BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 11

READT 036/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**ANDREW AND MANDY NIMICK**
	Appellants
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20005)**
	First respondent
AND	**CHRISTINE ANDERSON AND LYNDA PERRY** of Katikati, Real Estate Agents
	Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at TAURANGA on 20 January 2014

DATE OF DECISION 13 February 2014

APPEARANCES

The appellants on their own behalf
Mr L J Clancy, counsel for the Authority
Mr P Napier, counsel for the licensees

DECISION OF THE TRIBUNAL

Introduction

[1] Andrew and Mandy Nimick ("the complainant appellants") appeal against a determination of Complaints Assessment Committee 20005 to take no further action in respect of their complaint against Christine Anderson and Lynda Perry ("the licensees") as outlined below.

Background

[2] The complainants engaged the licensees, as employees of Marketing 2000 Ltd (Harcourts Katikati), to sell their property at 25 Princes Street, Katikati by a 31 August 2012 sole agency agreement for three months. That agreement stated, inter alia, *"at*

the expiry of this exclusive and sole agency authority, this agency appointment shall continue on general authority terms".

[3] The complainants signed an *"Extension Of Listing Authority"* document on 28 November 2012. That document was a standard Harcourts' form which was signed by the parties on 28 November 2012 and extends the expiry date of the original agency to 28 February 2013 but, otherwise, all other terms and conditions of the original listing authority remained unchanged. It follows that because there was an extension of the original listing authority before it converted to a general agency, then it was extended as a sole or exclusive agency.

[4] However, we accept that the vendor-complainant-appellants did not realise that, which is a matter of timing in that the original agreement was close to converting to a general agency, and thought they had granted a three month extension to Harcourts at Katikati as a general agency only, and not as an exclusive or sole agency. Interestingly, we are advised that since this dispute Harcourts have altered their form of *"extension of listing authority"* to show it as an extension of an exclusive listing authority. Also, the agency has not sued the appellants for the commission of $19,895 which has arisen and which the appellants refuse to pay.

[5] On 13 December 2012, the complainants emailed the licensees advising that they had decided to take their property off the market. Soon after that they disposed of their property by swap with a third party vendor. However, the agency sought commission as under a sole agency.

The Complaint

[6] The complainants complained to the Real Estate Agents Authority about the circumstances of the signing of the extension document, stating that it was not made clear to them that the document would extend the period of the sole agency rather than simply confirming a further period of general agency. The Committee found that the extension document could have been clearer as to its effect, but could find no evidence that the licensees had acted improperly or with the intention of misleading the complainants.

[7] The complainants contend that, between the signing of the extension document and the property coming off the market (that is, 28 November to 13 December 2012), the licensees failed to act in their best interests, particularly, as regards advertising.

[8] The grounds of appeal are detailed in the complainants' notice of appeal and submissions. In outline, the complainants assert:

[a] The licensees failed to arrange advertising in the Katikati Advertiser on 6 and 13 December 2012.

[b] The licensees failed to arrange open homes on 6 and 13 December 2012.

[c] The licensees requested money from the complainants for advertising in the Property Press, which (they say) should have been provided free of charge under the extended sole agency agreement.

[d] The licensees did not advise the complainants that (alleged) delays in signing the extension document would affect the advertising campaign for marketing the property.

[9] The appellants assert that they thought that from 28 November 2012 they had renewed their listing with Harcourts at Katikati as a general agency, and not an exclusive agency. They put it that, in any case, on the basis that it was extended as a sole agency, or exclusive agency, the licensees did not advertise the property in the local media for a period of 21 days; did not advertise it in the Property Press as contractually obligated to do so in the view of the appellants, and this during a period of time which would have been an excellent opportunity; that the licensees are wrong to deny that they were contractually obligated to advertise the property in the Property Press; that the licensees modified the renewal of listing contract *"without any open or fair consultation with us"*; and that the licensees have falsely accused the appellants of trying to avoid paying commission to the agency.

[10] We note that the original listing agreement, as a sole or exclusive agency, was signed by the parties as at 31 August 2012 for an asking price of $450,000, on which commission would be $19,895, and the expiry date of that exclusive and sole agency was 30 November 2012 when it would continue as a general agency. Inter alia, Harcourts undertook to market the property in either the Property Guide or the Property Press. The appellant vendors sought free advertising and Harcourts had that facility in those two local papers for free advertising or marketing.

