be entered into by me/us. Any marketing or advertising material including photography initiated or arranged by Borders, regardless of payment status, will be retained by Borders as its own and will not be available to other parties at least until the property’s settlement has been effected. Selling fees and other conditions will remain unaltered if the property is marketed and/or sold by Borders under a Sole Agency or a General Agency agreement but I/we accept that Borders reserves the right to subsequently amend any part of this agreement if I/we fail to honour any of its conditions”

[11] The Committee determined that in entering into the listing agreements which he did, the appellant engaged in unsatisfactory conduct in carrying out real estate agency work because:

- [a] His listing agreements did not refer to the statutory right set out in s.131 of the Act to cancel a sole agency agreement after 90 days of the agreement being signed. Section 131(5) provides that a licensee cannot contract out of the section. This right is not subject to the qualifications in clause 18 (set out above) regarding early cancellation.
- [b] His listing agreement attempted to be a listing agreement in its entirety and not simply a sole agency i.e. the agreement purports to be both an exclusive agreement for 90 days and a further general agency for 30 days, which is itself subject to very restrictive terms (e.g. precluding a client from entering into a sole agency agreement with another agency).
- [c] His agreement is unclear and very likely to mislead a member of the public. The Committee was of the view that the qualifications set out in clause 18 meant that the terms of the sole agency could, at the discretion of the company, extend past 90 days.
- [d] In the Committee's view, the clauses intended to preclude, or at least unreasonably delay, clients from appointing another agent if the Borders agency was cancelled or the sole agency expired. This is contrary to s.131 which cannot be contracted out of.
- [e] The requirements preventing other signage, and access by other agencies to the property during the general agency period of 30 days, in effect limited the client to a "sole agent" during that extended period also. The Committee held that this restriction was not "reasonably necessary to protect the interests of the agent" and therefore breached reg.9.12.
- [f] Clause 3 of the agreement was misleading "to the extent that 'easy cancel at any time for any reason' is highlighted in a box in large print, but the terms under which it must be actioned are far from 'easy' to comprehend and appear much further down the document in clause 18". This clause also breached reg.9.12.

We agree with those views of the Committee.

The Notice of Appeal

[12] The appellant filed a notice of appeal on 13 January 2012 containing a number of grounds upon which he appeals. We summarise these as follows:

- [a] The appellant disputes the CAC's findings on the basis that they "misunderstand the complaint" and the agreement. He submits that, contrary to the Committee's interpretation, the agreement allows vendors to cancel a sole agency agreement at any time during the maximum 90 days listing period; that the sole agency agreements are for a maximum period of 90 days and expire naturally upon reaching the 90 day period; and the clauses contained in the agreement are there to protect

Borders in its recovery of marketing costs and also to prevent vendors from having to pay double commission fees.

- [b] The appellant also pleads that he was denied natural justice contrary to s.84 of the Act. Section 84(1) reads: *A Committee must exercise its powers and perform its duties and functions in a way that is consistent with the rules of natural justice.*
- [c] The appellant argues that the Committee’s finding has wrongly been made against him in person, when it should have been made against Borders Real Estate Ltd as an organisation.

We deal below with the content of those grounds of appeal.

Relevant Statutory Provisions

[13] Section 131 of the Act provides:

“131 Parties may cancel sole agency agreements in respect of residential property 90 days after agreement is signed

- (1) *Any party to a sole agency agreement that relates to residential property and is for a term longer than 90 days may, at any time after the expiry of the period of 90 days after the agreement is signed, cancel the agreement by written notice to the other party or parties.*
- (2) *If the parties to a sole agency agreement to which subsection (1) relates agree in writing to renew the sole agency agreement, the signing of the renewal agreement is, for the purposes of that subsection, taken to be the signing of a new sole agency agreement.*
- (3) *For the purposes of subsection (1), a sole agency agreement is signed when it is signed by or on behalf of the client or, if there is more than 1 client, when the agreement is signed by the last client.*
- (4) *A notice under subsection (1) may be served by fax or email.*
- (5) *This section has effect despite any provision to the contrary in any agreement.*

...”

[14] **“Sole agency agreement”** is defined in s.4 of the Act as *“an agreement between an agent and a client in which the client agrees not to instruct any other agent to act for the client in respect of the transaction to which the agreement relates”*.

