

Decision No: [2014] NZREADT 31

Reference No: READT 031/13

IN THE MATTER OF

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

BETWEEN

IVAN & JANISS FLANNERY

Appellants

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 2005)**

First Respondent

AND

**DEBORAH LYONS AND
BARFOOT & THOMPSON**

Second Respondents

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport QC - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

APPEARANCES

Mr I Flannery in person
Mr R M A McCoubrey for the first respondent
Mr T D Rea for the second respondents

HEARD at AUCKLAND on 26 February 2014

Introduction

[1] Mr and Mrs Flannery appeal against the Complaints Assessment Committee's decision dated 28 March 2013 to take no further action against Deborah Lyons and Barfoot & Thompson Limited.

[2] Mr and Mrs Flannery now live in Australia. Mr Flannery returned to argue for the appeal.

[3] The appellants' complaint arises out of the sale of their property at 461 and 468 East Coast Road, Mairangi Bay in Auckland. This was a unique property because it was two dwellings on one title, being sold as one piece of land on a reasonably busy road in the North Shore of Auckland. Issues arose about the market appraisal carried out by the agent and the price indicator which appeared on the listing agreement and finally whether or not the second respondents had erred in putting together a brochure which showed the current CV for the property, even though the agent knew that the complainants had appealed this decision.

The facts of the case

[4] The facts are relatively straightforward. Mr Flannery told the Tribunal that Ms Lyons had listed the property for them in June 2007 but it did not sell and was withdrawn from the market. In February 2011 the agent and the Flannerys had co-operated so that the property was shown on an overseas television documentary where there was a suggestion of the property being worth approximately \$1.5 million. In June 2011 another agent with Barfoot & Thompson had appraised the property, prepared a comparative market analysis and gave a value range for the property of between \$1.2 to \$1.4 million.

[5] The licensees decided to list the property for sale in October 2011. They met with the licensee Ms Lyons to complete the listing agreement. No new appraisal was carried out by Ms Lyons but Ms Lyons and Mr and Mrs Flannery agree that Ms Lyons was told of the previous appraisal. Ms Lyons told the Tribunal that she believed that the appraisal figure shown in the listing agreement of \$1.5 million was a realistic figure. The listing agreement was signed without the search indicator being completed in front of the Flannerys. However on Barfoot & Thompson's own copy of the agency agreement the agent had added the search indicator figures of \$1.1 million to \$1.5 million. Mr and Mrs Flannery were not consulted about this but both Barfoot & Thompson and Ms Lyons said this was a figure that was not ever shown to anyone, it was just in-house notation which changed. However it was presumably used to define properties within a price bracket so that if there was an enquiry on the internet between \$1.1 and \$1.5 million the property would have appeared but not if the search was \$1.6 million. Mr and Mrs Flannery say that they were never consulted about the search indicator¹ figure.

[6] Mr and Mrs Flannery say that the appraisal figure of \$1.5 million was a major factor influencing them to sign the agency agreement.

[7] Their next concern was that Barfoot & Thompson's used an unapproved sales brochure which caused any potential purchasers of around the \$1.5 million mark to be put off. The sales brochure was a document that was seen by Mr Flannery on the day of the first open home. It contained some information about the house and on the second page contained information including the CV, which was shown at \$815,000. Mr and Mrs Flannery were horrified at this as they said that they told Ms Lyons that the CV was under appeal and felt it was too low. However they say that the agent did not change the brochure but instead urged them to obtain a valuation. They did this.

¹ They also noted that the Barfoot & Thompson's copy of the agreement also included water addition of chattels – water fountain and under 'notes' there was a note saying laundry shute from master to garage.

[8] The Flannerys assert that this information together with the search indicator put off any buyers who might have been prepared to pay more. They received one offer by tender which was not acceptable to them and they withdrew the property from the market. They subsequently relisted the property with another agency and sold the property for \$1.1 million. Mr and Mrs Flannery say that the agent who listed the property the second time said that the Barfoot's sales approach had affected the market and the property would not sell at a higher figure.

