

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision no: [2013] NZREADT 4
Ref No: NZREADT 115/11

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

BETWEEN NEIL POLLETT
Appellant

AND THE REAL ESTATE AGENTS
AUTHORITY
Respondent

MEMBERS OF TRIBUNAL

JUDGE P F BARBER – Chairman
MR G DENLEY– Member
MR J GAUKRODGER – Member

Heard at Auckland: 24 October 2012

Appearances: The Appellant on his own behalf
Mr L J Clancy counsel for the Authority

Date of Decision: 18 January 2013

RESERVED DECISION OF THE TRIBUNAL

Introduction

[1] Neil Pollett (“the licensee”) appeals against a decision of Complaints Assessment Committee 10048 finding he engaged in unsatisfactory conduct. That is defined in s.72 of the Real Estate Agents Act 2008 as follows:

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
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

The Committee found that Mr Pollett breached r 9.15 of the Real Estate Agents Act (Professional Conduct and Customer Care) Rules 2009 when advertising and/or marketing a property without a valid listing agreement, and censured him. Rule 9.15 of the Rules provides:

“9.15 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.”

[2] The Committee became aware of Mr Pollett's conduct in the course of its investigation into a complaint Mr Pollett had made against his supervisor, Patrick McCarthy of Browns Real Estate Ltd trading as New Zealand Sotheby's International Realty (“NZSIR”). At material times, Messrs Pollett and McCarthy were employees of NZSIR. Pursuant to s 78(b) of the Act, the Committee investigated Mr Pollett's conduct on its own initiative. The Committee found that Mr McCarthy had engaged in unsatisfactory conduct and made orders censuring him, directing him to enrol in and complete a course on the Act at the Open Polytechnic, and ordering him to pay a fine of \$1,500. The Committee also found that Mr Brown, who operates Browns Real Estate Ltd, had engaged in unsatisfactory conduct and made similar orders against him, except he was ordered to pay a higher fine of \$4,000.

[3] Mr Pollett has voluntarily suspended his salespersons licence from 31 October 2011 until 1 April 2015 and now seems to work in Australia.

Background

[4] The Licensee admitted that he showed a prospective client through a property at 85 Vintage Lane, Waiheke Island, without an agency agreement being in place for that property. According to the Licensee, Mr McCarthy informed him that he (Mr McCarthy) was in the process of obtaining a general listing from the vendor of that property and that, by the time the Licensee would have arrived at the property with the prospective client, Mr McCarthy would have had the agency agreement in place. The Licensee said that, as a very newly qualified agent, he was being led through the process by his supervisor Mr McCarthy.

[5] That prospective purchaser did not proceed with an offer on that property. According to the Licensee, on his return to the office from viewing the property, he was informed by Mr McCarthy that he did not obtain a listing agreement and that he would only obtain one if the prospective purchaser wanted to make an offer.

[6] The Licensee stated that he was contacted by another prospective client who wished to view a property at Kaitoke Beach on Great Barrier Island listed on

NZSIR's website. According to the Licensee, he spoke to Mr McCarthy about that Kaitoke Beach property and assumed that the listing agreement was in place, because Mr McCarthy indicated that it was and he was the listing agent.

[7] Due to his unavailability that weekend, the Licensee provided that prospective client with the contact details of the vendor of the Kaitoke Beach property and suggested that the prospective purchaser meet the vendor of that property on the island. However, apparently, that prospective client was unable to contact the vendor and unable to visit the island.

[8] On 20 August 2010 the Licensee sent NZSIR an email to warn that some of its listings had expired. One of those properties (whose listing had expired) was Ridge Country Retreat in Bay of Plenty. It appears that the Licensee did not remove that Ridge property from the marketing website in the interim until such a new listing agreement was obtained (if obtained).

[9] By letter dated 27 August 2012, Mr Pollett's employment contract was terminated by NZSIR. However, it was clear before then that Mr Pollett disagreed with NZSIR's policies and there was discontent between him and NZSIR and its employees, including Mr McCarthy. After his contract was terminated, Mr Pollett complained about Mr McCarthy's conduct.

[10] The Committee's unsatisfactory conduct finding against Mr Pollett related to the said three separate properties and we now provide further detail.

