BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 78

READT 102/11

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

BETWEEN **FRANK VARSANYI**

Appellant

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

First respondent

AND **SHONA McMILLAN**

Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at DUNEDIN on 16 October 2012

DATE OF DECISION 24 December 2012

REPRESENTATION

The appellant, with Mr M Dorking as a McKenzie friend
Ms J MacGibbon, counsel for Authority
The licensee second respondent, with Ms J De La Roche as a McKenzie friend

DECISION OF THE TRIBUNAL

Introduction

[1] Frank Varsanyi (the appellant) appeals against the decision of Complaints Assessment Committee 10048 to take no further action on his complaint against licensed salesperson Shona McMillan for her alleged conduct as selling agent of his property at 36 Russell Road, Seacliff, Dunedin. The complaint is that licensee pressured him to sell his property and failed to encourage an offer from another prospective purchaser.

[2] On 31 August 2011 the Committee determined to take no further action on the basis that there was insufficient evidence to support the appellant's complaint.

Background

[3] The appellant had been unsuccessfully marketing the property privately at a price of $745,000 throughout 2009. On 2 December 2009 he appointed the licensee as agent to sell the property for an advertised price of $765,000, but the property was not sold during that agency.

[4] On 6 September 2010, the appellant signed a second agency agreement with the licensee at an advertised price of $559,000. Shortly afterwards, the appellant went overseas. On 6 November 2010, an offer at $500,000 was made by the Hibbert family for the property with settlement and possession on 14 December 2010. The licensee had previously sold a property on behalf of the Hibberts.

[5] On 21 November 2010 the licensee informed the appellant by email (because the appellant was still in Bali) that another party, the Cottinghams, were interested in the property and that she had told them there was another offer on the table, but the Cottinghams did not want to make an offer until they had viewed the property and been to the Local Council. The Cottinghams had made plans to fly down from Auckland and stay and view the property on 12 December but this was not spelt out to the vendor/appellant. They had purchased their air tickets, apparently on a non-refundable basis, on 20 November 2010.

[6] The licensee stated her view to the appellant that the Hibberts' offer would not last until mid-December as they had sold their property and needed to buy something immediately. She further warned that the Cottinghams may not make an offer after seeing the property. The licensee states that she told the complainant it was up to him what he wanted to do. On 2 December 2010 the appellant accepted an offer of $525,000 for the property from the Hibberts.

The Committee's Decision to take No Further Action

[7] The substance of the Committee's reasoning is set out as follows:

"4.1 The Complaints Assessment Committee (the Committee) understands that the complainant might be of the opinion that he could have received a better offer from the Cottinghams and also that the property was sold well below what he believed it was worth. It is however a real possibility that the Cottinghams might never have made an offer after viewing the property. The evidence presented makes it clear that the Cottinghams were informed of the Hibberts' existing offer and that the Cottinghams did not want to be part of a multi-offer situation or to make an offer before viewing the property. The evidence does not substantiate that the Cottinghams were going to visit the property on the understanding price of $575,000.

4.2 The fact that the property was advertised for offers over $575,000 does not automatically mean a party that viewed the property will be offering over that price. After all, the Hibberts made an offer below that price after viewing the property and that was probably in response to the same advertisement. There was therefore no assurance that the Cottinghams would have offered over $575,000 if they chose to make an offer at all.

> *4.3 The Committee is satisfied that the complainant was informed of the Cottinghams' interest in the property and that they were coming down to view the property in December. In the Committee's view it is irrelevant that the licensee did not specifically inform the complainant that the Cottinghams had booked plane tickets to view the property, as she did inform him that the Cottinghams would be coming down to sight the property in December. The means of transport they would have been using is deemed irrelevant.*
>
> *4.4 The timeframe from when the complainant was first informed about the Hibberts' offer until the time when the agreement was finally signed was more than a month. The Committee is therefore satisfied that the licensee did not put the complainant under pressure to sign the agreement for sale and purchase.*
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> *4.5 The Committee is satisfied that, on the balance of probabilities, there was no evidence presented that substantiated the allegations made or that would substantiate a disciplinary action that can be dealt with under either section 72 or section 73 of the Act."*

[8] That extract from the Committee's decision encapsulates the issues covered before us and we agree with the Committee's views.

[9] Inter alia, the Committee had recorded that the complainant vendor was a keen collector of classic cars, kayaks, tribal artefacts, and the like and there were a great many such items on the property including more than 50 unrestored classic cars and firewood, rimu, and chickens.

[10] The Committee also recorded that the appellant vendor's relationship with his domestic partner had broken down in about July 2010 and he was emotionally devastated by that and said that he suffered severe depression at material times.

Relevant Evidence before Us

[11] The vendor appellant maintained that he was not kept fully informed by the licensee about the interests of the prospective purchaser, Mr Cottingham, and when there was strong interest from that prospective purchaser he (the appellant) was pressured by the licensee into accepting the offer from the Hibberts. He said that had he realised that the Cottinghams had actually booked tickets to come to Dunedin to view the property on a specific date on 12 December 2010 he would not have accepted the Hibberts' offer on 2 December 2010.

