

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 103

READT 84/13

IN THE MATTER OF

an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN

CAROLYN McCAY-WOODS

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 2008)**

First respondent

AND

STEPHEN JOHNSTON

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson

Ms N Dangen - Member

Ms C Sandelin - Member

HEARD at DUNEDIN on 20 October 2014

DATE OF THIS DECISION 19 December 2014

REPRESENTATION

The appellant on her own behalf

Ms K Lawson-Bradshaw, counsel for the Authority

The second respondent licensee on his own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Carolyn McCay-Woods (“the complainant”) appeals against the decision of Complaints Assessment Committee 2008 to take no further action on her complaint against Mr Stephen Johnston (“the licensee”). The latter holds an agent’s licence and works for Johnson Realty Ltd, trading as RE/MAX Quality.

[2] The complainant submits that the conduct of the licensee, which we outline below, amounts to “*unsatisfactory conduct*” defined in s.72 of the Act 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.”*

Background

[3] The complainant was the co-executor and a beneficiary of her late aunt's estate along with her cousin (Mrs Karen Macleod). The property at 57 Lees Street, Dunedin was part of that estate.

[4] The complainant intended to purchase that property herself from the estate and obtained various valuations to aid negotiations with the estate on price. The licensee provided the estate with two market appraisals for the property. The reasonableness of those market appraisals is at issue in this appeal, as well as the licensee's communications with the complainant and his involvement in the family dispute which arose over the sale of the estate property.

Appraisals and Valuations for the Property

[5] On 10 July 2012, an independent valuation of the property at \$227,000 was obtained by the estate from a Mr John Aldis, a local public valuer. Following this, the estate sought an appraisal from the licensee.

[6] On 17 September 2012, the licensee gave a market appraisal for the property of between \$255,000 and \$265,000.

[7] On 12 October 2012, the complainant obtained a second independent valuation from Dunedin Valuations Ltd, this time for \$200,000.

[8] On 2 November 2012, the licensee was asked by the estate (on request by the complainant) to revisit his appraisal and to specifically take into account two nearby properties namely, 55A Lees Street which had sold for \$245,000 and 45 Silverton Street which had sold for \$230,000. At this stage the licensee was also provided with a copy of John Aldis' valuation.

[9] On 21 November 2012, the licensee provided a revised appraisal taking 40 Silverton Street and 55A Less Street into account. His new appraisal was between \$250,000 and \$260,000. The additional properties were distinguished from 57 Lees Street and, in explanation for this, the licensee stated that 55A Lees Street had a restrictive covenant on its title, and the others which he took into account were all *“inferior in relation to sun, access, development potential and therefore land value. The style of houses is also not as appealing and has less potential than 57 Lees Street.”*

[10] The licensee also provided an explanation for why his appraisal was higher than John Aldis by stating that Mr Aldis had *“misjudged the difference garaging vs no garaging makes in the appeal of a property and ... he has not allowed for obvious development potential”*.

Sale Negotiations and Subsequent Sale

[11] The estate decided to offer the property to the complainant for a price between the lowest of its valuations and the lowest appraisal (i.e. between \$227,000 and \$250,000).

[12] In early December 2012, the complainant offered the estate \$238,000 (excluding chattels) for the property. This offer was not accepted.

[13] The property was advertised in January 2013 as a “*Deadline Sale*”.

[14] In February 2013, the complainant offered \$240,000 to the estate for the property. It was the best offer during this period of marketing.

[15] Ms Macleod (on behalf of the estate) counter offered \$250,000 (including chattels). However, the complainant did not increase her offer.

[16] In November 2013, Mrs McLeod brought civil proceedings in the High Court at Dunedin against the complainant for allegedly obstructing the sale of the property and sought to remove her as executor of the estate. The dispute was ultimately settled and it was agreed that the property would be placed back on the market.

[17] In early 2014 the property was placed back on the market and advertised for \$265,000. It ultimately sold for \$260,000 and that sale settled on 28 March 2014.