85 Vintage Lane, Waiheke Island (Waiheke Island property)

[11] As indicated above, a prospective purchaser contacted Mr Pollett seeking an investment property in the region of NZ\$1 million. Mr McCarthy suggested the Waiheke Island property and Mr Pollett arranged to take a relative of the prospective purchaser to view it. Mr Pollett was aware that Mr McCarthy did not have a listing agreement in place, but stated that Mr McCarthy told him one would be in place by the time he arrived at the property. Having not been a real estate agent for a long period of time, Mr Pollett said he was guided in this process by Mr McCarthy. The prospective purchaser did not make an offer on the Waiheke Island property.

[12] Mr Pollett said that on his return to the office from the Waiheke Island property, Mr McCarthy told him that he had not obtained a listing agreement and that he would only obtain one if the prospective purchaser wanted to make an offer.

[13] In response to the complaint made against him by Mr Pollett, Mr McCarthy stated that he arranged with the vendor of the Waiheke Island property for Mr Pollett to show the prospective purchaser through it. However, he said he made it clear that if the prospective purchaser showed any interest, it would be necessary to enter a new agency agreement before an offer could be made. Mr McCarthy said that he called REINZ to obtain their advice on the matter and they assured him that properties could be viewed by potential buyers without a formal agency agreement in place.

[14] The Committee held that Mr Pollett should have ensured that a valid agency agreement was in place for the Waiheke property before he showed a prospective purchaser through it.

[15] Before us, the Licensee Mr Pollett emphasised that Mr McCarthy had assured him that he would have a valid listing agreement for the Waiheke Island property the day before the Licensee visited it and Mr McCarthy strongly advised the Licensee that he (the Licensee) was legally entitled to take his client to view that property. This was the first property which the Licensee had ever taken a client to view and the Licensee was under Mr McCarthy's direct supervision so he accepted Mr McCarthy's advice. Indeed the Licensee offered to obtain a signed listing from the vendor himself before the visit, but was told not to do that by Mr McCarthy; and the Licensee assumed Mr McCarthy wanted to secure the listing commission for himself.

Kaitoke Beach, Great Barrier Island (Kaitoke Beach property)

[16] Mr Pollett stated that a customer of his saw the Kaitoke Beach property advertised on NZSIR's website. Mr Pollett told the customer that Mr McCarthy was the listing agent. The customer asked Mr Pollett if he could view the property over Easter. Mr Pollett said that a viewing could be arranged but, because he was unavailable that weekend, he provided the vendor's contact details to the customer so the customer could contact the vendor directly. In fact, no such viewing took place. Mr Pollett stated that he understood later that Mr McCarthy had never visited the property himself and did not have a valid listing agreement to market it.

[17] The Committee found that Mr Pollett should have ensured that a valid listing agreement was in place before he marketed the property by providing the vendor's details to the prospective purchaser.

[18] Mr Pollett states to us that had he assumed a valid listing agreement was in place for the property as it was advertised on NZSIR's website. He asserts that he did not "market" the property to the customer as the customer saw the property on the NZSIR website and enquired about it. Mr Pollett states he simply put the customer and vendor in touch with each other. He submits to us that he did not promote the Great Barrier Island to his own client, a Mr Arnesen, but that the latter approached him after viewing advertising (which Mr Pollett expected to be legitimate) by Mr McCarthy and requested that the Licensee set up an inspection for him at the property. As it happened the vendor of that property is a licensed agent and at material times also had a legitimate listing for it in his own right.

[19] Mr Pollett puts it that he did not personally promote, advertise, or market that property to anyone and never took his client, Mr Arnesen, to visit it. Mr Pollett assumed that if NZSIR, as his employer, was advertising the property then it had been done in accordance with the law. He assumed it had been listed properly by Mr McCarthy at material times as it was listed on the firm's website in the usual way.

[20] In oral evidence to us, the Licensee emphasised that his response to the client had been that he would refer him to Mr McCarthy who knew the vendor well. The

Licensee emphasised that he merely referred the client to Mr McCarthy and to the vendor, himself a licensed agent, but the matter did not go ahead in any way further.

[21] Before us, the Licensee admits that, with hindsight, he should have asked through Mr McCarthy to see the listing agreement for the property instead of assuming that because the property was listed on the firm's website, it had been properly listed. However, he emphasised that he had only been employed for about three months at that stage so the thought did not occur to him. He seemed to be also saying that he found Mr McCarthy to be rather cagey about what documentation existed with regard to particular listings.

