

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 77

READT 72/12

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

BETWEEN **KIM FRANKLIN**

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20005)**

First respondent

AND **CAMERON BAILEY**

Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at CHRISTCHURCH on 3 July 2013

DATE OF DECISION 11 September 2013

APPEARANCE

The appellant on his own behalf
Ms S G J Locke, counsel for the Authority
Mr J E Bayley for second respondent licensee

DECISION OF THE TRIBUNAL

Introduction

[1] Kim Franklin (the appellant) appeals against a 26 September 2012 decision by Complaints Assessment Committee 20005 to take no further action on his complaint against licensed sales person Cameron Bailey (the licensee) about pre-auction advice to a prospective bidder.

[2] The appellant is also a licensee and, at material times, was acting as a buyer's agent for the prospective bidder, a Mr Bateson. The appellant's complaint pertains to the licensee's dealings with Mr Bateson prior to an auction of a Christchurch residential property. The complaint to the Committee is set out in the appellant's 10 April 2012 Notification of Concern to the Authority as follows:

- “Concern 1: The vendors’ licensed salesperson [the licensee] declared the value of the said property to my client at a level that was misleading and deceptive.*
- Concern 2: The declared property value given by the vendors’ licensed salesperson [the licensee] caused a quantifiable financial loss to my client.*
- Concern 3: The variation between the declared property value and the actual amount unconditionally held by way of sale and purchase contract acceptable to the vendor was in excess of 17%.”*

Background

[3] On 2 March 2012 the licensee listed 74 Stanbury Avenue, Christchurch, for sale by auction to be held on 29 March 2012. The property was appraised as having a market value of \$360,000 to \$380,000.

[4] On 18 March 2012, the appellant attended an open home on the property in the company of Mr Bateson, his client prospective bidder, who had also attended the first open home on 11 March 2012.

[5] On the evening of 18 March 2012, the licensee presented a \$410,000 pre-auction offer from a third party (Mr and Mrs Crampton) to the vendors of the property. This pre-auction offer was acceptable to the vendors. Accordingly, a decision was made for the licensee to contact all identified interested parties to inform them that an acceptable offer was now on the table and that the auction was being brought forward to 20 March 2012.

[6] The licensee made contact with interested parties and that included having a telephone conversation with Mr Bateson. It is alleged that the licensee advised Mr Bateson that any bid *“would have to be better than \$350,000 and not just a few thousand”*.

[7] The appellant and Mr Bateson attended the auction on 20 March 2012, but did not make a bid. An opening bid was put forward by the auctioneer at \$410,000, being the purchase price in the pre-auction offer already on the table. The property ultimately sold at \$427,000 to the original offeror of \$410,000 (i.e. to Mr and Mrs Crampton).

[8] The appellant alleges that the licensee misled Mr Bateson into believing the property would sell for substantially less than \$410,000.

The Committee’s Decision

[9] In its usual way, the Committee conducted a hearing on the papers and determined, under s.89(2)(c) of the Real Estate Agents Act 2008 (the Act), to take no further action with regard to the complaint or any issue involved in the complaint. This was on the basis that the Committee did not find sufficient evidence to make a finding of unsatisfactory conduct against the licensee.

[10] The Committee summarised the opposing arguments. On one hand, the licensee maintained that, on the evening of 18 March 2012, he had made contact with as many interested parties as possible and informed them of the fact that bidding would be around \$410,000 or better. In contrast, the appellant alleged that his client, Mr Bateson, was told

that the property would sell for “... more than a couple of thousand dollars above \$350,000” and that his client relied on this statement as an indication of value.

[11] The licensee maintains that Mr Bateson asked him if the offer on the table was more than \$350,000 and was told it was significantly over that.