A Summary of Salient Evidence

Evidence from the Appellant/Complainant

[18] The appellant/complainant had various concerns. She considered that the market appraisal prepared by the licensee did not include data to substantiate its finding and that, in fact, relevant data were excluded.

[19] She also puts it that the licensee did not explain to her what was meant by the term “*deadline sale*” despite her making several requests to him to do that for her.

[20] The complainant objects to the stance of the licensee that she (the complainant) actively obstructed the marketing of the property and was the cause of it not achieving a sale price which concurred with his market appraisal.

[21] The complainant also maintains that, because of the licensee’s attitude towards her, the complainant’s co-executrix also developed a belief that she (the complainant) had been obstructive, untrustworthy, and needed to be removed as co-executrix. That led to the co-executrix, with the support of various family members, applying to the High Court seeking to remove the complainant as an executor of her said aunt’s estate. Although that matter was settled, the complainant/appellant says that she personally spent at least \$15,000 in legal fees regarding that application.

[22] The appellant complainant provided us with a quite detailed relevant timeline with reference to relevant documents adduced to us. She expanded her concerns in more detail.

[23] Inter alia in her evidence-in-chief, the complainant put it that by depriving her of clear information about the process of a “*deadline sale*”, despite her requests for

clarification of that, the licensee took advantage of a conflict between the complainant and her co-executrix and, as the complainant put it, *“increased the likelihood that the appellant would be blamed for the Lees Street property failing to achieve the respondent’s appraised value”*.

[24] The complainant acknowledged that a meeting for the purposes of marketing the property was held on 28 January 2013 and that she left this meeting within the first few minutes. However, she points out that, contemplating she would likely find this meeting *“difficult”* as she put it, she had ensured that her brother attended as her proxy and that is referred to further below.

[25] The complainant also put it that, probably because she felt that as at 14 February 2013 the licensee had not given her all appropriate details, she emailed him asking for specific information about what she might expect after she had submitted her offer but, she states, the licensee did not acknowledge that request in any way.

[26] The appellant rejects the licensee blaming her for the failure of the property to sell for his appraised value. She maintains that, in claiming she obstructed the sales process, the licensee created significant and, arguably, needless adverse effects on members of her immediate family and on her.

[27] The complainant states that, contrary to the assertions of the licensee, there were no difficulties in his obtaining keys for the property from her. She mentioned that she needed to have the locks of the property changed as they were all old and some in need of repair.

[28] The complainant also rejects the licensee’s allegations that he had difficulty with her in arranging inspections or appointments. She says that he simply did not fit in with her advice about her availability. She added that she was always conscientious in responding to the licensee’s emails and felt she was sometimes proactive in that respect. She detailed that she had agreed to inspections of the property after 5.00 pm on occasions but noted that, on 13 February 2013, she could not accommodate an evening appointment due to a family commitment.

[29] She also denied the indication from the licensee that she *“resorted to some personal/verbal abuse”* of him and put it that she had once told him that he did not cope well with abstract thinking, nor was he academically minded; but she did not intend to thereby insult him.

[30] Before us the complainant observed that she accepted the stance of counsel for the Authority, which we cover below, and she generally expanded a little on her above evidence-in-chief. Inter alia, she covered that because two of the locks at the property were unsafe, she had hired a locksmith who advised that all the locks should be replaced.

[31] She maintained that she did not *“storm out”*, as apparently had been put by the licensee, of the said meeting of January 2013 but left it at an early stage because she felt *“vulnerable”* and was able to leave matters to her brother. It had upset her that the licensee brought his wife unexpectedly as a support.

[32] She also emphasised that the licensee was the sole source of reporting information about the sale process to her family and she felt fragile that he appeared

to be painting her in a bad light to members of her family and making her out as a scapegoat in terms of his appraisal price not being reached.

[33] The complainant was carefully cross-examined particularly, by Ms Lawson-Bradshaw for the Authority. Interestingly, in cross-examination the licensee had taken the opportunity to indicate that when the complainant vacated the property, as appeared to be required by the licensee and the family to facilitate marketing it, quite extensive repairs were needed to the property but they seemed to be of deferred maintenance nature.

