BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 4

READT 002/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**ALFRED ROBERT GILLARD**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20003)**
	Respondent

MEMBERS OF TRIBUNAL

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

HEARD at Christchurch on 8 November 2013

DATE OF THIS DECISION 17 January 2014

COUNSEL

Mr J Waymouth for the appellant
Ms J MacGibbon for the Authority

DECISION OF THE TRIBUNAL

Introduction

[1] Alfred Gillard ("the licensee") appeals against the determination of Complaint Assessment Committee 20003 finding him guilty of unsatisfactory conduct.

[2] The complainants (a Mr N Roberts and Ms Barbara-Lee Dickson) are no longer a party to this appeal. They indicated to the Tribunal in January, when the notice of appeal was filed, that they did not wish to participate.

[3] No penalty decision has yet been made by the Committee.

Factual background

[4] The complainants were prospective purchasers of a block of vacant land at 1/572 McLaughlins Rd, Darfield. The licensee was the listing and selling agent for the property through Grenadier Real Estate Ltd.

[5] The property was first listed in May 2010 at an asking price of $288,000. The complainants first made contact with the licensee by a phone call on Saturday 5 May 2012 seeking information on the property. This was followed up almost immediately by the complainants e-mailing the licensee confirming the phone conversation and asking for the information to be e-mailed to them.

[6] On 6 May 2012, the complainants sent a text to the licensee asking if they could visit the property, and they did so. At 9.58 a.m. on Monday 7 May the licensee e-mailed the information that had been requested by the complainants on 5 May 2012. One hour later the complainants confirmed receipt of the e-mail. Less than two hours later, the complainants e-mailed the licensee requesting a meeting. A short e-mail exchange ensued and the complainants suggested a time to meet the licensee.

[7] Later that evening, complainants phoned the licensee to see whether the vendor would consider an offer of $275,000. That licensee said that the vendor was holding out for the asking price of $288,000.

[8] On the morning of 9 May 2012, the successful purchasers of the property contacted the licensee. They visited it at 2.30 p.m. and signed an offer of $282,000 at 3.00 p.m. that same day. That offer was accepted by the vendors on the evening of 9 May 2012.

[9] Early on the morning of 10 May 2012 the complainants phoned the licensee and were told that the property had been sold the previous day. The licensee suggested that they make a back-up offer, but they would not do that.

[10] It is not disputed that the licensee made no attempt to contact the complainants on 9 May 2012 after being contacted by the eventual purchasers so they could make an offer on the property.

Committee decision

[11] The complainants stated that they had expressed definite interest in the property and that the licensee sold the property to another purchaser without making further contact with them. They wished to be able to participate in a multi-offer and said that the licensee may have achieved a better price for his client.

[12] The Committee found a breach of Rules 5.1 and 6.2 of the Real Estate Agents Act (Client Conduct and Care) Rules 2009.

[13] Rule 5.1 reads:

> *"A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work."*
>
> Rule 6.2 reads:
>
> *"A licensee must act in good faith and deal fairly with all parties engaged in a transaction."*

The Committee also considered the relevance to the complaint of R 9.1 which reads: *"A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law"*, but did not apply it.

[14] A breach of any of the rules is a contravention of s 72, and s 72(b) in particular, and that section reads:

"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."

In its thoughtful decision, the Committee noted, *inter alia*, that the licensee did not consider the complainants to be serious in terms of contemplating the purchase of the section. He felt they were expressing only minor interest. A little later in its decision the Committee found: *"that the licensee, in failing to give credence to their interest and give them a chance to make an offer, was acting in a way that showed a lack of care and skill and accordingly, he breached Rule 5.1."*

The Appellant's Evidence

[15] The appellant is a salesperson licensee and has been actively engaged in the real estate business for over 25 years. He also holds the qualification of a branch manager under the Act. He has held that status since 1992 and over that period he has actively managed real estate offices and sales teams.

[16] However, he considers that the enquiry he received from the complainants was, in his opinion, nothing more than a generalised enquiry of the type he is used to receiving quite frequently. He notes that the complainants did not respond to him after their private viewing of the property which they undertook on Sunday 6 May 2011, but on 7 May 2012 he sent them relevant material. As they had not followed up with him, he felt they were no longer interested, presumably, because of what they had seen or read. He considered that the complainants were in the range of buyers at $275,000 for which the property had been originally listed in 2010. However, upon GST being increased to 15%, he had advised the vendors to increase their asking price to approximately $288,000, including GST, so as to preserve their financial position, and he did not see the complainants as buyers in that range.

[17] The appellant asserts that the complainants' enquiry was merely of a general nature and that the pricing levels they indicated to him were well below the expectations of the vendors. He does not use the word "*tyre kickers*" about them, his counsel, Mr Waymouth, emphasised that that was his personal expression only, and the appellant referred to them as general enquirers or people simply making a price enquiry. Their interest at $275,000 was well below what the vendor was seeking so that the appellant felt under no obligation to advise the vendors of it. He felt he had no duty to do so under Rule 9.13 which reads: *"A licensee must submit to the client all offers concerning the sale, purchase, or other disposal of any land or business, providing that such offers are in writing."* Obviously there was no written offer from the complainants.