[9] Ms Lyons gave evidence. She said that she found it difficult to know exactly what price the property would sell for given the uniqueness of the property (a home and minor dwelling on a single title and located on a main road). She said she found it difficult to find comparable recent sales statistics. She agreed she did not carry out a new appraisal or provide one to the appellants but did suggest that a registered valuation could be obtained.

[10] Ms Lyons said that the reason that she put \$1.5 million into the agreement as the appraised figure was because that was the figure that Mr and Mrs Flannery said was the only figure at which they would sell. She said she felt it was not impossible to achieve that figure. She described the search indicator, [which she acknowledged she filled in after the signing] as one which is used for internal purposes only and where the figure is adjusted throughout a marketing campaign. She said that the sales brochure was in the usual format for Barfoot & Thompson which included the publically available valuer information such as CV, legal description and rates. She said that when the claimants raised concerns she made sure that the information about the written objection to the CV was advised to potential purchasers.

[11] Ms Lyons said on reflection she wished that she had discussed with the Flannerys the search indicators and had done her own marketing appraisal.

[12] Evidence was also given by Mr Max House for Barfoot & Thompson. Mr and Mrs Flannery complained about the response that they received from him to their complaint. They said that they wrote/complained to him and he responded and they wrote back but he did not respond to that letter. This also included a request for a copy of the tender which they had received on their property. Mr House said that he acknowledged the letter he received from the Flannerys and responded in detail in June 2012. He said that it was a substantive and final response to the appellants' claim. He said that he reviewed the letter of 3 July 2012, which contained further requests and formed the view that a further reply was unnecessary. He took the view that their complaint was just a request for compensation and that he had adequately responded to this in his first letter. When questioned by the Tribunal he continued to insist that he did not need to reply to the second letter from the Flannerys and that he had taken all appropriate steps on behalf of Barfoot & Thompson.

The issues for the Tribunal

[13] The Tribunal must assess whether the facts set out above and its assessment of the witnesses and the law mean that it should uphold the decision of the Complaints Assessment Committee, modify it or set it aside. The Complaints Assessment Committee in its decision dated 28 March 2013 determined that it would take no further action with regard to the complaint or any issue involved in the complaint.

[14] The issues for the Tribunal to determine whether or not there has been any breach of the Real Estate Agents Act 2008 (Client Care Rules) or any provision of the Act.

[15] We need to make this determination in respect of the following questions:

1. Did the agent [Ms Lyons] err in her approach to the appraisal process as we have set out above?
2. Did the agent err in inserting a price search indicator without discussing it with the Flannerys and without reaching agreement on its value?
3. Did the agent and agency err in determining that the CV must be the actual figure shown by the Council?
4. Did Barfoot & Thompson via Mr House err in the response that it gave to Mr Flannery's complaint?

Issue 1 – The Appraisal

[16] The Flannerys assert that Ms Lyons breached Rule 5.1, 6.4, 9.1, 9.4, 9.6, 9.7, 9.10 and 9.16 of the 2009 Client Care Rules and that Mr House has breached Rule 9.1. These rules read as follows:-

Rule 5.1:

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

Rule 6.4

"A licensee must not mislead a customer or client nor provide false information, nor withhold information which should by law or fairness be provided to a customer or client."

Rule 9.1

"A licensee must act in the best interest of a client and act in accordance with the client's instructions unless to do so would be contrary to law."

Rule 9.4

"A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest."

Rule 9.6

"An advertised price must clearly reflect the pricing expectations of the client."

Rule 9.7

"A licensee must not mislead customers as to the price expectations of the client."

Rule 9.10

"A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for signature unless all of the material particulars have been inserted into or attached to the document."

Rule 9.16

"A licensee must not advertise any land or business on terms that are different from those authorised by the client."

[17] Rule 9.5 requires that an appraisal of a land or business must be provided in writing to a client by the licensee, must realistically reflect current market conditions and must be supported by comparable information on sales of similar land, in similar locations or businesses. This was not undertaken by Ms Lyons but another agent.