A Summary of Further Relevant Evidence to Us

The Evidence of Mrs Nimick

[11] The appellants had sought to sell their then property at 25 Princes Street, Katikati, through the team at Harcourts there of Ms C Anderson and Ms L Perry. They did not *"want to be tied to certain advertising media or costs"*. The agents explained to them that the sole agency contract, which they signed on 31 August 2012, expired on 30 November 2012 and would then, automatically, become a general agency contract. It was important to the appellant vendors not to be locked into a sole agency for very long.

[12] After a time, the appellants queried with the licensees why they had not advertised the property in the Property Press and the licensees explained that they considered that advertising in that paper *"did not work"*.

[13] Mrs Nimick said that in mid November 2012 the parties wanted to meet because the sole agency was coming to an end, and the agents wished to discuss price, marketing, and renewal of the listing. Mrs Nimick says that at no point were the words *"sole agency or general agency"* used, nor was it made clear that the continuation of free advertising in local papers was dependent on the agency continuing as a sole agency and that printing deadlines needed to be met.

[14] The agents arranged an open home to be followed by a meeting with the appellants on 25 November 2012. However, the appellants cancelled the open home and the meeting was rescheduled for 28 November 2012 when there was discussion because the licensees asked the appellants to reduce the asking price and the appellants declined to do that because the property had only been on the market for three months. Also, the licensees asked the appellants to pay $280 to advertise in the Christmas issue of the Property Press which they recommended as excellent marketing. The appellants said they would consider that. They were aware that, for a sole agency, advertising in the Property Press was organised by the agents free of charge. The appellants did not question that there now be a charge because they thought they were about to renew a general agency contract and they were asked to

renew their listing and agreed to on that basis. They also advised the licensees that they were becoming uncertain whether they wished to continue with the sale of their property and that they would review the situation just after Christmas i.e. in early 2013.

[15] Mrs Nimick emphasises that it was never made clear to them that the extension of the listing agreement was as a sole or exclusive agency, and the appellants thought they had renewed as a general agency.

[16] It was noted that by the time of that meeting of the appellants with the licensees on 28 November 2012, they had, as they put it, *"the idea of approaching a vendor regarding a house swap"*. They kept that concept to themselves and realised they would not approach the vendor they had in mind about suggesting a house swap until they were certain that their sole agency with Harcourts had expired and they had moved on to a general agency listing. This was because they did not wish to pay commission on a transaction which they were arranging entirely by themselves. Also they did not wish that the licensees get themselves involved in any swap. It seems that they initiated house swap talks with a vendor on 5 December 2012 and fairly soon achieved a swap contract.

[17] Mrs Nimick complains that the licensees did not advertise their property in the Katikati Advertiser on 6 December 2012 nor arrange any further open home, and failed to market the property throughout December 2012. The appellants did not then complain because they thought they had given the licensees only a general agency so that they had no entitlement to free advertising.

[18] By 13 December 2012 the appellants had arranged a house swap so they endeavoured to cancel the extension of their listing with Harcourts but were advised that Harcourts/the licensees held a sole agency for the property until 28 February 2013. As it happens, it appears that on about 11 December 2012 the licensees learned from a mutual friend that a house swap was likely. That friend worked in a local shop and had arranged to rent the property acquired by the appellants from their swap.

[19] An explanation given to the appellants by the licensees about non-marketing of the property in December 2012 seemed to be that they were waiting to find whether the appellants would pay for advertising in the Christmas edition of the Property Press at Katikati, and as to what advertising they sought. Also, the licensees felt that the more effective advertising was being undertaken in the usual way on the Internet and that there had been extensive, but, unsuccessful, newspaper advertising of the property. Also, the licensees said that advertising deadlines were missed due to the appellants cancelling appointments with the licensees to discuss marketing strategy and because of delays in meeting to sign an extension of the agency. A relevant factor also seems to have been that the licensees had provided the appellants with much more than the normal allocation of free advertising.

[20] Overall, Mrs Nimick stated that the appellants are outraged that the licensees, whom they feel should have been acting in the best interests of the appellants, did not advertise the property for about seven weeks over November and December 2012. Mrs Nimick was extensively cross-examined by both counsel.

The Evidence of Mr Nimick

[21] Mr Nimick corroborated Mrs Nimick's evidence and emphasised that because his work involves dealing with contracts in the forestry industry he did not wish to have a general agency continuing indefinitely. Accordingly, he sought a formal extension of the original listing agreement on the basis that it could be cancelled by the appellants on seven days notice to the agency.