Ridge Country Retreat (Ridge property)

[22] When, by email dated 20 August 2011, Mr Pollett informed NZSIR that some of his listings had expired, that included the listing for Ridge property. In reply emails, NZSIR agreed that the Ridge property should no longer be marketed on the website.

[23] The Committee found that Mr Pollett should not have marketed the property until a new valid agency agreement was in place.

[24] Mr Pollett states that he asked NZSIR to remove the Ridge property from their website in order to comply with the Act. He claims that he had no ability to remove it himself. Mr Pollett submits that he had no control over the addition or removal of any property advertisements on NZSIR's website. He said that he promptly notified the vendors that their listing agreement had expired when he returned to New Zealand and three times in writing made it very clear that NZSIR would have to remove the advertising regarding their property. He also advised both the NZSIR marketing manager and the administration manager as they controlled that company's advertising, but neither took any action to remove the advertising at his request. Indeed, a few days later the general manager at NZSIR cancelled Mr Pollett's "employment" (an independent contractor's agreement) with immediate effect and NZSIR kept on advertising that particular property online for some months.

[25] In his oral evidence Mr Pollett referred to this Tauranga property (the Ridge property) and explained that, while he had been overseas, its listing had lapsed so that the first thing he did on returning to his office in early August 2010 was to check the position and endeavour to have a relisting agreement signed. However, by then his relationship with NZSIR had become estranged. He had been in Australia where he now seems to be working as an international marketing property consultant. He wanted the vendor to sign a relisting agreement urgently and immediately sent an appropriate form to her for signature. However, she did not take any steps for about three days so he told her the matter was urgent. Also, he told his supervisor to remove it from the website in the meantime but, as explained above, that was not implemented, and his contract with NZSIR was cancelled.

Discussion

[26] It seems that Mr Pollett fell out with his employer, NZSIR, because in terms of Rule 7.2 he felt obliged to complain about Mr McCarthy failing to “do things correctly”. NZSIR took umbrage at Mr Pollett over that stance and told him to obey his supervisor (Mr McCarthy) even through Mr McCarthy’s actions may not be appropriate. That attitude of NZSIR soon led it to terminate Mr Pollett’s services.

[27] Mr Pollett emphasised that he had brought a formal complaint to the Authority against Mr McCarthy because he felt that was a legal obligation upon him under Rule 7.2 of the Client Care Rules. In fact he was not so obliged but we can understand his reasoning as r 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.” It needs to be noted that r 7.1 reads in a somewhat similar way except that “unsatisfactory conduct” is put instead of ‘misconduct’ and “may” is to be read for “must”.

[28] We assess Mr Pollett as an honest and scrupulous person. He said that, for a time, he had got on well with Mr McCarthy who worked in the same office as him but Mr McCarthy soon made it clear that he was focussed only on his own business endeavours rather than assisting or supervising Mr Pollett. The latter told NZSIR he felt rather let down by that but the then general manager of NZSIR also took the view that Mr Pollett should be able to look after himself. Mr Pollett felt that NZSIR gave him very little support as a newly qualified licensee and his termination came after about a year working at NZSIR in the Auckland area.

[29] Mr Pollett emphasised to us that when investigators of the Authority were dealing with him prior to the Authority dealing with his complaint against Mr McCarthy, it was not made clear to Mr Pollett that he himself was also being investigated by the Authority. He thought they were considering a charge against Mr McCarthy and that he was simply helping the investigators with that.

[30] Mr Pollett also emphasised that s 50 of the Act requires that all new sales persons be supervised by an agent or branch manager (usually for about six months he suggested), yet he received no such supervision, but rather misadvice from Mr McCarthy.

[31] A wilful or reckless breach of the Rules is “misconduct” under s 73(c)(iii) of the Act whereas a breach of the Rules *simpliciter* is “unsatisfactory conduct” under s 72(b) which creates strict liability in this regard. That reflects Parliament's view about the importance of compliance with the Rules (as well as the Act and Regulations made under the Act).