[12] The Committee relevantly held:

- [a] It was satisfied that the majority of people contacted by the licensee had been told that bidding would be around \$400,000 or better;
- [b] Mr Bateson arrived at his own decision that the property might sell for around \$380,000;
- [c] The issue regarding being misled related to a small number of interested parties who said they were not told the \$400,000 figure when they pressed the licensee for information as to whether their bid would be in the “ballpark” and whether it would be worth their while attending the auction. The licensee disputed this and the Committee decided, after some consideration, that it did not have enough evidence to proceed with a finding against the licensee;
- [d] The licensee was not in a position to divulge the actual purchase price being offered by another party or to indicate that an offer of \$410,000 had been accepted, as it was only an offer on the table at the time and not an agreement signed by the vendors. That offer could potentially have been withdrawn prior to the auction, leaving the vendors without any offer and, perhaps, willing to sell the property at a different price;
- [e] Auctions can be highly unpredictable as was the case here, in that the property sold for an even higher amount well beyond its initial appraisal value. Even without the alleged misleading statements, it was likely that some bidders could have incurred expenses that ultimately were of no benefit to them as there could only be one buyer for the property.

Further Relevant Evidence before Us

The Evidence of the Complainant/Appellant (Mr Franklin)

[13] The appellant is to be commended for the thorough and clear way in which he has presented his views, not only to us but also to the Committee. Broadly, his evidence confirms the facts as we have set them out above, but provided much more detail not needing to be covered here. He was carefully cross-examined by counsel.

[14] It seems that the prospective purchaser who was the appellant’s client (i.e. Mr Bateson) incurred \$546 for legal advice to assist him bid at the auction and spent much time arranging finance up to a maximum budget of \$400,000. Indeed, Mr Bateson arranged for the appellant to bid on his behalf at the auction. Also, Mr Bateson became emotionally attached to the property and, in all the circumstances, had become confident he would be top bidder.

The Evidence of the Licensee (Mr C Bailey)

[15] The licensee has had about eight years experience in the real estate industry, is regarded as a very high performer as a salesperson, and is committed to ongoing education in the industry.

[16] He detailed the marketing process for the property. There was huge interest in the auction with 19 registered interests who had all been provided with a copy of the relevant auction pack by 16 March 2012. That was prior to the second open-home for the property.

[17] The interest of Mr Bateson came through the first open-home. The licensee referred to his communications with Messrs Bateson and Franklin (the appellant) although Mr Bateson did not seem to formally disclose to the licensee that he had retained the services of Mr Franklin as a buyer's agent.

[18] Inter alia, the licensee described how on the afternoon of 18 March 2012, after the second open home had been held, a pre-auction offer of \$410,000 was tabled by a Mr and Mrs Crampton. Although the offer was significantly in excess of the licensee's appraisal that was thought to be indicative of the unusual market forces which arose after the Christchurch earthquakes. The vendors were happy to accept that offer of \$410,000 but the licensee advised them that the auction should be brought forward and he would telephone all interested parties and advise them that unless they were "*in the \$400,000 ballpark, there would be little point attending the auction*". He also indicated to the vendors that, in the circumstances, he expected the auction to open and close on the \$410,000 offer and there was little point in simply filling the auction room.

[19] The licensee said that he then telephoned as many of the 19 interested parties he could contact and advised them of the situation and, in particular, that the auction was being brought forward to 20 March 2012. He advised all concerned that the bidding would need to be in the vicinity of \$400,000 and/or above \$400,000 as, otherwise, there would be little point attending the auction.

[20] In particular, the licensee deposed that he telephoned Mr Bateson on the evening of 18 March 2012 and explained the situation to the above effect. Mr Bateson asked him if the existing pre-auction offer was above \$350,000, and the licensee responded that it was significantly above that and in the vicinity of \$400,000. The licensee categorically denies that he misled Mr Bateson (or any other interested party) into thinking that the offer was less than in the region of \$400,000.