[15] **“Agency agreement”** means *“an agreement under which an agent is authorised to undertake real estate agency work for a client in respect of a transaction.”*

[16] Sections 72 and 73 are key provisions in the complaints and disciplinary regime created by the Act. Section 72 defines *“unsatisfactory conduct”* by a licensee and

s.73 defines “*misconduct*” by a licensee. Among other things, a wilful or reckless breach of the Act or Rules constitutes misconduct (s.73(c)(i) and (iii)); and a breach of the Act or Rules constitutes unsatisfactory conduct (s.72(b)). The Rules “... set *minimum standards that licensees must observe and are a reference point for discipline*” – Rule 3.3. Relevant provisions include:

- [a] Rule 6.4: 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.
- [b] Rule 9.12: An agent must not impose conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent.

The Stance of Mr Graves (the Appellant) Before Us

[17] The appellant, very helpfully, filed detailed typed submissions setting out about 16 grounds of appeal. Essentially, he disagreed with the reasoning of the Committee and with the Committee’s procedural approach.

[18] The appellant emphasises his submission that no one has been disadvantaged by the listing form in issue.

[19] He submits that his (then) company should have been complained about and not him personally.

[20] He maintains that he was denied natural justice by the Committee because it did not gather appropriate information nor, he alleges, investigate the issue properly.

[21] He considered much of the Committee’s reasoning to be irrelevant to the complaint and maintains that he was providing his company’s clients with benefits on a “*very consumer friendly*” basis.

[22] He also emphasised that his company needed to protect itself against more substantial real estate rivals.

[23] He developed those themes in some detail.

[24] The appellant emphasised that his listing agreement is a “*living document*” so he does not have it in a set printed form but changes it “*almost monthly*” to comply with the law as he sees it.

[25] The appellant also emphasised to us that, despite the nature of the communications between the Authority’s investigator (and staff), and the appellant, to which we refer below, he did not understand that he was being asked to state his response to the complaint in full. He says that, at all material times, he expected the Authority’s investigator to come and interview him but that did not happen so that, he maintains, he did not receive natural justice.

DISCUSSION

[26] We note that the appellant has not complied with the requirements/Orders of the Committee about the substance of his listing form on the basis that he did not

accept its decision and was waiting for us to deal with his appeal. We comment below on the form of listing agreement which he now uses through Tall Poppy Real Estate Ltd.

Borders' Sole Agency Agreement

Clause 18

[27] Clause 18 of the Borders' sold agency agreement (set out above) provides for early cancellation; i.e. it provides vendors the opportunity to cancel an agreement prior to the expiry of the 90 day period. Counsel seemed to put it that, as the appellant states in his notice of appeal, Borders' agreements expire automatically upon reaching the end of the 90 day period, so that, on its own, clause 18 is not contrary to s.131. We feel that clause 18 abrogates from the simple concept of "*cancel the agreement by written notice*" in terms of s 131 because it adds various conditions to which we refer below.

[28] Counsel also put it that the issue for us is whether clause 18 renders clause 3 misleading.

Clause 3

[29] As the Committee pointed out, clause 3 of the agreement (set out above) is highlighted in a box at the top of the agreement and is headed/summarised: "*Easy Cancel Listing Agreement. You can cancel at any time for any reason*".

[30] Clause 3 states that a vendor may make a request to conclude the agreement at any time prior to the expiration of the 90 day period. However, the ability to do so is "*subject always to all the conditions of this agreement*". Those conditions include, among other things, the processes for cancellation in clause 18 of the agreement, and the effect of cancellation in clause 19 (discussed below).

[31] For example, cancellation within the 90 day sole agency period is subject to among other things, provision of reasons by the vendor and Borders' acceptance of the cancellation and, presumably, the vendor's reasons (clause 18). Until formally cancelled "*by Borders*" (i.e. until the vendor's cancellation request with reasons is accepted by Borders), clause 18 purports to prevent the vendor from allowing any other real estate agent access to the property "*under any circumstances or for any reason*" without first obtaining written consent from Borders.

[32] Do the provisions of clause 18 and 19 mean that cancellation under the agreement is not, in fact, "*easy*" and able to be done "*at any time for any reason*"? We consider that is the case and that the Committee was correct to find that clause 3 is misleading. It follows that its inclusion in the agreement is contrary to Rule 6.4 of the Rules so that use of the agreement by Mr Graves, as the principal of Borders, amounts to unsatisfactory conduct.