The Evidence of the Licensee Ms C W Anderson

[22] Ms Anderson emphasised that she and Ms Perry work as a team. She covered the facts referred to above in general. She emphasised that because the original listing agreement was due to expire on 30 November 2012, she arranged to meet with the appellants on 25 November 2012 to discuss *"the extension of their exclusive listing"*, as she put it. However, the appellants cancelled an open home proposed for that date and the meeting was postponed to 28 November 2012 at Harcourts office Katikati, where an extension of the listing authority was then signed by the appellants.

[23] On 13 December 2012, the appellants advised the licensees that they, the appellants, wished to take their property off the market. Ms Anderson states *"we were happy to do so, but we reminded the Nimicks that commission would still be payable to us if they sold their property during the extension period which expired on 28 February 2013"*.

[24] There was detailed evidence from Ms Anderson about what marketing advertising took place or could have taken place. Inter alia, she stated that the agents do not promise or guarantee weekly advertisements in any particular publication; and that the frequency of print media advertising is left to their discretion, which is influenced by a number of factors and that at no time did Harcourts tell the Nimicks that the agents would advertise the property every week. Nevertheless the agents monitor that aspect carefully. Ms Anderson said that the second respondents made it clear to the Nimicks that they needed an extension of the listing authority as a matter of urgency and added:

> *"... If they wanted us to continue to provide free advertising after the original listing agreement expired on 30 November 2012. Allocations for advertising are submitted well in advance and, for that reason, we endeavour to secure extensions of exclusive listings well before the original expiry date. Unfortunately, the delayed signing of the extension on 28 November 2012 affected our print media advertising programme".*

[25] Ms Anderson continued:

> *"12. Our office deadline for advertising on the 6th December 2012 edition of the Katikati Advertiser was on 27 November 2012. We did not submit an advertisement for the Nimicks' property as they had not signed an extension at that point and we did not know if they would agree to an extension. "*

[26] Ms Anderson also stated that the licensees sent weekly property reports to the Nimicks throughout the course of their listing which included advice of the print media advertisements undertaken as well as those scheduled to run in coming weeks. The report of 7 December 2012 showed no upcoming advertisements scheduled. The

report of 12 December 2012 informed the Nimicks that their property would next be advertised in the 20 December 2012 issue of the Katikati Advertiser. Ms Anderson said that at no time did the Nimicks take issue with the advertising programme until they lodged a complaint with the Authority leading to these proceedings. Ms Anderson explained that there was exposure on various internet sites, a window card in the front window of the Harcourts office, and a sign-board at the property.

[27] Ms Anderson emphasised that the Harcourts form of extension of listing authority is a standard form which the Nimicks read and confirmed that they understood prior to signing it; and they asked no questions and raised no concerns about it and appeared to understand it.

[28] Under cross-examination from Mr Clancy, Ms Anderson emphasised that the licensees were in close touch with the appellants at all times and would have liked the appellants' cooperation so that Harcourts could provide a written marketing plan, and advised the appellants to lower their asking price. Ms Anderson also mentioned that the agents do not run open homes in December of a year as it is too close to Christmas for the convenience of the people involved. She said that they favoured the appellants with free advertising.

[29] Ms Anderson's cross-examination by Mrs Nimick commenced with a focus on whether the licensees had made it clear to the appellants that the listing extension of 28 November 2012 was that of a sole or exclusive agency. Ms Anderson was sure that she used the word *"exclusive"* when referring to the extension. Ms Anderson was closely cross-examined about the marketing and advertising arrangements.

The Evidence of the Licensee Ms L Perry

[30] Ms Perry gave brief evidence in which, essentially, she corroborated the evidence of Ms Anderson.

The Stance of the Appellants

[31] As already covered, the appellants feel totally let down by the agency in terms of what they describe as *"the whole picture"*. They feel that the November/December 2012 marketing programme was virtually non-existent when there was an exclusive agency in favour of Harcourts at Katikati. They feel they were misled in renewing the listing on an exclusive basis rather than a general agency as they had thought was happening at the time. They are outraged that, having themselves organised a swap of the property, they have received an invoice for the commission from Harcourts.

The Stance of the Licensees

[32] Inter alia, Mr Napier emphasised that the present two licensees have had no involvement in the type of forms they are required to use on behalf of their Harcourts' agency.