[34] Ms Lawson-Bradshaw carefully covered the sequence of events in the marketing process with the appellant complainant. It was clarified that the complainant did not actually ask the licensee what “*a deadline sale*” precisely meant, but she now maintains that the licensee must have had a professional duty of care to do that for her as she thought it was an absolute deadline but no such deadline was applied.

[35] Again the complainant firmly rejected the claim of the licensee that she had obstructed the marketing process and that was why his appraisal value was not reached; although in fact the ultimate sale price was very close indeed to that.

[36] The complainant expressed concern that the licensee seemed to be a close acquaintance of her co-executrix and her husband and preferred to treat with the co-executrix and not keep the complainant informed because he regarded her as a keen buyer rather than as one of two vendors. The complainant seemed to be saying that she felt the licensee egged her co-executrix to insist that she pay the full appraisal price when, in the view of the complainant, the appraisal contained flaws.

[37] It was also made clear in cross-examination that the deceased aunt of the complainant had been nursed for about four years by the complainant which was why the complainant had been living in the property. The co-executrix appeared to be a cousin of the complainant and, until the above situation arose, had been good friends with her although the cousin lived overseas mainly. The complainant seemed to be saying that, due to the licensee’s influence, her co-executrix ceased communicating with her.

[38] The said High Court proceedings seem to have been filed at the High Court Dunedin some time in 2013. Those proceedings sought to remove the complainant as a trustee of her Aunt’s estate and appoint another beneficiary in her place. It seems that the complainant had cared for her Aunt in her final years. Six persons were named as beneficiaries of the estate (including the complainant and her said co-executrix) and they all seemed to be nephews and nieces of the Aunt. The pleadings alleged that the complainant had a conflict of interest in terms of her obligations as trustee of the estate due to her expressed desire to purchase the property and alleged refusal to pay rent or outgoings regarding it but occupying it.

[39] In particular, it was pleaded that she had misconducted herself in the administration of the estate by failing to deliver up keys to the premises to allow for inspection by the licensee (with the alleged consequence that locks were changed to allow for a duplicate key to be given to the licensee estate agent); refused to participate constructively in a meeting with her co-executrix and the licensee on 28 January 2013; failed to facilitate access to the property by interested parties on 16 and 18 February 2013; and refused to agree to the appointment of an agent to

market the property after the failure of the licensee to sell it at a deadline sale; and refused to pay rent at a market rate to the estate for her occupation of the property.

[40] In the course of the hearing the complainant made it clear that her concerns were about the standard of the licensee's market appraisal, his poor communication, and his view that she had obstructed the sale process of the property.

[41] It also concerns her that the Committee has, in her view, upheld the co-executrix's version of events above her own and she is irked that her co-executrix and her husband have had a longstanding personal and professional relationship with the licensee and, indeed, engaged the licensee to market the property but then took limited interest in his activities.

[42] She also clarified that the existing locks of the property were unsound because they were over 50 years old and she had them changed to increase security and to enhance the presentation of the property during the sale process. She asserts that, once the locks were replaced, the new keys were made available to the licensee.

[43] The complainant also emphasised that she had numerous email contacts with the licensee over marketing the property; collaborated with him for that purpose; showed a large number of interested parties throughout the property from time to time as requested by the licensee and that had involved her in keeping the bathroom clean and the hall, lounge and bedroom vacuumed, and the kitchen clear of dishes, and that indeed the licensee had commented favourably on that.

[44] We have no reason to doubt the integrity or honesty of the complainant appellant.

The Evidence of the Licensee

[45] Inter alia, the licensee confirmed that the complainant left the said 28 January 2013 meeting abruptly and noted that the meeting had been set to discuss the open homes and the marketing process of the property. The licensee added *"it seemed to me that this was later used as an excuse for not understanding the deadline sale process, and to close down the marketing of the property and inspections by interested parties"*.

