BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 13

READT 042/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**ANTHONY SWAIN**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20008)**
	First respondent
AND	**SUZANNE LESTER**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Mr J Gaukrodger - Member

HEARD at WELLINGTON on 27 January 2014

DATE OF THIS DECISION 19 February 2014

COUNSEL

Mr C O'Connor, for the appellant
Mr L J Clancy, for the Authority
No appearance by or for the second respondent

DECISION OF THE TRIBUNAL

The Issue

[1] On 8 May 2013, Complaints Assessment Committee 20008 found Anthony Swain ("the licensee") guilty of unsatisfactory conduct as defined in s.72(a) and (d) of the Real Estate Agents Act 2008 ("the Act") for deducting advertising money from a purchaser's deposit when he was not entitled to do so. The licensee works for a Tommy's real estate agency at Johnsonville, Wellington.

Factual Background

[2] Suzanne Lester (the complainant and second respondent) is the executor of her late father's estate. The licensee marketed the sale of a property at Newlands owned by the complainant's father before his death, and administered by the

complainant after his death. The complainant dealt with the licensee regarding the sale of the property both before and after her father's death.

[3] The relevant listing agreement made no provision for advertising to be charged to the vendor. However, upon the property being under a sale contract, the licensee deducted from the deposit received from the purchaser $266 as advertising charges for two separate advertisements in issues of "Tommy's" real estate magazine. The settlement statement sent by Tommy's to the estate lawyer did not explain the deduction for the advertising and an invoice was not provided.

[4] When the deduction was queried by the complainant, the licensee readily agreed to refund the cost of one advertisement ($133) but maintained the other charge was legitimate.

[5] In his response to the complaint, the licensee maintained that the issue of advertising was discussed at a meeting in his office on 18 June 2012 between the complainant, her late father, the licensee, and his colleague Mr Barry Ellis, and it was then agreed that a further advertisement would be placed in the agency's property magazine. This was in addition to a free advertisement which had already been placed in an issue of the magazine. The complainant does not accept the licensee's version of the relevant discussions.

The Complaints Assessment Committee's Decision

[6] The Committee found that a cursory examination of the listing authority shows that the vendor had no commitment to meet any advertising costs, and that there was no other agreement that the vendor would meet the cost of a further advertisement. Accordingly, in the Committee's view, the licensee was guilty of unsatisfactory conduct contrary to s.72 of the Act and rule 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. The Committee also found a breach of s.122(1) of the Act.

[7] Sections 72 and 122 read 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."*
>
> *"**122 Duty of agent with respect to money received in course of business***
> *(1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions.*
> *(2) Despite subsection (1), if an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to the money, he or she must take all reasonable steps to ascertain as soon as practicable the person who is entitled and may retain the money in his or her trust account until that*

person has been ascertained.

(3) Pending the payment of any such money, the money must be paid by the agent into a general or separate trust account at any bank carrying on business in New Zealand under the authority of any Act and may not be drawn upon except for the purpose of paying it to the person entitled or as that person may in writing direct.

(4) No money to which this section applies is available for payment of the agent's debts, nor may it be attached or taken in execution under the order or process of any court at the instance of any of the agent's creditors.

(5) Nothing in this section takes away or affects any just lien or claim that an agent who holds money to which this section applies has against the money."

[8] Rule 5.1 reads:

> *"5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work."*

[9] The Committee also found that even if the licensee's account of the 18 June 2012 meeting was correct, there was the error that a deduction was made twice for the same sum, when no deduction was entitled to be made. The Committee also expressed concern that there was no proper record of the agreement made at that 18 June 2012 meeting about further advertising.

[10] The licensee was found guilty of unsatisfactory conduct, reprimanded, censured, directed to pay the complainant the sum of $133 and to apologise to her.

A Summary of Further Relevant Evidence to Us

The Evidence of the Appellant

[11] The appellant has been a real estate agent in the Northern suburbs of Wellington (the Johnsonville area) since 1995. He noted that his listing instructions came from the complainant second respondent and her late father. The latter had previously been a real estate agent but was rather ill at the time and wished to sell his home and enter a retirement village. On listing, there was no agreement that the vendor pay any advertising or other marketing expenses.

[12] On 30 May 2012 the appellant received an email from the complainant enquiring about advertising rates and payment methods for different marketing options. He responded by telephone that day and, in particular, mentioned to the complainant that a quarter page in his agency's magazine would cost $133 inclusive of GST.