[33] Mr Napier referred to the appellants taking issue with various aspects of the advertising carried out in the local paper, the Katikati Advertiser, during the extension of listing period. He noted that the appellants had complained that advertising should have been maintained in late November and December 2012 at the previous level; that the licensees well knew that the appellants would extend the listing authority; and that appointments to deal with that and other matters were not cancelled by the appellants; that the latter were not informed that a delay in signing the extension of

the listing authority would affect the advertising campaign; that the licensees could have advertised the property in the Katikati Advertiser earlier than they did, i.e. on 20 December 2012, following the signing of the extension of the listing authority on 28 November 2012; and that the licensees did not act in the appellants' best interests by advertising the property on 20 December 2012 in the Katikati Advertiser because they then knew well, as from 11 December 2012, that the appellants were making private arrangements for a house swap and no longer needed to advertise the property.

[34] The response of the licensees is that advertising under the standard listing agreement of Harcourts is left to the discretion of the particular salesperson and nothing is promised or guaranteed and they gave no assurances to the appellant.

[35] Mr Napier emphasised that the extension was simply a continuation of the original listing and that, overall, the appellants' property received more exposure in print media than usually given to customers. The licensees did not think it useful to run advertisements in the 28 September and 13 December 2012 editions of the Katikati Advertiser. They had made it clear to the appellants that, if free advertising was to continue, the extension of the exclusive agency needed to be signed because allocations for free advertising are arranged well in advance and the delay in signing the extension until 28 November 2012 affected the print media advertising programme for the appellants' property e.g. the office deadline for advertising in the 6 December 2012 edition of the Katikati Advertiser was 27 November 2012, and for the 20 December 2012 edition was 10 December 2012.

[36] It is submitted by Mr Napier that the licensees' conduct regarding advertising was not unsatisfactory, and the print media advertising was extensive, varied, and sensitive to market reaction, and emphasised advertising in the Property Guide, various websites, window cards and sign-boards. The licensees had fairly similar responses to the appellant's allegation of lack of advertising in the Property Press.

[37] Mr Napier seemed to accept that Harcourts give a guarantee to customers of clear communication but submits that has no bearing on the present appeal. He noted that the Committee determined that, although the extension of the listing authority could have been more clearly explained, there is no evidence to suggest that the licensees acted improperly or deliberately intended to mislead the appellants in respect of the nature of the extension (i.e. that it was extended as an exclusive agency and not as a general agency). There is some doubt as to whether the appellants actually appealed that part of the Committee's determination but we deal with that issue in any case.

[38] Mr Napier also submits that the evidence shows that the licensees fully engaged with the appellants throughout the period of the listings.

[39] Mr Napier generally submits that there has been no unfairness in the dealings of the licensees with the appellants, even with regard to rendering an invoice for commission.

Discussion

[40] The Committee held a hearing on the papers, pursuant to s.90(1) of the Real Estate Agents Act 2008 ("the Act"), and made a determination to take no further action under s.89(2)(c).

[41] Section 111 provides a right of appeal to us for any person affected by a determination of a Committee, including a decision under s.89. The appeal is by way of rehearing and, after hearing the appeal, we may confirm, reverse, or modify the determination of the Committee.

[42] In *K v B* [2010] NZSC 112, [2011] 2 NZLR 1, the Supreme Court clarified principles articulated in *Austin, Nichols & Co Inc v Stichting Lodestar*, the Court confirmed (at its para [32] that appellate courts will adopt a different approach on appeals from discretionary decisions to that taken on general appeals:

> *"... for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary.*

[43] We have previously held that Committee determinations under s.89 are subject to general rights of appeal and the wider principles described in *Austin Nichols* apply. In *Jones v CAC 10028 and Shekell* [2011] NZREADT 15, we said:

> *"[25] ... Determinations pursuant to s.89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s.89 would generally be regarded as 'general appeals'. All parties agree that the Tribunal should apply the principles set out in Austin, Nichols, as reiterated by K v B (supra).*

[44] This contrasts with the position where an appeal is from the exercise of the separate discretion under s.80 to take no action on a complaint, or where an appeal is from a decision not to refer a misconduct charge to the Tribunal. In those cases, the narrower appeal grounds identified in *K v B* as appropriate on appeals from discretionary decisions will apply; see *Smith v CAC* [2010] NZREADT 13 (appeal from discretionary decision under s.80) and *Dunn v REAA* (CAC 143) [2012] NZREADT 56 (appeal from decision not to refer a misconduct charge).