[46] He then continued that there were no difficulties in conducting open homes and the property was always kept neat and tidy by the complainant. However, he then put it that he had difficulties in arranging inspections or appointments for prospective purchasers and said that *"potential buyers lost interest in the property due to the inability to obtain timely access"*. He said all this occurred while the complainant was actively trying to purchase the property herself and he recorded that he had advised *"the estate"* that given the access problems, the property needed to be vacated *"to facilitate marketing"*. He maintained that on one occasion the complainant had *"closed down the marketing and inspections, she resorted to some personal/verbal abuse of me"*. He added *"the complainant seemed to not understand that, given her interest in purchasing the property, it was inappropriate to include her actively in marketing decisions"*.

[47] The licensee maintained that it did not seem appropriate to discuss marketing strategy with the complainant, as an interested purchaser, and that it was not his role to explain to her the meaning of *"deadline sale"*.

[48] The licensee was thoroughly cross-examined by the appellant and by Ms Lawson-Bradshaw (as counsel for the Authority) and it emerged that he had been told by the co-executrix that she was having “*unworkable problems*” with the complainant so that “*the family*” were applying to the High Court to remove the complainant as an executrix of her late Aunt’s estate. He provided evidence for that purpose to the family solicitors. We understood that he felt those solicitors expected him to take instructions from the co-executrix rather than from the complainant.

[49] There was quite some detail involved in the cross-examination of the licensee by the complainant and we noted that at material times the complainant was involved in serious studies at university and made it clear to the licensee that she preferred to be contacted by email. It appeared to us from the cross-examination of the licensee by the complainant that the licensee did not seem to understand that the complainant was an executor of the estate and was entitled to be listened to over marketing strategy and the like. There seemed to be little doubt that because the licensee told the family that marketing was being hindered by the complainant the family launched the said High Court proceedings and required vacant possession i.e. that the complainant leave the property. The licensee maintains that even though the complainant had “*a personal motive*” he treated her with respect. Certainly before us the complainant was polite to the licensee who in return was slightly dismissive of her.

[50] In helpful cross-examination of the licensee Ms Lawson-Bradshaw inter alia, asked the licensee to point out how the complainant had been obstructive. His response was that the co-executrix felt that and also she had been reluctant to provide keys and she had agreed to buy the property and then changed her mind. He seemed to admit that because he viewed her as an interested purchaser there was something of a conflict between them but we feel from hearing the parties that the so called obstruction from the complainant may well be exaggerated.

The Complaints Assessment Committee’s (CAC) Decision of 26 November 2013

[51] As mentioned above, the CAC decided to take no further action against the licensee. The allegations by the complainant before the CAC were that:

- [a] the defendant’s appraisal was misleading because he (the licensee) had not used comparable properties in similar locations and this resulted in his valuations not reflecting the market; and
- [b] that the licensee had communicated with the complainant/appellant poorly and had pressured her to vacate the property as he had formed the view that she was obstructing the sale process.

[52] In support of her complaint, that the licensee had provided a misleading appraisal, the complainant referred to the neighbouring property which she said was comparable, albeit larger, and which sold for \$245,000. She also referred to three other nearby properties that sold for \$228,000, \$229,500 and \$235,000 respectively.

[53] In response, the licensee stated that he did not consider any of the four properties to be comparable to the estate property. He said that the neighbouring property was subject to a restrictive covenant which meant it was worth less than otherwise; and, in relation to the three other properties, he did not see them as being

comparable because the estate property was better in terms of sunlight and aesthetics.

[54] The CAC accepted that it was not unreasonable for the licensee to have come to the valuation conclusions that he had. It was also noted that, upon a request by the complainant to revisit the valuation in light of the October 2012 independent valuation, he had lowered his appraisal estimation slightly. Therefore, the CAC decided that the licensee had not breached Rule 9.5 (set out below).

[55] In terms of the allegation of poor communication, the CAC preferred the evidence from the co-executor, and accepted that the licensee had behaved professionally at all times.

Market Appraisals

[56] Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (“the Rules”) provides:

“Appraisals and pricing

9.5 An appraisal of land or a business must be provided in writing to a client by a licensee; must realistically reflect current market conditions; and must be supported by comparable information on sales of similar land in similar locations or businesses.”