[12] There was much detail about the appellant's involvement with his property over about 15 years and about his unsuccessful efforts to sell it until the licensee took a grip on the situation from 2 December 2009. We can understand the feelings of the appellant vendor, who had spent 15 years restoring a unique large property which had originally been a hospital, that he had expected a higher sale price. The licensee emphasised that, at material times, he was *"in a bad mental state"* and that the licensee knew that. He referred to values of properties in the area, but they cannot be sensibly related to his unique property. He maintained that the licensee did not *"give it a chance"*.

[13] The appellant seemed concerned that, as at December 2010, he was willing to sell the property for $575,000 but that the Hibberts came back at $525,000, saying they could not afford any more, and he felt that the licensee pressured him to sell it on the basis that the chance of the Cottinghams doing so was very slim in terms of her experience.

[14] The vendor complainant also seemed struck at the amount of commission which he believed had passed to the licensee, but it is clear that she had been a dedicated agent on his behalf and he seemed to acknowledge that to us. At the time he sold the property to the Hibberts, he seemed to not realise that there were only ten days before the Cottinghams were due to come to Dunedin and view it.

[15] It was, of course, put firmly to the appellant that there was a risk he would have lost the Hibberts as purchasers. His response was that their price was so ridiculously low there could have been no such risk, but the licensee pushed him into selling at $525,000 and he agreed under extreme pressure from her. He admitted that the situation had been checked out for him by his lawyer at all material times.

[16] He kept emphasising that after 15 years of hard work on the property he had *"given it away"* and that he should have waited throughout that Summer for further offers and that it was ridiculous of him to have sold for $525,000 on 2 December 2010.

[17] The appellant seemed to be saying that the licensee had pressured him when he was in a very emotional state. He now says that he was *"in a bad way mentally"* on 2 December 2010, and that the licensee knew that and pressured him, and he has since been told by all his friends that he was *"mad"* to sell the property at $525,000.

[18] Mr Cottingham gave evidence for the appellant vendor. He had endeavoured to arrange that he and members of his family stay at the property (which once had backpackers' accommodation), but the licensee advised that, at that stage, guests were no longer being accommodated there. The licensee told him that an offer had been made for the property and suggested that Mr Cottingham make an offer conditional on his viewing it and, perhaps with other conditions. He declined to do that and wanted to obtain a LIM report as well as inspect the property. Even though the licensee pressed him, he (quite understandably) declined to make any type of offer without seeing the property. He was booked to fly to Dunedin for that purpose on 12 December 2010.

[19] We understood from Mr Cottingham's evidence that he had a strong interest in the 50 unrestored classic cars rather than in the property itself so much. Mr Cottingham also agreed that at no stage had he given any indication of the price he might be prepared to pay to the licensee.

[20] The Cottinghams had bought their air tickets on 20 November 2010 and feel outraged that, in their view, the licensee had sold the property without giving them the chance to view it. Mr Cottingham also seemed annoyed that, because he could not get a refund on air tickets, he had spent money coming to Dunedin to view a property which had already been sold to someone else.

[21] The licensee put it to the appellant that she had done a good job for him and that she was sorry about his current feelings. The appellant did not seem to deny that the licensee had done a good job for him in general.

[22] It was emphasised that the appellant had told the licensee that the property must be sold as the licensee could not live there anymore as his former partner had left him and he needed to urgently put matters behind him, and sell the property.

[23] The vendor kept reiterating, inter alia, that he would not have signed an agreement to sell to the Hibberts on 2 December 2010 if he had known that the Cottinghams were coming to view it on 12 December and that he was not told of that precise fact.

[24] The licensee explained that the property was so large, and in such a mess and derelict, that her salespeople colleagues felt it to be unsaleable. She emphasised that the appellant wanted the property sold so that he could move on from his emotional state.

[25] The licensee emphasised that she could not extract an offer from the Cottinghams on any conditional basis until they had come to Dunedin to inspect the property and confer with the local Council. From her experience she had doubts about the likelihood of their continuing and making an offer, and she was being chased by the Hibberts whom she felt might withdraw as prospective purchasers. She said that she was very worried that the appellant might lose the opportunity to sell to the Hibberts for $525,000 which was much more than any other prospective purchaser had considered. She said that she omitted to tell the appellant that the Cottinghams were actually booked to fly to Dunedin on 12 December 2010 to inspect the property as she did not think that was relevant; and she had just told the appellant that they were coming on that particular date. She said that from her experience as a real estate agent she did not think the Cottinghams were genuine purchasers and that with *"a real solid offer on the table"* the appellant should accept it. The licensee insisted that, at all times, she was only acting in the best interests of the appellant.

The Statute

[26] A complaint can only be made in relation to alleged unsatisfactory conduct (s.72 of the Act) or alleged misconduct (s.73 of the Act.

