

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 99

READT 007/13

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

**BETWEEN** **ZANE COZENS** of Turangi, Real Estate Agent

Appellant

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

First respondent

**AND** **SELINA WATSON**

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr G Denley - Member  
Ms C Sandelin - Member

**BY CONSENT HEARD ON THE PAPERS**

**DATE OF DECISION** 12 November 2013

**COUNSEL**

Ms L A Foley for the appellant licensee  
Ms J MacGibbon for the Authority  
(Sadly, the complainant is now deceased)

**DECISION OF THE TRIBUNAL**

***The Issue***

[1] Zane Cozens (“the licensee”) appeals the decision of Complaints Assessment Committee 20005 finding him guilty of unsatisfactory conduct on a complaint by the late Selena Watson, the purchaser of the residential property referred to below. By consent, we have been asked to determine this appeal on the papers.

***Factual Background***

[2] The complainant was interested in purchasing the property at 21 Rangiamahia Road, Turangi. A sale and purchase agreement was signed on 20 March 2012 and included a standard finance condition to be confirmed on 23 March 2012 (i.e. within three working days), and providing for settlement on 30 March 2013.

[3] Originally, the property had been set down for an auction on 23 March 2012.

[4] On 22 March 2012, the licensee contacted the complainant by both telephone call and text and told her that unless she declared the contract unconditional by close of business on Thursday 22 March, the property would proceed to auction on the pre-arranged date of 23 March 2012.

[5] Given that the finance clause in the agreement allowed the complainant until 5.00 pm 23 March 2012 to satisfy the finance condition, this was inappropriate. It was put to us that, unaware of this inappropriateness, the complainant arranged for her solicitors to undertake to satisfy this condition and declare the contract unconditional on 22 March 2012. However, her solicitors contacted the licensee and stated that he had misinformed the complainant as to the requirements of the contract and sought that the licensee call their client and inform her of this and the licensee did this. The solicitors costed this extra work to the complainant at \$862.50 in additional legal fees. An exhibit to us is a copy of an email dated 22 March 2012 at 9.47 am from the complainant to the appellant licensee making the contract unconditional.

[6] The licensee stated that, earlier, on 16 March 2012, he had been told by the complainant that finance had been approved. Accordingly, at 9.39 am on 22 March 2012, the licensee contacted the complainant and stated that the agreement needed to be declared unconditional and at 2.32 pm that day sent her a further text saying that the auction was proceeding because *“the solicitor acting for you will not declare the sale unconditional until April”*. He sent a final text at 3.07 pm stating that in fact the property cannot be sent to auction *“as you have a contract in place”*

### ***Committee’s Decision***

[7] The Committee determined that the licensee had placed undue pressure on the complainant to declare the contract unconditional prior to the auction through the licensee’s text saying that the property was to go to auction unless the contract was declared unconditional that day. The Committee went on to say that the error stemmed from the licensee drafting the finance condition to fall on the same date as that of the pre-arranged auction. The relevant portion of the Committee’s decision reads:

*“4.6 It appears to the Committee that the licensee was under pressure from various sources to have the contract declared unconditional and was trying to please them all. As a result matters became heated in his conversation with the complainant’s solicitor regarding getting the sale declared unconditional.*

*4.7 After full examination of this matter and the evidence available the Committee is of the view that this problem that led to this complaint was caused by the licensee committing an error in the drafting of the contract. Specifically we find that the licensee should have been aware of the finance clause (and any other preconditions) in the contract fell before that date, and that in not doing so his conduct fell short of the standard a reasonable member of the public is entitled to expect from a reasonably competent licensee.”*

[8] The Committee imposed several penalty orders on the licensee including: censure; payment of the complainant’s extra legal costs in the amount of \$862.00

(claimed “as a result of the licensee’s mistake”); and enrolment in the unit standards programme for knowledge of sale and purchase agreements and facilitating sale of real estate.

### **Discussion**

[9] Counsel for the licensee submits that the conduct does not reach the threshold of falls short of a reasonable standard (as in s.72(a) of the Act) and submits that there is no evidence to support a penalty order requiring the licensee to pay the complainant’s additional costs.

[10] We now set out 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.”*

[11] We find that the licensee pressured the complainant into satisfying the finance condition in advance of the required date. As a result, the purchaser felt a sense of urgency to satisfy that condition and have an unconditional contract on 22 March rather than by 5.00 pm on 23 March 2012. We consider that this conduct was unwarranted and fell below the standard a reasonable member of the public would be entitled to expect of a reasonably competent licensee in terms of s.72(a) of the Act.

[12] Although this was the ground that resulted in the Committee finding unsatisfactory conduct (together with the drafting of the contract being inappropriate), the error arose as a result of the licensee continuing to market a property for auction when there was already a sale and purchase agreement in place which was expected to proceed.

[13] The vendors for the property had already accepted the purchaser’s offer on 20 March 2012 but subject to its conditions. In those circumstances, the auction should have been cancelled or any sale at the auction should have been made conditional on the sale to the complainant not proceeding. The standard Conditions of Sale at Auction provide for an unconditional contract of sale but they could have been altered appropriately.

[14] There was no obligation on the vendor to proceed with the auction. An advertisement of an auction is merely an intimation of an intention to sell; there is no obligation on the vendor to hold the auction, and the property can be withdrawn from sale at any time before the planned auction date.

[15] Continuing to advertise the property for auction in the usual way during the period 20 March to 23 March would have been potentially misleading to any other consumer interested in the property. For example, such a person may have undertaken steps in anticipation of bidding at auction, such as obtaining a building report, bank loan pre-approval, and title checks. That consumer would incur costs in preparing for an auction, unaware that the property was already under contract and conditional only on finance.