[45] In this case, the Committee conducted an investigation and hearing on the papers, carefully weighed the issues and the evidence and determined to take no further action. In the circumstances, we agree with Mr Clancy, as counsel for the Authority, that the present appeal is a general appeal in terms of *K v B*. The complainants are therefore entitled to judgment in accordance with our opinion, notwithstanding that may involve an assessment of fact and degree and entail a value judgment.

[46] For this appeal, all parties have filed further material which was not before the Committee at first instance. We are entitled to consider all that information, in addition to the material previously before the Committee, in exercising our own judgment as to the issues in dispute.

[47] Mr Clancy submits that the licensees' explanation as to the lack of advertising on 6 and 13 December is credible on the evidence; and that while best practice may have been for the licensees to have been clearer about the advertising (or lack thereof) proposed for early December 2012, including explaining the impact of the timing of the signing of the extension agreement, their actions do not (it is submitted) warrant a finding of unsatisfactory conduct.

[48] As Mrs Nimick remarked, these proceedings would not have taken place if Mr and Mrs Nimick had realised that their extension of the listing agreement was that of a further sole or exclusive agency. We can accept that if Mrs Nimick had realised that, there would have been no extension other than, perhaps, a general agency determinable on seven days notice from them to the agency.

[49] We feel that the licensees did a good marketing job for the appellants overall. Where the situation went wrong, from the point of view of the appellants, was that they only intended to extend a general agency and not to renew the original exclusive or sole agency. They were particular in their own minds about what they intended because, already, they had somehow initiated the prospect of swapping their property with that of another vendor in the area. Naturally, they were conscious that the other vendor had not been introduced to them or their property by the Harcourts agency at Katikati so that they would not be liable to pay commission to real estate agents unless the swap transaction took place during the course of a listing.

[50] However, because at contract law the extension or second listing effected on 28 November 2012 is a sole or exclusive agency contract, Harcourts have sent an invoice for commission, as on a sale of the property, to the appellants who refuse to pay it. To date, Harcourts have not sued for it and, indeed, have amended their form of renewal of listing contract to make it clear that the listing remains a sole agency.

[51] Any liability of the appellants for commission is not in issue before us. We are concerned solely with the conduct of each of the two licensees. In all the circumstances, we do not think they have failed or been unsatisfactory in any way towards the appellants. The form they used to extend the original sole agency was a standard Harcourts' form which they thought they had explained clearly to the appellants. However, the form is so drafted that we can understand that the appellants did not realise that they were giving an extension as an exclusive or sole agency and they genuinely thought the form only gave the agency an extension as a general listing. As indicated above, the renewal form does not use any of the terms sole, exclusive, or general but, because it clearly extends an existing agency or listing and that listing was then still sole and exclusive, its extension is that of a sole and exclusive agency.

[52] We observe that the appellants showed quite some initiative in getting the idea of making a swap without involving real estate agents and achieving it. If the extended listing of 28 November 2012 had been as a general agency, they would probably have avoided liability for commission.

[53] Technically, the issues now raised by the appellants concern the competency of the licensees' marketing work. However, that seems to us to have been satisfactorily undertaken and performed. It tapered off, in terms of news print advertising over December 2012, because deadlines were dependent on the appellants having renewed a sole agency promptly, and there was a slight delay as explained above. In any case, we can accept that in all the circumstances, the free newspaper

advertising required by the appellants was a fairly minor part of the overall marketing work of the licensees.

[54] The Committee ended its thoughtful reasoning, with which we agree, as follows:

> *"3.12 The licensees say that it should have been clear to the complainants that they were signing an extension of the sole agency as there was no need for them to come into the office and sign a document if the listing was simply moving to a general listing. They say that nowhere in the form are the words "general listing".*
>
> *3.13 Although the Committee accepts that there is no wording on the document saying that it is a general listing there is also no wording saying that it is an extension of a sole agency. We are strongly of the view that in terms of best practice this whole problem would have been avoided if the document had been clearer as to exactly what was being signed. We believe that with the general movement to a consumer focus that licensees would be well advised to adopt clearer plain English language that avoids any misunderstanding about the purpose of the document.*
>
> *3.14 Notwithstanding these comments after analysing the facts and evidence in this case we do not find any evidence to suggest that the licensees acted improperly or deliberately intended to mislead the complainants and because of that will be taking no further action under this part of the complaint."*

[55] We agree with the approach taken by the Committee. For the above reasons this appeal is dismissed.

[56] 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 J Gaukrodger
Member

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Mr G Denley
Member