[18] The appellant also points out that when the complainant, Mr N Roberts, did finally contact the appellant on 10 May 2012, apparently to make an offer, he (the appellant) encouraged that the complainants enter into a backup agreement and gave them much general encouragement, but they declined his support. That attitude simply confirmed to the appellant that the complainants were never genuine.

[19] The appellant seems to have been a close friend of the vendors and knew that they would not contemplate significantly reducing their asking price level of $288,000 so that the appellant did not see the complainants' possible interest at $275,000 as being in a realistic range. The appellant felt that there had been insufficient interest shown by the complainants for him to suggest they proceed to a written offer. When he received firm interest at a higher price level from the actual purchasers, the appellant saw it as his duty to endeavour to complete a sale process with them, and that happened.

[20] The appellant was thoroughly and carefully cross-examined by both counsel but did not waiver from the theme of his evidence-in-chief.

[21] He mentioned that he has never met either complainant. He covered in some detail that there were two important restrictive covenants over the land and that a Land Use Consent for it had expired. He had sent the complainants a copy of that former consent as well as a LIM report with details of restrictive covenants. Essentially, it seems that the land is zoned rural, and before a dwelling house could be built on it, there needed to be a new consent under the Resource Management Act. The restrictive covenants applied to aspects of building work permitted on the land and the type of land use. We understood that there could be no intensive farming activity, such as the raising of poultry or pigs.

[22] The appellant ascertained that the male complainant was a rural contractor of some type who seemed to understand the detailed explanations which the appellant gave him about restrictions on the use of the property.

[23] Because the first phone call which the appellant took from the complainants was made on a Friday, the appellant did not have facilities to photostat/scan the relevant documents until the Monday 7 May 2012. On that Monday the male complainant rang the appellant at home to discuss the covenants and other documents and asked whether the vendors would look at an offer of $275,000. The appellant said they would not as he well knew they were firm at $288,000. He added that reference to price was, quite fleetingly, merged into their discussion about the documentation which the appellant had supplied to the complainants.

[24] The appellant mentioned that over the previous year or so he had had about 30 similar enquiries about the land where he supplied similar information to the enquirer and he felt that the complainant's enquiry was just another one of those. The appellant also emphasised that his technique as a salesperson is not to "*hard sell*"; he does not hound people but is quick to follow up when he gets a feel that an enquirer is genuinely interested in a property.

[25] The appellant emphasised that this complaint has caused him ongoing massive stress as it is the first complaint he has ever had made against him and has dogged his mind ever since. He said that for 18 months the complaint has had an adverse effect on his life each day; and he is determined to clear his name.

[26] There was no further contact from the complainants with the appellant after their phone conversation of Monday 7 May 2010.

Discussion

[27] There is no real dispute about the facts of this appeal. The question is whether, in the circumstances we have covered above, it was unsatisfactory conduct by the

appellant to not assess the complainants as genuinely prospective purchasers of this rural land, rather than as simply general enquirers.

[28] Rule 6.2 provides that a licensee must act in good faith and deal fairly with all parties engaged in a transaction. Counsel for the licensee has submitted that at the time of the licensee's phone discussions with the complainants, a transaction was not in place and as such a breach of the Rule cannot be established.

[29] It is submitted for the Authority that a purposive approach should be adopted so that the interpretation of this provision is consistent with the statutory purpose of the Act (and its regulations), which is consumer protection. Accordingly, it is submitted for the Authority that the Rule can be construed to mean that the complainants were engaged in a possible or potential transaction, and that this implied meaning is so obvious as to go without saying, in light of the statutory scheme and purpose; and to limit the interpretation of this Rule to only involving those parties who are party to a concluded contract would unduly restrict it to a narrow set of circumstances. We agree. A possible or potential transaction had commenced upon the licensee taking the complainants' phone call on Saturday 5 May 2012 so that Rule 6.2 was engaged. The communications between the complainants and the licensee comprised "*a transaction"* for the purposes of the Rule.

[30] Irrespective of Rule 6.2, it is submitted by Ms MacGibbon that unsatisfactory conduct can be found on the ground that the licensee's standards fell short of what a reasonable member of the public is entitled to expect from a reasonably competent licensee in terms of s 72(a) of the Act. In principle we agree with that submission of Ms MacGibbon. Also Rule 5.1 (set out above) could apply.

[31] Was the licensee's adverse assessment of the complainants, as unlikely to be serious purchasers of the property, unsatisfactory conduct? Was there a lack of competence on the part of the licensee?