[16] We understand current practice, in the situation described above, is to cancel the auction arrangements on the basis that the vendors have accepted a pre-auction conditional contract. Theoretically, it might be possible to continue with the auction on the basis that only a backup contract could eventuate; but that seems unrealistic. If the vendors had not accepted the conditional offer, an auctioneer could have taken the sum offered as a starting bid; but at the risk of losing that offer.

[17] We are, of course, appreciative of the submissions from Ms Foley (counsel for the appellant licensee) expressing a contrary view to ours. He emphasises that the appellant licensee asserts that he was repeatedly told by the purchaser that her finance had been arranged and, indeed, she had sent him a text message on 16 March 2012 stating "*Finance approved we will require possession at 8.00 am on 30 March due to furniture trucks. Will that be a problem?*" That was prior to the agreement for sale and purchase of 20 March 2012.

[18] There was also a LIM condition to be satisfied by the end of business on 23 March 2012, the date advertised for the auction of the property.

[19] Counsel for the licensee (Ms Foley) puts it that the fact that the dates for fulfilling conditions and the auction were the same "*was unfortunate*" but, without more, could not be regarded as falling short of a reasonable standard. Ms Foley also put it that the licensee was simply asking the purchaser and her solicitor to confirm formally something which they had said they would be doing; and requiring that cannot be conduct which falls short of a reasonable standard. We observe that the purchaser had various rights under her conditional purchase contract and she and her lawyer were simply exercising those rights. It seems to us that the licensee was using the prospect of an auction to pressure the complainant into advising that the contract was unconditional despite her contractual rights.

[20] It is also put by Ms Foley that the unsettling period for the purchaser as to whether the auction would proceed was only between 14.32 hours and 15.07 hours (i.e. 35 minutes) on 22 March 2012 as, at the later time, the licensee admitted it had been an error on his part to have the property proceed to auction in the light of the purchaser's contract to purchase conditionally. We take that aspect into account. It was also put that any unsettled feelings of the purchaser would have arisen from her lawyer requisitioning the title; but there does not seem to have been anything untoward about that.

[21] Essentially, Ms Foley put it that the only event for which the licensee might be disciplined was requiring the purchaser to declare the contract unconditional on 21 March 2012, which was a day earlier than she was so required to by her contract of purchase. We consider that is the essence of the case and is an unsatisfactory aspect.

[22] We agree with Ms Foley that the auction sale could have proceeded on the basis of being conditional on the sale to the complainant purchaser not proceeding, subject to appropriate advice to interested parties.

[23] Ms Foley also submitted that the licensee could not be criticised on the basis that continuing to advertise the property for auction during the period 20 to 23 March 2012 was misleading to any other consumer interested in the property, because that is consistent with common practice and (he puts it) until the agreement for sale and purchase had become unconditional, the property could and should have continued to be marketed.

[24] However, in the particular circumstances of this case, the licensee knew that the purchaser had arranged her finance. It was merely a question of her lawyer formally confirming that in terms of the contract requirements, and of approval of a LIM report which had led to the purchaser's solicitor requisitioning title. The licensee knew that was most unlikely to be a barrier to completion of the sale and purchase.

[25] Ms Foley again emphasised that there was only a 35 minute period, as is evident from the above text times, for the purchaser complainant to have felt under pressure to declare the contract conditional before 23 March 2012 and that the auction would proceed (and we have covered that aspect above), so that no additional legal fees could be justified and there is no evidence they were incurred.

[26] Ms Foley also seemed to be putting it that the purchaser's solicitor unnecessarily involved himself in extra attendances due to his anger at being pressed to confirm finance earlier than required by the contract. Ms Foley emphasised that the purchaser's lawyer declared the agreement unconditional on 22 March 2012 as *"a result of his client's clear instructions that she was ready to go unconditional, not as a result of the overlap of the conditional dates and auction dates"*. However, it seems to us that the complainant purchaser succumbed to unnecessary and unfair pressure from the licensee.

[27] Ms Foley emphasised that the licensee also appeals against the Committee's decision in relation to the additional legal costs the licensee was ordered to pay to the complainant. It is put that no invoice or schedule has been produced and there is no evidence that additional costs were incurred; and, given that the complainant is no longer a party to the appeal, the Authority is unable to provide further evidence on this point; and as such, it is a matter for us as to what is the appropriate penalty in this case should we uphold the Committee's unsatisfactory conduct decision.

[28] However, the Committee had evidence, adequate from its point of view, that the legal costs were incurred; and we see no need to query that. The complainant's evidence is that she has incurred those legal fees. We consider that those fees were incurred by the complainant purchaser due to the unsatisfactory conduct of the licensee.

[29] In short, counsel for the licensee submits that the licensee did not engage in unsatisfactory conduct and his appeal should be allowed. However, we find that, in all the circumstances, the licensee's conduct of the sale and auction fell short of appropriate standards resulting in unfair pressure on the complainant. The Committee was correct to find unsatisfactory conduct on the part of the appellant licensee.

[30] We find that the variety of steps taken by the licensee in this case as referred to above, individually and collectively, amounted to unsatisfactory conduct. It was unsatisfactory that pressure was applied to the complainant to take steps that she was not required to undertake, and that the property continued to be marketed as going to auction when a sale and purchase agreement (conditional admittedly) was in place and expected to proceed.

[31] The appeal is dismissed so that the penalty Orders of the Committee stand.

[32] 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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Ms C Sandelin  
Member