[13] On 18 June 2012 the complainant and her father came to the appellant's office without an appointment and met with him and Mr Barry Ellis about the marketing of the property. The appellant says they put it to him that a sale had become more pressing because of the father's failing health. The appellant says that he told them that he had already booked an advertisement in the Tommy's magazine due to be published the next day, 19 June 2012, at no cost to the vendor and the complainant thanked him for that and asked him to place another such advertisement at a cost of $133 in the next issue. The appellant also says that it was agreed that cost would be

deducted from the eventual deposit when a sale of the property became unconditional.

[14] The appellant/licensee accepts that he did not make a file note of those instructions, or of that agreement, nor get the vendor's written consent to the cost of the advertisement. He now regrets that and, in future, intends to always keep a record and obtain a signed authority for payment or amend the listing agreement to cover such instructions about advertising or anything else.

[15] The property was duly sold but the appellants says that a clerk at Tommy's made an invoicing mistake and charged the complainant (because her father had died in the meantime) $266 for both the advertisements in the Tommy's magazine. By email of 20 August 2012 the complainant queried that and the appellant replied on 22 August 2012 saying *"one advertisement was agreed by yourself during the marketing of your dad's home and the other one Barry and I agreed to pay for"*. Within a few days after that, the cost of one advertisement was refunded to the complainant. There seems to have been virtually no communication between the parties from then. In December 2012 the appellant was contacted by the Authority about the second respondent having made a complaint that she was charged for either advertisement in the Tommy's magazine.

[16] The appellant was carefully and thoroughly cross-examined by Mr Clancy for the Authority who put it to the appellant that the complainant and her father came unannounced to speak with the appellant and Mr Ellis because they were concerned at the property being marketed inadequately. The appellant is adamant that issue was not raised and that they came solely to discuss purchasing some advertising in the Tommy's magazine and thanked the appellant for having advertised in a previous issue of that at no cost to the vendor.

[17] The appellant also states that, at the 18 June 2012 meeting, there was agreement that the vendor pay $133 for a similar advertisement in the next issue of the Tommy's magazine and payment of that $133 cost would be deferred and deducted when an eventual deposit was obtained on sale of the property.

[18] The appellant emphasised that, because he and Mr Ellis thought the vendor and the complainant were good people, they did not think to obtain an authority to cover their eventual taking of the $133 from a deposit in the firm's trust account, or to diary the agreement about advertising, or to vary the listing agreement to cover the advertising expense.

[19] The appellant stated to us that the appraised value and valuation advice was that the property should fetch $460,000 and the complainant's father sought that sum to assist his transferring to a retirement village; but the property actually sold for about $430,000.

[20] The appellant said that when it was raised with him by the complainant that she had been overcharged $266 for advertising, he advised her and was of the view there was simply a mistake by his clerical staff and that, in any case, the charge should have been $133. Rather curiously in all the circumstances, although $133 was reimbursed to the complainant fairly promptly, the further $133 ordered by the Complaints Assessment Committee of the Authority to be paid to her by the appellant has never been repaid; apparently because the appellant appealed the Committee's decision and seemed confident of success before us. He added that his manager

offered a mediation process to the complainant but she declined. He emphasised that the $133 balance had not been paid by his firm to the complainant *"as we didn't owe it"*.

The Evidence of Mr B A G Ellis

[21] Mr Ellis is also an agent of Tommy's office at Johnsonville who had been involved in marketing the property with the appellant. He confirmed that the vendor and the complainant called unannounced on the appellant and him on 18 June 2012 *"to discuss the marketing of 15B Kinapori Terrace, Newlands*". He said that the vendor was not in the best of health and wanted to hasten the sale process; that they discussed advertising in the Tommy's magazine and the agents confirmed to the vendor that an advertisement had already been placed there at the cost of the agency; and that the father and daughter asked for a second advertisement to be placed in the next issue of the Tommy's magazine at a cost to them of $133 on a similar basis.

[22] Mr Ellis confirmed *"no recording of this meeting was made but the terms were clear"*.

The Stance of the Second Respondent Complainant

[23] Ms Lester (the complainant) did not attend the hearing. We understood that she did not wish to participate further having filed a thoughtful and relatively extensive memorandum dated 10 January 2014 which we now cover.

[24] The complainant noted that she has spent much time, as a working mother, putting forward her case to the Authority and to us. She has been deeply affected by the sudden death of her father. She seems irritated that when she rang the licensee about the mistake of his firm charging her $266 for the advertising, he simply treated it as an administrative error. She feels that she received no satisfactory response from the licensee or his manager, and nor did her solicitor as he sought to finalise her father's estate .