Clause 19

[33] Clause 19 of the agreement (also set out above) applies in two situations, namely:

- [a] The sole agency agreement is “concluded” during the 90 day listing period and the vendor still intends to sell the property; or
- [b] The sole agency agreement is not cancelled by the vendor prior to the expiration of the 90 day period and the property is not sold by Borders at the end of the 90 day period, and the vendor still intends to sell the property.

[34] The effect of (a), if it applies, is that a vendor must enter into a 30 day “minimum” period of general agency with Borders. During this period, a vendor may enter a sole agency agreement with only one other specified company, or a general agency agreement with any other company, only if all of Borders’ costs have been paid and cleared. Further, even if a vendor enters into a general agency with another company during the period of Borders’ general agency, clause 8 (explicitly referred to in clause 19) purports to prevent the vendor from allowing the other company to display sale or marketing signage on or near the property.

[35] The effect of (b), if it applies, is that the vendor must enter into a 30 day period (no reference here to “minimum”) of general agency with Borders. During this time, the vendor cannot enter into any other sole agency agreement.

[36] We consider that the prohibition on vendors from entering into a sole agency agreement with another agency for a 30 day period, even after the end of the Borders sole agency agreement, will usually be contrary to Rule 9.12. That rule prohibits agents from imposing conditions on a client that are “not reasonably necessary” to protect the interests of the agent. We also consider that, in this case, the prohibition is contrary to Rule 9.12.

[37] We also consider that the prohibition means that the “Easy Cancel” clause (clause 3) is misleading and contrary to Rule 6.4. The clause allows for the sole agency agreement to be cancelled, but because of clause 19, a vendor is not immediately entitled to enter into a sole agency agreement with another agency. That makes clause 3 misleading. Because we find that clause 3 is in fact misleading, and that clause 19 is “not reasonably necessary”, the inclusion of those provisions in the agreement is contrary to Rule 6.4 and/or Rule 9.12.

Natural Justice

[38] The Committee is bound to exercise its powers and perform its functions in a way that is consistent with the rules of natural justice, s.84(1) of the Act.

[39] Natural justice is “a duty lying on every one who decides anything” to “act in good faith and fairly listen to both sides” – refer *Laws of New Zealand Administrative Law* (online ed) at [58],. The two key principles of natural justice are that the parties be given adequate notice and opportunity to be heard and that the decision-maker be unbiased. Mr Graves appears to be challenging the first of these principles.

[40] The Authority wrote to Mr Graves on 4 August 2011 noting that the Committee had previously provided him with a full copy of the information provided by Mr Langdon and that it had decided to conduct an inquiry. It went on to state that Mr Graves was to provide a “written explanation of [his] conduct” in relation to the complaint. Without limiting what Mr Graves could provide in explanation, the letter asked him to respond specifically to a particular issue; he was to provide evidence of

instances where consumers had tried to cancel a sole agency listing agreement and had been happy with the process. Mr Graves was given 10 working days to provide a response.

[41] Mr Graves put it to us that he did not realise he was being asked to put his case in answer to the complaint and that he “*certainly expected further contact*”. He maintains that he was not given the chance to put his case. However, in its said decision the Committee encapsulated his stance. Also, in a response e-mail to the Committee of 30 August 2011 Mr Graves refers to his having taken the 4 August 2011 e-mail to a barrister and then sets out the comments of that barrister. Also, there were further subsequent communications about the complaint between Mr Graves and the Authority and Mr Graves provided substantive argument.

[42] There has been no breach of natural justice in this case. Mr Graves was fully advised of the complaint and given every opportunity to respond and did so. In any event, we have conducted a rehearing and have absorbed all Mr Graves’ issues and submissions.

[43] We consider that the Authority conducted a full and careful investigation of Mr Langdon’s complaint and gave Mr Graves every opportunity to respond; and, indeed, as we have said, he did respond fully. There has been no denial of natural justice but, in any case, he has had a full rehearing before us, in the usual way, so that any such possible procedural defect has been cured. Having said that, it may be helpful if Committees of the Authority, and/or an investigator of the Authority, spelt out to a complainee whether or not that complainee would be interviewed and preferably, offering a physical interview to the complainee if that person so seeks.

Correct Party

[44] This appeal raises an issue as to the complaints form used by members of the public to complain about the conduct of licensees, although the form which Mr Langdon completed in this case is slightly different to the one now available on the Real Estate Agents Authority website.

[45] In the form filed by Mr Langdon, under a heading “*Licensee you are raising a concern about*”, the form asks for details of an individual (i.e. surname and given name) first, then a company name. In the form now available on the website, under a similar heading, the form again asks for details of an individual first and then asks for an agency name.