[57] We agree with Ms Lawson-Bradshaw (counsel for the Authority) that the purpose of the above rule is to ensure transparency and that any appraisal provided by a licensee is realistic so as to avoid the risk of an overinflated (and therefore misleading) appraisal used simply to obtain a property listing; or an unrealistic low appraisal to ensure a quick sale and commission for the licensee, but which may lead to vendors achieving significantly lower than market value for their property.

[58] It does not follow that an appraisal will always match the purchase price. A different purchase price may, of course, be realised, whether that be under or over the appraised value. What is important is that the licensee has exercised the required care and skill in reaching his or her market appraisal and that it is supported with comparable sales data. This enables a vendor client to make an educated decision when they are presented with purchase offers.

Discussion

[59] We note that the licensee seemed to be saying that a “*deadline sale*” is a non-price marketing method with a time deadline somewhat similar to the tender process, but the vendor is able to accept an offer prior to the deadline. The licensee regarded the deadline sale process as similar to an auction or tender date process with the deadline being the closing time for offers “*if the price is right*”, but that the process was not secret as is the tender process. He then seemed to accept that the process could be simply described as that of a normal sale but there is a date by which it is too late to make an offer.

[60] We note that the real estate industry supplies material to explain to the public what a deadline sale is. One of those explanations is: “*The deadline sale method is fundamentally the same as those of auction and tender except it allows maximum flexibility for you to accept what you like and when you like. The property is offered*

for sale with no price with a deadline upon which offers need to be submitted (e.g. three to four weeks) on the basis that the vendors reserve the right to accept an offer at any time before then". The main point seems to be that there is a deadline date by which all offers must be submitted. It has also been put that sale by deadline is "very similar to the tender process except that all offers are written on the standard Law Society Sale and Purchase Contract and otherwise there are no specific requirements regarding deposit or the locking in of tenders for any period post closure and the vendor may accept offers prior but all parties are notified and all offers are negotiated by the salesperson". It is not necessary for us to deal with the pros and cons of that marketing process.

Market Appraisals from the Licensee

[61] The complainant alleges that the licensee did not include data to substantiate his appraisal and that relevant data was excluded. She also put the following issues:

- [a] the two independent valuations from John Aldis and Dunedin Valuations were substantially lower than the licensee's appraisal;
- [b] the licensee did not consider the sale of 55A Lees Street;
- [c] the licensee should have considered three properties sold on Maitland Street;
- [d] the licensee did not explain why certain properties were excluded from comparison; and
- [e] the reasons provided by the licensee for differentiating 55A Lees Street and 4 Silverton Street were "superficial".

Did the Licensee's Appraisal Reflect Current Market conditions?

[62] The properties referred to in the licensee's 17 September 2012 appraisal were all currently for sale or had been sold in the previous two years. Should we therefore consider that his appraisal was based on current conditions?

[63] The market appraisals obtained by the complainant from Harcourts and Ray White were not dissimilar to the licensee's market appraisal. On 12 August 2013, Harcourts stated that the property could expect to sell for somewhere over \$240,000 up to \$260,000. It was noted that the then Capital Value of the property was \$295,000. Ray White appraised the property, on 5 August 2013 for between \$230,000-\$250,000.

[64] The licensee's revised appraisal of between \$250,000 and \$260,000 turned out to be an accurate prediction because the property ultimately sold for \$260,000, albeit in March 2014.

Did the Licensee Provide Comparable Information?

[65] In the licensee's 17 September 2012 (initial) appraisal, he provided a list of comparable recent sales and a list of comparable properties for sale. The properties listed were sold within the previous two years, of relatively similar land sizes and

were in the same central Dunedin area. The licensee also included community reports, property sales trends for the Dunedin City area, and historical price trends.

[66] When asked to revise his appraisal, the licensee did so and took into account two further properties (55A Lees Street and 40 Silverton Street). However, he ultimately determined that, in his opinion, they were inferior in terms of light and aesthetics. He also considered John Aldis' valuation and gave specific reasons in his revised appraisal why his (the licensee's) appraisal was higher.

[67] The complainant has complained that the licensee did not provide sufficient detail as to why particular properties were referred to in his appraisal. When asked, he did later provide his reasons why specific properties were not comparable to the property, albeit he did not provide reasons for all the properties.