[21] The licensee noted that soon after that telephone conversation with Mr Bateson on the evening of 18 March 2012, he received an email from the appellant requesting an auction registration form. The licensee responded by email at 9.05 pm that evening that he had already registered Mr Bateson prior to the pre-auction offer having been received by the vendors. The licensee noted that at no stage did the appellant enquire of him concerning the pre-auction offer or as to what he (the licensee) had told Mr Bateson during their telephone conversation on the evening of 18 March 2012.

[22] The licensee recounted that at the auction the bidding was fast and strong having opened at \$410,000 and immediately going to \$415,000. There were eight bids in total between only two bidders and the said Mr and Mrs Crampton purchased at \$427,000.

[23] In his evidence-in-chief, the licensee had emphasised that he was at material times aware of his obligations under Rule 6.4 of the Rules not to mislead a customer and under Rule 9.7 not to mislead a customer as to the price expectations of the client vendor. He denies any suggestion that he misled Mr Bateson or any interested party in this case and states: *“I believe that I appropriately balanced my professional obligations to potential buyers with my obligation under Rule 9.1 of the Rules to act in the best interests of the Allens [the vendors].”*

[24] Under cross-examination, the licensee made it clear, inter alia, that he simply did not want to encourage anybody to attend the auction unless they could readily afford to bid more than \$400,000. He was pressed by the appellant as to precisely what he told all interested bidders. He confirmed his above evidence and explained that he certainly did not want to lose rapport with any of those people as he may be able to interest them in buying another property in due course. He accepted that, in effect, the property had been sold before the auction and it was simply a question of whether the offered price of \$410,000 would be increased by the auction process.

Procedure

[25] It is settled law that this appeal is by way of rehearing, and the matter is to be looked at de novo. This proceeding is a general appeal rather than an appeal against the exercise of a discretion.

[26] The burden of proof lies with the appellant who must establish the case on the balance of probabilities and, the more serious the allegation, the more we expect to be satisfied that the requisite standard has been made out *Eden v Complaints Assessment Committee* [2011] NZREADT 6, 21 April 2011, at [21].

[27] On an appeal, we cannot make a finding of *“misconduct”* under s.73 of the Act because the Committee is not empowered to make such a finding and the above issue has come to us as an appeal. However, we could refer the matter back to the Committee recommending that a charge of misconduct be laid.

[28] In order to establish *“unsatisfactory conduct”*, the appellant bears the onus of proving one of the elements of s.72, which provides:

“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.”*

[29] In terms of s.72(b) the following rules within the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the Rules) are directly relevant:

“6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

- 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.*
- 9.1 *A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.*
- 9.7 *A licensee must not mislead customers as to the price expectations of the client.”*

Discussion

[30] The complaint was, essentially, that the licensee misled Mr Bateson over a realistic price range for the property. However, it is also contended by the appellant that the licensee should have communicated the details concerning the property auction to him as the vendor's agent, and as allegedly requested, instead of contacting his client directly.

[31] The licensee submits that he did not make a statement to Mr Bateson that any offer *“would have to be better than \$350,000 and not just a few thousand”*.

[32] Also, the licensee points to the surrounding circumstances, including that the vendors had an offer in excess of their expectations already, and that there was no incentive for the licensee to fill the auction room with persons who had no prospect of bidding. The licensee also noted that Mr Bateson's recollection of the content of his discussion with the licensee is inconsistent with the majority of other interested parties (about 11 parties).

[33] The licensee stated that neither Mr Bateson nor the appellant further contacted the licensee prior to the auction to discuss the existing offer or to seek any clarification. Further, the licensee submits that he acted with complete professionalism in circumstances where he had to balance his duty to act in the best interest of his client and his duty not to mislead customers; nor divulge the exact terms of the pre-auction offer; because to do so would not be in the best interests of his client, particularly, as there was a risk, however minimal, that the existing \$410,000 offer could have been withdrawn prior to the auction.

