BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 106

READT 033/11

IN THE MATTER OF	a charge laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (CAC 10040)**
	Prosecutor
AND	**LESLEY DE RUYTER**
	Defendant

MEMBERS OF THE TRIBUNAL

Ms K Davenport QC - Chairperson
Ms N Dangen - Member
Mr G Denley - Member

HEARD at CHRISTCHURCH on 14 November 2013

DATE OF DECISION

APPEARANCES

Ms J MacGibbon, counsel for the Prosecution
No appearance for the Defendant

ORAL DECISION

Introduction

[1] Ms de Ruyter is charged with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008.

The Charge

1. Following a complaint made by Marilyn Hoogenraad and Jason Coleman ("the complainants"), Complaints Assessment Committee 10040 charges the defendant, Lesley de Ruyter, Agent, with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 in that her conduct consists of a wilful or reckless contravention of rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, namely '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'.

Particulars:
On or about 3 February 2010 the licensee advised the complainants that:

(i) Mr and Mrs Stringer ("the purchasers") had sold their home; and

(ii) The purchasers would pay the complainants a deposit for the purchase of the complainant's property when the purchasers received the deposit for the sale of their property;

and presented the complainants with an unconditional offer from the purchasers for the purchase of the complainants' home, in circumstances where the licensee knew or should have known that the purchasers had not entered into an agreement for the sale of their home.

[2] This case has been heard in two parts, the first hearing on 21 June where the Tribunal heard evidence from the complainant Ms Hoogenraad. Ms Hoogenraad is the sister of Ms de Ruyter. Ms de Ruyter was at the hearing on 21 June and cross examined her sister. Today (14 November 2013) the Tribunal has reconvened. Ms de Ruyter has not appeared and the Tribunal heard evidence from Mrs Stringer who was the other party to the Agreement for Sale and Purchase, the subject of this complaint.

[3] [1] The complaint arises out of an Agreement for Sale and Purchase entered into on 3 February 2010 between Mr Jason Coleman and Ms Marilyn Hoogenraad as vendors and Stephen Hugh and Lavinia Jean Stringer as purchasers. The property was 8.3 hectares at 1856 Maheno-Herbert Road, Herbert, Oamaru, Otago, a farmlet which was being sold by Ms Hoogenraad and her partner. They listed it for sale with Ms Hoogenraad's sister Ms de Ruyter, with Century 21 in Oamaru. The property had been rather hard to sell and Ms Hoogenraad told the Tribunal that they were thrilled when on 3 February Ms de Ruyter presented them with an unconditional Agreement for Sale and Purchase with a purchase price of $365,000 plus GST. The deposit was said to be $35,000 to be paid on settlement of the transaction and the settlement date was set for six months after the Agreement for Sale and Purchase (see Clause 3).

[4] Mrs Stringer told the Tribunal that at the time that she entered into the unconditional Agreement for Sale and Purchase she and her husband Stephen had listed their property at 20 Lark Street, Oamaru for sale. They had listed it for $270,000 but they had not concluded any agreement on the property. She told the Tribunal that Ms de Ruyter assured her that there would be no difficulty entering into an unconditional contract and she could always live in the Maheno-Herbert Road property and rent out the Lark Street property. She also represented to Mrs Stringer that there could be a GST deduction arranged prior to settlement to cover the deposit on the purchase, although Mrs Stringer was not exactly certain how this was going to work. Ms de Ruyter advised Mr and Mrs Stringer that the rent from Lark

[1] The Tribunal confirmed with Ms de Ruyter the date of the reconvened hearing and the place of hearing by e-mail dated 30 October 2013. The Tribunal delayed the start of the hearing to give her time to arrive but she has not done so. The Tribunal therefore proceeded in her absence.

Street would cover the finance of the cost of the purchase of the Maheno-Herbert Road property. Ms de Ruyter also suggested that Mrs Stringer use a different lawyer to her normal solicitor and suggested a conveyancing practitioner, Ms N Cullen of Cullen Conveyancing.

[5] At the time that this unconditional agreement was entered into Mr and Mrs Stringer did not have a sale on their property but subsequently an offer was received for $225,000 from Century 21. This was not accepted because an independent valuation had shown that the property was worth $270,000 and a sale at this price would also leave the Stringers unable to complete the purchase of the Herbert Street property.

[6] The bank subsequently informed Mr and Mrs Stringer that they could not obtain sufficient borrowings to enable them to purchase the Herbert Street property unless they sold the Lark Street property for close to the valuation amount of $270,000. They told Mr Coleman and Ms Hoogenraad of this problem and subsequently took legal advice from their solicitor. They came to the realisation that they could not complete the contract and asked to be released from it. They were eventually released from the agreement by Mr Coleman and Ms Hoogenraad. In July 2012 they sold the Lark Street property for just over $260,000 but did not subsequently renew their offer to purchase the Maheno-Herbert Road farm.