[25] The complainant agrees that the meeting of 18 June 2012 was impromptu as she was shopping with her father in Johnsonville and her father became concerned over how the licensee's firm was marketing the property. She said they did not call in on the licensee because they wished to hasten the sale due to the poor health of her father but because her father, having been in real estate himself, did not agree with the way the property was being marketed. The complainant said that all had agreed that paid advertising for the property was unnecessary.

[26] At the meeting of 18 June 2012, her father told the agents that it was not necessary to advertise further because open homes were arranged and there was website advertising. The complainant said that the discussion that day was about the price and wording used for marketing.

[27] The complainant stated that she is shocked that the licensee and Mr Ellis assert that she and her father agreed to there being a further advertisement in Tommy's magazine to be paid for by the vendor. She noted that her father was very careful with his money and did not agree to paid advertising at any stage. The complainant categorically states *"I did not agree to any suggestion by Tony Swain to place a*

quarter page advertisement in the Tommy's magazine at a cost of $133 including GST – only to the one free advertisement".

[28] It also clearly annoys the complainant that monies for advertising costs were deducted from the deposit without her consent and that, she puts it, there has not even been an apology to her for that.

[29] Furthermore, the complainant considers that the content of such a meeting as that of 18 June 2012 should have been diarised by the licensee.

[30] The complaint states that she was aware of Tommy's inhouse complaints procedure but did not trust that agency *"to independently look into the matter for me"*.

[31] The complainant, helpfully, makes it clear that she was fairly soon refunded $133, as half of the $266, on the basis that the first advertising in Tommy's magazine was freely given by the agency. She added *"but my concern and dispute was over the amount of $133 which I had not agreed to".* She concluded *"I therefore consider his (the licensee's) actions in the deductions of monies from the estate account without notification or my consent (either written or verbal) and his attitude and manner in the subsequent dealings of my concerns, to be in breach of the requirements of the Real Estate Act."*

Submissions for the Appellant

[32] Counsel for the licensee, Mr O'Connor, puts it that whether the $133 advertising cost was agreed to be paid by the complainant is a question of fact for us to decide. He notes that the complainant has declined to give evidence and be available for cross-examination.

[33] Mr O'Connor submits that either the complainant agreed to pay for the cost of one advertisement in the next issue of Tommy's from the meeting of 18 June 2012, or that the licensee genuinely believed that. Mr O'Connor also submits that, in all the circumstances, the lack of a record of that was an honest oversight and could not amount to incompetence or negligence. He also submits that the deduction made for the cost of that advertisement was done in the genuine belief that it had been authorised so that s.122(1) of the Act should not apply.

[34] In particular, Mr O'Connor covered that the consequences of the Committee's finding could be career destroying to the licensee in terms of his reputation and that a published finding of unsatisfactory conduct would be devastating to him. It was put that he has been "rocked" by the Committee's decision.

[35] Counsel put it that the licensee has made a significant contribution to his community for decades and that he is known as a decent person who should not be driven from the industry. He submitted that a finding of unsatisfactory conduct is out of all proportion to the circumstances of this case and, in any case, cannot be justified.

Discussion

[36] Was payment for the second advertisement authorised by the complainant or her late father; and, if not, is a finding of unsatisfactory conduct against the licensee appropriate in the particular circumstances?

[37] Mr Clancy, counsel for the Authority submits that the Committee's decision finding unsatisfactory conduct was open to it on the facts and, particularly, because it was not satisfied that there was an agreement to meet the $133 cost of further advertising.

[38] He also submits that the Committee was correct in stating that where deductions for expenses are made, a proper invoice should be issued by the licensee (or the agency) to the customer. We agree that is best practice and did not occur in this case.

[39] Mr Clancy also submits that it is clearly unacceptable to bill clients for advertising which was to be placed free of charge. In this case, that was the position with the first advertisement at least. Mr Clancy accepts that, once notified by the complainant, the licensee did acknowledge that an administration error occurred and that a deduction of $133 was wrongly made twice. He then immediately had $133 refunded to the complainant's solicitor for the cost of the first advertisement.