[34] Counsel for the Real Estate Agents Authority, respectfully, submitted that the Committee was correct when it stated:

“5.1 ... This complaint ... raises serious issues regarding potentially misleading conduct of licensees in auction situations. In an auction the licensee must find a balance between the need to act in the best interest of his client (the vendor) and also not to mislead any potential purchaser to whom he also owes duties to. This is particularly so were those potential purchasers could be put in a position of incurring significant costs to be in a position to attend and bid at auction ...

5.13 This complaint is a timely reminder that licensees mindful of their duties to the vendor, must be very careful regarding any comments they make to ensure any potential purchasers are not misled about price expectations.”

[35] We agree with those comments of the Committee. Auctions are a popular method of sale in the New Zealand residential property market. It will often be the case that parties interested in a property will approach the licensee acting on the sale for information as to the vendor's price expectations before making a decision to attend an auction as that can involve significant upfront costs (e.g. arranging a builder's report or having a lawyer search

the title and obtain a LIM report) which are irrecoverable if bidding at the auction is above the level the customer or bidder expects.

[36] Such situations commonly arise and involve a licensee balancing duties to act in the best interests of his or her vendor client without misleading potential purchasers, particularly, in respect of the client's price expectations. We agree with the Authority that licensees must get that balance right and that potential purchasers must not be misled.

[37] Whether a licensee has balanced those competing duties appropriately in any given case will, of course, depend on the facts. It is a matter for us whether the licensee misled the appellant's client as to the vendor's price expectations and the likely bidding range at the auction. Is there sufficient evidence of that to make a finding of unsatisfactory conduct against the licensee? We agree with Ms Locke that the complaint raises important issues.

[38] Part of the appellant's argument to us is as follows:

"This is the first incident in my time in this industry where I have felt compelled to make a complaint. This type of performance is wide-spread throughout this industry and on this occasion I am putting a line in the sand as it caused an avoidable quantifiable monetary loss to my client. When representing a client's interest in a property purchaser transaction, my quintessential role is to exercise my fiduciary obligation to protect their personal circumstances, protect them from themselves by shielding their emotion from the selling party and to maximise their equity in a property purchase by paying the least amount possible at the time of settlement.

Had the licensee paid me the professional courtesy to communicate the details concerning this property auction to me as requested (as he did with the other representing licensees) instead of contacting my client directly, we would not be embroiled in this process right now. I would have extracted the information we needed on where our interest would have needed to be (above \$400,000.00) concerning the pre-auction offer and we would have graciously bowed out of any further participation at that point. Speaking directly to another licensee's client is a big call on any day – you would understandably do this at your own peril in any industry regardless of regulations or rules concerning the ethical or legal implication of doing so."

[39] The appellant seeks we find that, in all the circumstances, the licensee's conduct has breached the Act. He must be seeking a finding of unsatisfactory conduct under s.72. He puts it that a suitable penalty would be reparation of \$546 to Mr Bateson *"for the cost of his legal pre-auction preparation"*. We observe that Mr Bateson's concern seems to be to recover \$546 legal fees he incurred in preparation for the auction; and that has led to a very substantial cost to the industry in terms of the Authority's investigation and decision work, and to our dealing with this appeal.

[40] However, we note that the appellant appears sensible and sincere in bringing the complaint to the Committee and this appeal to us. He feels he has a duty not only to protect his client, Mr Bateson, but also to ensure that the licensee and his employer real estate agency company follow proper protocols and do not disseminate false information.

[41] Mr Bayley (counsel for the licensee) submits, inter alia that the credibility of the licensee has not been impugned. He emphasises that, at the time of auction, the vendors had received an offer in excess of their expectations so there was no incentive on the part of the licensee to fill the auction room with persons who had no prospect of being

successful bidders. It is also submitted that Mr Bateson's recollection of the content of his discussion with the licensee is inconsistent with what was told to many other interested parties and that it cannot be disputed they were told by the licensee that bidding would need to be in the vicinity of \$400,000 or otherwise it would not be necessary to attend the auction. Mr Bayley emphasises that the licensee denies misleading any other parties and there is no clear evidence that he did. We agree.