[7] The evidence of Ms Hoogenraad is essentially the same. She said that when her sister told her that there had been an unconditional agreement entered into on the property she was overjoyed. The property had been on the market since July 2009. She said that in addition to being told by her sister that the purchasers had sold their Lark Street property she was also told that the deposit would be paid as soon as the Stringers received the deposit from the purchasers of their property, which had been delayed. She also told her sister that Mr and Mrs Stringer would like to rent the Herbert Street property prior to settlement, thus giving the vendors an ability to have an income for the six month waiting time.

[8] Ms Hoogenraad and her partner moved out of the Maheno-Herbert Road property in preparation for the Stringers moving in and went to live in another property that they had purchased. When they understood from the Stringers that they could not complete the purchase they were forced to move back to the Maheno-Herbert Road farm and sell their new property. They made a significant loss of approximately $50,000. Ms Hoogenraad told the Tribunal that she had immediately contacted her sister who told her that she had done everything correctly. Ms de Ruyter denied that she had told her sister that the property had been sold and said that she always said that the Stringers had had an offer on their property but had turned the offer down. She told the Tribunal that many times she tried to speak to her sister about this but she would not talk to her or respond to any messages. Ms de Ruyter cross examined her sister on this evidence and she raised with her sister the issue of whether or not the Stringers had told her that they had sold their property. Ms Hoogenraad confirmed that this is the advice that she had received from her sister. Ms de Ruyter asked her sister whether it was true that Ms de Ruyter had never seen the contract but Ms Hoogenraad was firm in her evidence that her sister had told her that the Lark Street property owned by the Stringers had been sold.

[9] The Tribunal has not had the benefit of hearing from Ms de Ruyter except in her cross examination of her sister. However on 24 May 2010, relatively contemporaneously with the events and following the complaint she wrote to the Complaints Assessment Committee. This is a summary of what she said:

(i) That Mr and Mrs Stringer had informed her that they were going to accept the offer on their property but it was not until after the purchase of Maheno-Herbert Road that they decided not to accept the offer. The Stringers had told her that finance was not an issue anyway as they had a good equity in their property to borrow against. She said that she continually asked the question about finance during the period of negotiation and was always told that it was not an issue. She told the Complaints Assessment Committee that they could end up owning both homes but this did not seem to be a concern to them. She said the deposit was not due until settlement but the purchasers had advised her that once they accepted the contract on their Lark Street property they would transfer the deposit to the purchasers from the sale to the purchase of the new property. She said that she told her sister of this.

(ii) She said she was unaware that the purchasers visited the vendors in February 2010 and unaware of the circumstances which had arisen. She apologised for the inconvenience and said it was totally unexpected after her talks with the purchaser and advising them in detail of the position they could be in if they did not sell their home. She said she was told by the Stringers on each occasion that this was not an issue.

(iii) She concluded by saying it was the purchasers that were totally at fault in this situation:

> "*By way of not accepting my advise (sic) and making their Sale and Purchase Agreement conditional therefore causing the vendors undue cost and stress. I once again believe that I asked the appropriate questions and stated the most obvious facts before writing up the Sales and Purchase Agreement and making it an unconditional contract and follow the instructions of my purchasers*".

Discussion

[10] It is unfortunate that Ms de Ruyter has not come to the hearing today in order to give the Tribunal her evidence to support that letter. The Tribunal must determine whether, on the balance of probabilities and after having heard the two witnesses whose evidence is set out above, the Complaints Assessment Committee have discharged the burden of proof upon them to prove the charge on the balance of probabilities. Having considered the evidence and the questions which the witnesses were asked the Tribunal conclude that the Complaints Assessment Committee have established the charge and that Ms de Ruyter's conduct is misconduct in terms of s 73 of the Real Estate Agents 2008 and that her conduct is a wilful or reckless contravention of Rule 6.4 which says:

> "A licensee may 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."

The particulars of the false information are:

Issue 1
That Mr and Mrs Stringer had sold their home.

Issue 2
That the purchasers would pay the complainants a deposit for the purchase of the property when the purchasers themselves receive the deposit for the sale of the property.

[11] We find the charge established. We consider from the evidence that we have heard that this was a wilful breach of the rules which put the purchasers and the complainants in a situation where heartache and cost would be experienced by all and this has proved to be the case.

[12] Ms de Ruyter has informed the Tribunal that she is no longer working as a licensed agent. However having heard this evidence the Tribunal conclude that the only appropriate penalty is for Ms de Ruyter to have her license cancelled under s 110(b). We also impose upon Ms de Ruyter a fine in the sum of $5,000.

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

DATED at AUCKLAND this 3rd day of December 2013

_____
Ms K Davenport QC
Chairperson

_____
Ms N Dangen
Member

_____
Mr G Denley
Member