[17] Ms Lyons as has been said did not carry out an appraisal of the property. Rather she simply considered the appraisal done by another Barfoot & Thompson's agent some months before, discussed the matter with Mr and Mrs Flannery and put a figure of \$1.5 million in the listing agreement. She frankly acknowledges that she should have carried out her own written appraisal for the property. Equally frankly she acknowledged the potential difficulties in doing this given the unique features of the property. She said that she considered that the property could have reached \$1.5 million and that this was not an unreasonable figure.

[18] There is nothing in the Rules which requires the agent actually listing the property to carry out the appraisal. Nor is there a timeframe within which an earlier appraisal must be redone. It is enough if an agent within the agency provides to Mr and Mrs Flannery the information needed so that they could determine what the proper value for the property was. The appraisal carried out by the other Barfoot & Thompson agent was carried out in June 2011 and the property listed by Ms Lyons in October 2011. While the market can change during that five month period at that time the market was very depressed and there was a discussion between the vendors and the agent in which the parties agreed to use this appraisal. Ms Lyons also suggested (a little later) that the vendors obtain a registered valuation of the property. We consider that this is sufficient discharge of her obligations.

Issue 2 – Did the agent err in asserting a price search indicator without discussing it with the Flannerys?

[19] The Tribunal find that it would have been good practice if Ms Lyons had discussed the price indicator with the vendors but that this does not amount to misconduct or unsatisfactory conduct. While both Mr House and Ms Lyons dismissed the price search indicator as being nothing more than an internal document whose figure changed as the marketing campaign progressed, nonetheless there should have been agreement between the agent and her clients as to the figure within which a potential purchaser would find the property if they searched the internet and the purpose of the figure. Ms Lyon's failure to do so may not have affected the outcome of the price but it did distress the Flannerys. For this reason a discussion would have assisted Mr and Mrs Flannery to understand the price indicator search range. However we consider that this failure was neither incompetence nor negligent, simply an oversight possibly brought about by the fact that Barfoot & Thompson appear routinely to have not regarded the price indicator as being of any real significance. We do not think that this conduct is sufficiently serious enough to amount to unsatisfactory conduct.

The CV figure

[20] The Tribunal do not think that either Barfoot & Thompson or Ms Lyons erred in determining that the proper CV ought to have been shown on the information provided to potential purchasers. It should have been tempered by information that this was under appeal and it appears that Ms Lyons took this step when Mr and Mrs Flannery pointed this out to her. An attempt to have hidden or to have fudged the CV would have been entirely inappropriate and could have led to a suggestion that Ms Lyons was misleading potential purchasers.

Mr House's response

[21] Mr House was somewhat dismissive of the Tribunal's questions when he was asked as to why he had not responded to the request in the Flannery's letter of 3 July 2012 that they be provided with a copy of the tender. His firm view was that they wished to claim compensation and that he was not prepared to entertain this. He felt his first letter answered all this. The Tribunal are concerned about this attitude. Barfoot & Thompson is a large agency and Mr House must deal with many complaints and concerns by vendors and purchasers. Barfoot & Thompson's have no obligation to accept any criticism levelled at them but nonetheless a reflection that a courteous but firm response to a letter (or indeed any response at all) is better than none. His evidence came across as somewhat arrogant and no doubt added to Mr and Mrs Flannery's view that their concerns were being fobbed off or dismissed by Barfoot & Thompson. We do not determine considering that this amounts to either a breach of s 72 or s 73 of the Real Estate Agents Act 2008.

[22] We have reached a similar conclusion for the issue of the appraisal. The fact that Ms Lyons was familiar with the property and had seen an earlier appraisal meant that she felt that she could rely upon the appraisal done by another agent. It is not ideal and she frankly acknowledges that she should not have presumed to have known all about the property and should have done a fresh appraisal. However this is not conduct which breaches any of the Regulations or Rules made under the Act and in particular does not breach Rule 9.5 as an appraisal was done by the licensee (another employee of Barfoot & Thompson). So for reasons that we have set out above we do not find that this error again crosses the threshold of professional misconduct.

[23] We therefore conclude that the appeal cannot succeed and we uphold the decision of the Complaints Assessment Committee.

[24] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 29th day of April 2014

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member