[46] Given the purposes and principles set out at s.3 of the Act, namely “... *to promote and protect the interests of consumers in respect of transactions that relate to real estate and promote public confidence in the performance of real estate agency work*”, the complaint form should not be construed too narrowly. We do not regard the complaint form as akin to a formal pleading in civil proceedings; and it is most often filled out by lay complainants. We consider that the form should be read widely enough to allow complaints to be considered by Complaints Assessment Committees in terms of the potential liability of both an individual licensee and/or any licensee company. The Act itself contemplates such an approach. Section 4 provides that “*real estate agency work*” includes “*any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or to provide ... services ...*”.

[47] In any event, it was open to the Committee (and it is open to us) to make a finding of unsatisfactory conduct against Mr Graves personally. As the principal of Borders (i.e. its owner, director, and manager), his conduct in using a listing agreement which included misleading or unreasonable terms can properly be found to have been “*unsatisfactory*” under s.72 of the Act. There can be no doubt that, at material times, Borders Real Estate Ltd represented Mr Graves himself. It was his alter ego. It is perfectly appropriate that he was the party before the Committee of the Authority and the present appellant to us.

General

[48] Inter alia, the appellant felt it inappropriate that the complaint about him was made by a competitor licensee. However we observe that Rule 7.1 reads: “*A licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct may make a report to the Authority*”. Rule 7.2 reads: “*A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct must make a report to the Authority*”. While we, and the Committee, have not regarded the appellant’s conduct as amounting to “*misconduct*” under the Act, but as being unsatisfactory conduct, the complainant was entitled to feel that he should lay a complaint to the Authority in all the circumstances.

[49] We have set out above the full text of s.131 of the Act. We consider that s.131 is designed so that a prospective vendor cannot be committed to a sole agency agreement with a licensee, regarding residential property, for longer than 90 days and must then be able to readily and easily cancel any such sole agency agreement. We consider that the listing agreement complained of breached s.131; but we accept that the appellant had not effected that out of any sinister motive but from a misguided approach.

[50] Somewhat related to all the above is a form of advertisement put before us for Borders Real Estate emphasising, *inter alia*, that its listing agreement has an “*easy-cancel provision in case your plans change*”. That advertisement focussed on cut-price commission then being available from Borders and Mr Graves emphasised that, having given marketing discounts, he was concerned that Borders’ clients not be inveigled away by larger real estate firms. The cut price aspect seemed to be a factor in his endeavouring to ensure that advertising fees be paid before a listing was terminated. He seemed to think that other agents could sometimes be predatory towards him. He emphasised that “*in any situation whatever*” he would always “*concede to the customer*”.

[51] Mr Graves has provided us with the listing agreement he now uses on behalf of Tall Poppy. From it we have the concern that a minimum 15 day period of general agency will always follow the end of a sole agency. In that respect his clause 15 reads:

“A period of General Agency applies after conclusion of the Sole Agency and the fee changes (see page 1)

15) *that if at the conclusion of the Sole Agency we still intend to sell the property a 15 day minimum period of TALL POPPY General Agency (including TALL POPPY’s continued marketing of the property) will follow immediately regardless of whether the sole agency expires or is cancelled. The TALL POPPY General Agency will continue after the minimum 15 day period until cancelled in writing by us unless specific buyer interest exists (even if that*

interest has not progressed to an offer being made) or money TALL POPPY considers due remains outstanding in which case the General Agency will continue until that buyer interest is at an end and/or the money is paid in full”.

[52] We consider that clause 15 breaches s 131 of the Act because it adds a gloss to termination of a sole agency, namely, that there be a new minimum of a 15 day general agency period. We consider that, under s 131, a customer/consumer must be able to completely terminate his or her relationship with the licensee after 90 days of a sole agency agreement unless the customer/consumer decides otherwise. *Inter alia*, there is the risk of a double commission situation arising.

[53] We consider that the decision of the Committee is correct with sensible and appropriate reasoning. We endorse and confirm the decision of the Committee.

[54] For the above reasons this appeal is dismissed.

[55] We observe that the appellant has not really advanced further argument to us than was put to the Committee of the Authority and, until now, does not seem to have accepted that the Act must be carefully complied with. We order that he forthwith pay costs of \$1,000 to the Registrar of this Tribunal within 21 days of this decision.

Judge P F Barber
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member