[32] Committees of the Authority have a wide discretion whether to inquire into, or inquire further into, a complaint or allegation under the Act. If, having held a hearing on the papers under s 90, a Committee is satisfied on the balance of probabilities that an agent has breached the Rules, then a finding of unsatisfactory conduct must follow pursuant to s 72(b). A defence of total absence of fault may be available to an agent. Additionally, a breach of the Rules involving a low level of culpability will generally be reflected in a low level penalty.

[33] The evidence is that Mr Pollett offered the Waiheke Island property for sale to a prospective purchaser without an agency agreement being in place. He says that he thought one would be in place by the time he showed the prospective purchaser through the property and that he was guided in this process by his supervisor, Mr McCarthy.

[34] In respect of the Kaitoke Beach property at Great Barrier Island, Mr Pollett says he assumed an agency agreement was in place as the property was advertised on the NZSIR website. Mr Pollett provided the vendor's contact details to a prospective purchaser. In fact no agency agreement was in place.

[35] In respect of the Ridge property, the evidence is that Mr Pollett brought the fact of the expiration of the Listing Agreement to the attention of NZSIR in the expectation that it would remove it from the website. He states that he could not personally remove it.

[36] From examining communications between the Authority and Mr Pollett, we can understand that he did not realise that the inspectors of the Authority seemed to be examining his conduct as much as that of Mr McCarthy against whom he had complained. However, the hearing before us is, and has been, a full rehearing so that overall natural justice has been complied with. We are not constrained by any views of any Committee although, generally, we find their views sound and extremely helpful.

[37] With regard to the Waiheke Island property, there is no doubt that, at material times, NZSIR did not hold a listing agreement regarding it so the issue for us is whether we are satisfied from the evidence that Mr Pollett had taken all reasonable steps to satisfy himself that there was a listing agreement in place when he dealt with a prospective buyer. It seems to us that he was entitled, in the circumstances we have described, to conclude on the balance of probabilities that the property was properly listed with NZSIR and Mr McCarthy should have advised Mr Pollett that he, Mr McCarthy, had delayed formal listing for some reason or other. After all, Mr McCarthy was his supervisor and superior at NZSIR and Mr Pollett was in his very early stages of a career after recent qualification as a licensee.

[38] Our above comments about the Waiheke Island property apply to a large extent to the Great Barrier Island property; except that, from the evidence before us, there was a listing agreement in force regarding the property as it had been listed by the vendor himself an experienced licensed sales person. In any case, it seems to us that Mr Pollett was entitled to believe that a valid listing with NZSIR had been created by Mr McCarthy for that Great Barrier Island property. Certainly it was listed on the NZSIR website and Mr Pollett had no control over that. In any case, Mr Pollett only passed on information about the property to an interested purchaser whom he referred on to Mr McCarthy.

[39] With regard to the Tauranga property, Mr Pollett took steps to have the property relisted upon expiry of the listing agreement; but his superiors took no action to support his endeavours and, indeed, his stance seemed to lead to his dismissal.

[40] Mr Pollett put it that some of his comments made in relation to his complaint against Mr McCarthy may have been taken out of context by the Committee and used against him without him having had the benefit of responding. We take that possibility into account.

[41] Mr Pollett asserted to us that he well understood the Act and the Rules at all material times because he had (at material times) recently studied them in completing the course to become a licensee. He largely relied on his supervisor at NZSIR for the first 6 months of his 12 months working there and was commended by them for exceptional service. He emphasised that he is a person who always “tries to do the right thing” and, as already indicated, he impressed us as honest and scrupulous and determined to apply the Act and the Rules in terms of his then recent tutoring of them.

[42] As also indicated above, it is important that investigators of the Authority make it clear, if they are concerned about a licensee’s conduct, that the licensee is entitled to respond to any of their concerns. It must be made clear to the Licensee that he or she is being investigated and all allegations or concerns must be fully disclosed. It is only natural justice that the licensee be given the opportunity to explain issues or answer allegations, preferably, at a face-to-face appointment with the inspector.

[43] We conclude that there has been no unsatisfactory conduct on the part of Mr Pollett and even if, technically, that could be sheeted home, in all the circumstances we would take no further action in terms of our power to do that under s 89(2)(c) of the Act.

[44] Accordingly we quash the findings of the Committee and acquit Mr Pollett.

[45] 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.

Judge P F Barber
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member