[68] Ms Lawson-Bradshaw observed that, while it may be useful for a licensee to list specific reasons for the inclusion of each property in such an appraisal, and to explain why each property is inferior or superior to the property being appraised, that is not necessarily required by the Rules in every case. We agree the Rules require that the appraisal reflects current market conditions and that comparable sales information is provided. Here, a considerable amount of information was provided by the licensee in his appraisal report.

[69] It is submitted for the Authority that the Committee was correct in deciding that the licensee's appraisals met the requirements of the rules in all the circumstances of the case.

Communication from the Licensee

[70] The complainant alleges that the licensee did not fully explain to her the conditions of a deadline sale so that she was under the mistaken impression that the sale of the property would be finalised after 14 February 2013. We deal with that issue below.

Defamation by the Licensee

[71] The complainant alleges that the licensee improperly complained about her to her co-executor (Mrs MacLeod) and was, therefore, instrumental in the High Court proceedings that Mrs Macleod brought against her on behalf of the estate. The complainant makes reference to a "*will say*" statement from the licensee prepared for those High Court proceedings, but it appears the statement was never signed by the licensee and therefore may or may not accurately reflect his opinion at the time.

[72] The Statement of Claim for the High Court proceedings pleads that the complainant obstructed the sales process by failing to provide keys for the licensee to inspect the property as a real estate agent, resulting in the locks needing to be changed; refusing to participate constructively in a meeting with her co-executrix; and failing to facilitate access to the property by interested parties.

[73] Ms Lawson-Bradshaw observes that the view that the complainant behaved obstructively was taken by other beneficiaries, as demonstrated in their statements provided by the licensee.

[74] She also submits that it was open to the Committee to conclude that there was insufficient evidence to conclude that the licensee acted improperly, to the extent that any disciplinary issue arises, in respect of any comments he may have made about the complainant.

[75] We record that, adduced to us by consent, was a fulsome letter of support for the licensee by the co-executrix. The latter feels that the complainant was seeking to "*financially advantage herself*" and dealt with that in some detail. It seems that when the complainant vacated the property she resigned as an executor of her Aunt's estate. It also seems that there was a family dispute about whether the complainant should have been paying rent for staying in the property after her Aunt's death. There was an allegation that the complainant refused to hand over keys to the licensee or to her co-executrix. Her reason was that they were needed for duplication so that the property could be marketed, but the co-executrix says she could not obtain keys to the property for well over a month from requesting them soon after the aunt's death. It seems that, eventually, the co-executrix then went to the property with the estate solicitor and had the locks changed. It is alleged that the complainant would deny the co-executrix entry to the house and, also allegedly, endeavoured to thwart the sale of the house to anyone other than herself. That theme was developed further by the executrix.

[76] We received very helpful final oral submissions from the parties and, of course, from Ms Lawson-Bradshaw, and they mainly emphasised issues covered above.

[77] The licensee maintains that he has at all times complied with his duties under the Act and its Rules and that the rest of the complainant's family were "*happy*" with his performance as real estate agent to sell the estate property and that at all times he was simply endeavouring to "*do my job*". He felt that, at material times, the complainant was aware of the meaning of sale by deadline but put it that, if she wanted to have that process explained to her, she should have obtained that from the estate lawyers because she was an interested party regarding the sale and purchase of the property.

[78] Ms Lawson-Bradshaw covered the main issues but, in particular, put it that insofar as it has emerged that the listing agreement was not signed by both trustees we should not deal with that in terms of the licensee's conduct because it was not part of the complaint dealt with by the CAC. We agree that we do not seem to have jurisdiction to deal with that because it was not an issue before the Committee.

[79] Ms Lawson-Bradshaw accepted that the issues involve matters of evidence and fact that are for us to determine. She appeared to be putting it that we might consider that the current market appraisal of the licensee complied with the requirements of the Act and its Rules. She accepted that licensees have an obligation to satisfactorily and efficiently communicate under the Rules with both vendor and prospective purchasers.