[42] Mr Bayley also submitted that the licensee had to balance his duty to act in the best interests of his client vendors with his duty not to mislead prospective bidders. Nevertheless, he could not divulge the exact terms of the pre-auction offer because to do so would not be in the best interests of his client vendor; and there was also some small risk that offer could potentially have been withdrawn prior to the auction leaving the vendors without any offer and, perhaps, needing to sell the property at a lower price.

[43] Mr Bayley also noted that, basically, the allegation against the licensee is that he misled Mr Bateson about the bidding range needed for the auction; but that this appeal has somehow "*morphed*" into an allegation that the licensee should have telephoned the appellant, and not Mr Bateson, to explain the existence of the pre-auction offer and the consequences of that from the perspective of the licensee and the vendors.

[44] As Ms Locke put it, an important issue arising from this appeal is the necessary balance between an auction process of obtaining the best price for vendors but at the same time not misleading any interested bidder. She acknowledged that the further issue has arisen that the appellant maintains the licensee should have been treating with him at material times and not with Mr Bateson.

[45] Ms Locke also reminded us that in dealing with a particular case in 2007, the then Commerce Commission referred to the issue of advertisements seeking a buyer enquiry over a particular price and noted that an advertised price for a property must be near what the vendor sought as, otherwise, the situation could be misleading to interested members of the public. She submitted that, in the present case, the advice given to interested parties by the licensee was sufficiently "*in the ballpark area*" so as not to mislead. We agree. She also emphasised that an overall consideration of the evidence could not lead us to find unsatisfactory conduct on the part of the licensee. Again, we agree.

[46] For all that, it is helpful that the appellant has highlighted that where a prospective bidder or purchaser uses a buyer's agent, and has authorised the licensee to deal with that buyer's agent, then the licensee must do so. In this case there was no such formal authorisation; although that could have been inferred. However, that he did not make that inference in the circumstances was not deficient conduct by the licensee. Indeed, in the circumstances of this case it would have been discourteous of the licensee to have contacted the appellant on the evening of 18 March 2012 rather than Mr Bateson. Having said that, we agree with the appellant that if the licensee had also telephoned him on the evening of 18 March 2012, the appellant may well have asked appropriate questions and realised that Mr Bateson should "*graciously bow out*" as the appellant put it.

[47] Nevertheless, the licensee cannot be regarded as dealing with the appellant's client because neither the appellant nor Mr Bateson had made the appellant's status, as Mr Bateson's agent, clear to the licensee.

[48] After quite some reflection, we are jointly of the view that there is quite some vagueness in the evidence in relation to the allegations against the licensee. As already

indicated above, we find that the complaints against him have not been proved on the balance of probabilities.

[49] We infer that the appellant's particular concern is that he feels there was a breach of protocol when the licensee dealt with Mr Bateson directly by his conversation on the evening of 18 March 2012 as described above. On the facts of this case we do not find any breach of protocol; but we do agree with the appellant/complainant that if a licensee has been clearly authorised and directed to deal with a nominee for a prospective purchaser, then from that point that nominee should be dealt with on behalf of the particular interested party.

[50] For the above reasons, this appeal is dismissed. Put another way, we agree with the views and findings of the Committee.

[51] Mr J E Bayley, counsel for the licensee, also noted that the Committee permitted publication of its decision but with names and identifying details omitted. He requests that leave be reserved for him to make submissions concerning publication of our decision. We reserve leave accordingly and, of course, any application needs to be brought to us in terms of s.108 of the Act. We flag at this point that we are not particularly attracted to granting name suppression to licensees simply because they have been cleared of any unsatisfactory conduct. However, we accept that in terms of s.108 there may be factors to influence us to the contrary.

[52] 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