[40] In respect of the second advertisement, rule 9.8(b) of the Rules requires that when an agency agreement is signed, a licensee must explain, in writing, how a property is to be marketed and advertised. This includes explaining any additional expenses that such advertising and marketing will incur and that the prospective vendor need not agree to incurring them. In the present case, the agency agreement does not record that the owner is to pay any sum towards advertising or marketing. The licensee contends that, subsequent to signing the agency agreement, a verbal agreement was reached in which the complainant agreed to pay for a further advertisement. It is put that, in light of rule 9.8, any such verbal agreement regarding advertising should have been recorded either by way of an amendment to the agency agreement or in writing. In terms of Rule 9.8 that would be good practice but it is Rule 9.10 which requires that the agency agreement contain *"all material particulars"*.

[41] Mr Clancy, further submits for the Authority that that licensees are expected to keep up-to-date files, including diary and file notes, particularly of meetings where issues relating to the handling of a client's money are discussed. We agree that competence requires this.

[42] While we are only dealing with a small sum of money, matters of principle arise here. Counsel for the licensee contends that the lack of record was an oversight and is not of such gravity as to suggest incompetence or negligence. However, Mr Clancy submits that s.72 of the Act, which defines *"unsatisfactory conduct"*, does not simply catch conduct on a scale of seriousness. He submits that a breach of the rules simpliciter will constitute a breach of s.72 and it is then the penalty orders imposed which reflect whether the conduct was at the lower or higher end of that scale. As the orders made in this case were relatively lenient, the Committee clearly recognised that the licensee's conduct was at the lower end of the scale. In any case, it could have decided to take no action.

[43] Mr Clancy submits that it was open to the Committee to conclude that the licensee's conduct met the threshold of unsatisfactory conduct.

[44] In his final oral submissions to us, Mr Clancy put it that the issue is to ascertain precisely what was agreed upon by the parties at the meeting on 18 June 2012 in the licensee's office and, overall, is a finding of unsatisfactory conduct fairly warranted. He seemed to be submitting that the licensee's conduct was unsatisfactory so that

we should make a finding that he has breached s.72 of the Act but, perhaps, impose a penalty on the basis that the conduct was at the very low end of offending. He submits (correctly in our view) that, at the very least, there was a failure to obtain a written authority to the advertising expenditure and to its deduction from the deposit at a time when it was held in the agency's trust account. He emphasises, that, although a relatively very small sum is involved, the principle is very important.

[45] We stress that an important principle is involved in this case. Licensees or agencies cannot deduct from funds held by them on trust without a written authority to do so. Nevertheless, in terms of unsatisfactory conduct we consider that, there needs to be a threshold of reality. In all the circumstances of this case, we do not consider that the licensee crossed the threshold.

[46] In this case we gave a short oral decision at the end of the hearing so that the licensee know the result of this appeal, but on the basis that we would be issuing this reserved decision fairly soon. We mentioned that, obviously, the way trust accounts are handled is pivotal to professional and business life. We noted that in this case we had two contradictory versions as to what were the instructions given by the vendor to the licensee with regard to advertising but that because we found the licensee *"from our experience and assessment of people, to be an honest and credible person as a witness we accept his account of the meeting that took place"* on 18 June 2012 at the agency's offices. We then noted that, technically, the licensee's evidence is unchallenged because the complainant would not attend this appeal hearing and give evidence and be cross-examined.

[47] We noted that the listing agreement should have been amended to show that there was to be paid advertising of $133 debited to the vendor or that, at the very least, there should have been a signed memorandum to that effect made at that meeting of 18 June 2012. We also indicated that important though audit requirements are, the sum of $133 in the context of a property sold for about $430,000 can be regarded as a de minimis situation. We accept that there cannot be a de minimis situation in terms of important principles but we concluded our oral submissions by saying: *"we take the view that when you look at this picture as a whole, there has not been unsatisfactory conduct and, in any case, such a finding would be out of all proportion to the effect on Mr Swain's career"*. We do not overlook that there has been a breach of s.122(3) of the Act because the complainant did not authorise the deduction of any advertising costs from the deposit in the agency's trust account.

[48] Perhaps, it is a better way to put it that, in all the circumstances of this case, the threshold of unsatisfactory conduct as defined in s.72 of the Act has not been crossed. We are satisfied that the licensee had the vendor's approval to advertise in the next issue of Tommy's own magazine at a cost of $133 but, because those instructions arose at an impromptu meeting on an amicable basis, the licensee overlooked obtaining a written authority to the expenditure to be signed by the vendor or even recording the arrangement. All that is very regrettable but we do not consider that it requires a finding of unsatisfactory conduct in the circumstances of this case.

[49] Accordingly, this appeal is allowed and we quash the findings of the Committee.

[50] 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

_____
Ms N Dangen
Member

_____
Mr J Gaukrodger
Member