[80] Counsel also succinctly put it that, in the ordinary course, a licensee should not make adverse comments about a vendor, although whether the licensee did so in respect of the complainant is somewhat vague in terms of the evidence. It is suggested that views of criticism from the co-executrix were passed on to the Aunt's family by the licensee.

[81] In a final oral address to us, the appellant submitted that she still feels that the licensee's appraisal had "*a scattergun approach*", did not deal with properties

comparable to the property, and placed too high an appraisal figure on its value which, she felt, was obstructive of her wish to purchase the property at a fair market price from the estate. She felt it would have been better if the licensee had driven around the area more to view comparable properties. We note that the licensee responded that he did do that and maintains that his appraisal was correct and vindicated by the price ultimately obtained from a third party.

[82] The appellant stated to us that she appreciated the licensee's admission during the hearing that he had not explained to her the meaning of a deadline sale. She also put it that there had been substantial remedial work to the property after her offer for it was rejected. She observed that may have pushed up the value of the property so that it sold reasonably near to the price appraised by the licensee. She also emphasised that she told the licensee, at all material times, that she would make access available to the licensee whenever he asked, and did so, and that she has never been obstructive.

Our Views

[83] It seems to us that, possibly in good faith, the licensee ignored the complainant at times when she was a co-vendor of the property by not keeping her properly informed of the developments and prospects. He may have misunderstood the advice, apparently given to him by the estate solicitors, that she should not be favoured in any way as a prospective purchaser from the estate.

[84] It does seem that he spread the word to the family that the complainant was obstructive to him over the marketing process when that does not seem to have been the case. Also he seemed to treat that "*family*" as the co-executrix and her family to whom he was very close, apparently as a friend of the co-executrix and her husband; and we can understand that the complainant feels he favoured those persons over her.

[85] We find that the actual appraisal of the property by the licensee cannot be regarded as deficient or defective in any way. It was adequately completed.

[86] The "*deadline sale*" process seems to contain a certain amount of puffery as a process or sales tactic, but the licensee should have made it clear to the complainant what that strategy meant and comprised; and he did not and he admits that.

[87] As we have indicated, the licensee did not treat the complainant as a vendor entitled to information in the same way as the co-executrix but as a prospective purchaser to be somewhat ignored. At material times he appeared confused as to how to treat her and he favoured the co-executrix. He seems to have semi-ignored the complainant because, in his perception, she had a conflict of interest as a keen prospective purchaser of the property. Indeed, she did have such a conflict of interest. However, the licensee seemed to have another conflict in that he was close friends with the co-executrix and her husband.

[88] Having said all that, the overall marketing performance of the licensee seems to have been sound and efficient.

[89] While we have quite a number of concerns about the conduct of the licensee as we have covered above, we consider that it is borderline as to whether his conduct meets the threshold for unsatisfactory conduct.

[90] Under the Act, the onus of proof rests with the complainant on the balance of probabilities. All in all, we consider that the threshold for unsatisfactory conduct is not quite met.

[91] In terms of the four alternative aspects of unsatisfactory conduct comprising s.72 of the Act (set out above), it is borderline whether in terms of s.72(a), overall, the real estate agency work of the licensee as described above “*falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee*”. In terms of s.72(b) it was not put to us that the licensee’s conduct contravened any specific provision of the Act or regulation or rule except Rule 9.5 which we have covered above and which we consider has not been breached. There are, of course, various Rules of a general nature such as Rule 5.1 requiring that a licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work and Rule 6.2 requiring that the licensee must act in good faith and deal fairly with all parties engaged in a transaction. In terms of s.72(c), we could not find that the licensee has been incompetent or negligent. In terms of s.72(d), it is highly arguable whether his said real estate agency work would reasonably be regarded by agents of good standing as being unacceptable. It might be regarded as insensitive, or as a little inadequate, but perhaps not “*unacceptable*”.

[92] Accordingly, this appeal is dismissed. We confirm the finding of the Committee that no further action be taken on the appellant’s complaint against the licensee.

[93] 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

Ms N Dangen
Member

Ms C Sandelin
Member