[27] Section 72 of the Act defines unsatisfactory conduct:

> *"**72 Unsatisfactory conduct***
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that –*
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
> *(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
> *(c) is incompetent or negligent; or*
> *(e) would reasonably be regarded by agents of good standing as being unacceptable."*

[28] Section 73 of the Act defines misconduct –

*"**73 Misconduct***
For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct –
(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
(b) constitutes seriously incompetent or seriously negligent real estate agency work; or
(c) consists of a wilful or reckless contravention of –
(i) this Act; or
(ii) other Acts that apply to the conduct of licensees; or
(iii) regulations or rules made under this Act; or
(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licence."

[29] Rule 6 of the Real Estate Agents (Professional Conduct and Client Care) Rules 2009 deals with standards of professional conduct. Rule 6.4 states:

"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."

[30] Rule 9 refers to client care and dealings with customers and Rule 9.2 states:

"9.2 A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure."

Discussion

[31] The Committee conducted a hearing on the papers, pursuant to s.90 of the Real Estate Agents Act 2008, and made a determination under s.89 of the Act. Section 111 provides a right of appeal to us from any determination by a Complaints Assessment Committee. On appeal, we may confirm, reverse or modify the determination appealed from. If we reverse or modify the determination we may exercise any of the powers that the Complaints Assessment Committee could have exercised (s.111(5)).

[32] In *K v B* [2010] NZSC 112, [2011] 2 NZLR 1, the Supreme Court clarified principles articulated by the Court in the earlier case of *Austin*, *Nichols & Co In v Stichting Lodestar* [2007] NZSC 103,]2008] 2 NZLR 141. The Court confirmed that appellate courts will adopt a different approach on appeals from discretionary decisions to that taken on general appeals:

"[32] ... for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a

general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary."

[33] We have previously held that we shall adopt the wider approach set out in *K v B* on appeals from decisions as to unsatisfactory conduct (general appeals) and the narrower approach on appeals from discretionary decisions. In the present case, the wider approach is appropriate as the Committee determined to take no further action in this matter which was a determination rather than a discretionary decision.

[34] May be Mr Cottingham was a likely purchaser. The licensee had to come to a view on that and advise the appellant vendor. The licensee had had a previous experience with Mr Cottingham over another property where he had not pursued a prospective purchase. Of course, his insistence on inspecting the property and at least obtaining a LIM report before contemplating an offer was very sensible. However, the dilemma for the licensee, in advising the appellant, is that she honestly felt the Hibberts could withdraw their offer at $525,000 and she had no idea whether the Cottinghams were interested at that price level if they did choose to pursue the transaction.

[35] It may well be that the licensee pressured the appellant a little too much; but he had unburdened his problems to her and made it clear that he wanted quit of the property due to his emotional state at the time. She needed to interpret all those factors. Also, the Government valuation of the property was $400,000 and the licensee had poor feedback about value and about the messy state of the property.

[36] At material times, the appellant was begging the licensee to arrange a sale of the property on his behalf so that he could move on with his life. Before us, he seemed to accept that, apart from the price obtained, she had *"done a great job"* for him, and he realised it was an unusual property for the marketplace and a challenge for an agent to sell.

[37] With hindsight it, would have been a safer course for the licensee to have made it clear to the vendor that the Cottinghams had actually booked air tickets to come from Auckland to view the property on 12 December 2010. However, we can understand her view that the vendor could not risk losing the Hibberts' offer when the Cottinghams were not interested in any form of offer until they had viewed the property and, seen the local Council and, one would expect, taken advice and thought about the situation. Also, Mr Cottingham would give no hint whatsoever of the price level to which he might aspire. We did not find his evidence for the vendor to be convincing.

[38] Frankly, this seems to be a situation where friends of the complainant vendor have semi-derided him for selling his unusual/unique property at too cheap a price. We do not think that, at material times, much store could be put on the likelihood of an attractive offer coming from Mr Cottingham, but one never knows. We are impressed at the extensive efforts of the licensee in achieving a sale. Her marketing efforts were strenuous and involved extensive work hours and effort. Her decision to press the appellant into accepting the offer from the Hibbert family may well have been rather prudent. Certainly, she honestly felt that the Hibbert offer was *"great"* for the appellant, *"was on the table"* (as she put it), and was *"loseable"*.

[39] All in all, when we stand back and view the evidence objectively, we cannot conclude that the appellant's conduct at all material times was in any way deficient. In any case, we agree with the conclusion of the Committee, in all the circumstances, that no further action be taken with regard to the complaint or any issue involved in this case.

[40] The appellant's contention is that the licensee unduly pressured him to sign the sale and purchase agreement representing the Hibberts' offer. He further alleges that the licensee failed to act in his best interest and failed to pass on relevant information, namely, that the Cottinghams had already booked flights to come and view the property in December. However, there is no evidence to show that a better offer was available for the property. Also, we note the Committee's finding that, given it was more than a month from when the appellant was first informed of the offer until the time that he accepted the offer, the complaint that there was undue pressure could not be substantiated.

[41] If he appellant's decision to sell at $525,000 was unwise, which we very much doubt, he has no sensible reason to blame the licensee.

[42] Accordingly, this appeal is dismissed.

[43] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

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Judge P F Barber
Chairperson

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Mr G Denley
Member

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Mr J Gaukrodger
Member