[32] It is the licensee's submission, which was the same as he put before the Committee, that the complainants were a "*non-committal minor interest party*" and, as such, it was reasonable for him to not contact them about making an offer.

[33] Ms MacGibbon also submitted that it is unsurprising that the Committee made adverse findings against the licensee on the basis of poor practice as follows:

(a) The licensee characterised the complainants as "tyre kickers" when in fact the evidence shows them to be engaged and interested potential purchasers. There were persistent phone calls and e-mail in the days between 5-7 May 2012 and this clearly showed an interest in the property.

(b) The complainants had given their expression of interest with a verbal offer of $275,000. This was only $7,000 less than what the property was purchased for.

(c) There is no evidence that the licensee went back to his vendor client and presented the complainants as potential purchasers who might be willing to make a higher offer, such that a multi-offer situation could be favourable.

(d) The vendor has stated that $282,000 was within the price range, so it appears to be unclear why the licensee informed the complainants that the price had to be $288,000 without any scope for negotiation.

[34] It can be seen as odd that the licensee did not go back to the complainants once the written offer had been made by the ultimate purchaser and advise them that they had a last chance to put in their highest written offer, absent vendor instructions to that effect. Ms MacGibbon submits that the Committee's findings were correct.

Unsatisfactory conduct

[35] On behalf of the Authority, Ms MacGibbon accepts that the conduct in question does not reach the threshold of misconduct and, as such, it is for us to determine whether no further action should be taken or whether the Committee was correct to find that the licensee's conduct was unsatisfactory in nature.

[36] In *Ryan v Real Estate Agents Authority* [2013] NZREADT 45 we held:

> *"[48] Any breach of any of these rules, would prima facie, result in a finding of unsatisfactory conduct under s 72(b) of the Act. Of course, it is a matter of judgment whether any of the rules have been breached. …"*

[37] We went on to state:

> *"[51] We have previously held that not every departure from best practice will amount to unsatisfactory conduct requiring a disciplinary response (Wetzell v CAC & MacVicar [2011] NZREADT 8 at [37]; but care must be taken when applying this dicta. Any suggestion that licensee conduct must be at the more serious end of the disciplinary spectrum before a disciplinary response is warranted would be contrary to the statutory scheme of the Real Estate Agents Act 2008. The Act creates a two tier disciplinary scheme, where more serious conduct amounts to misconduct and less serious conduct to unsatisfactory conduct.*

[38] Ms MacGibbon submitted that any breach of the Rules by the licensee will result in a finding of unsatisfactory conduct. It is however, a matter for judgment whether the licensee's conduct amounts to a breach of the Rules. There was reference to *CAC v Downtown Apartments Limited* [2010] NZREADT 06 where we stated:

> *"[50] At a high level of generality, therefore, it may be said that s 72 requires proof of a departure from acceptable standards and s 73 requires something more – a marked or serious departure from acceptable standards."*

[39] For the purposes of unsatisfactory conduct, all that is required is proof of departure from acceptable standards, rather than deliberate departure.

[40] In *Pollett v Real Estate Agents Authority* [2013] NZREADT4 we held:

> *"[32] Committees of the Authority have a wide discretion whether to inquire into, or inquire further into, a complaint or allegation under the Act. If, having held a hearing on the papers under s 90, a Committee is satisfied on the balance of probabilities that an agent has breached the Rules, then a finding of unsatisfactory conduct must follow pursuant to s 72(b). A defence of total absence of fault may be available to an agent. Additionally, a breach of the Rules involving a low level of culpability will generally be reflected in a low level penalty."*

[41] As Ms MacGibbon put it; any "*lower level*" breach of the Rules will be reflected in the penalty imposed.

[42] In the High Court decision of *S v New Zealand Law Society* HC Auckland CIV-2011-404-3044, 1 June 2012, Winkelmann J dealt with the application of the two-stage test from medical disciplinary proceedings. The appellant sought the imposition of the same two stage test to require the Tribunal to first ask whether there had been any misconduct, and secondly to ask whether it warranted any disciplinary sanction. Her Honour stated a para [27]:

> *"The provisions upon which the medical disciplinary proceedings, and their two stage test are based, are very different from s 7 of the Act with which I am concerned. Most obviously, s 7 is concerned solely with a determination of the nature of the relevant conduct whereas the equivalent medical disciplinary provisions are additionally concerned with the circumstances in which sanctions may be imposed. Adopting the proposed test in this case would require the addition of a gloss to the words of the statutory provisions and one that has no justification as a matter of statutory interpretation. I decline to adopt that analysis."*

[43] It is therefore submitted for the Authority that should we find a breach of the licensee's obligations, then an unsatisfactory conduct finding should follow, subject to the licensee making some absence of fault argument.

[44] It is accepted however, that Committees (and this Tribunal on appeal) have a broad discretion to take no further action, such that it is not necessary to go on to determine whether conduct is unsatisfactory in terms of s 72 of the Act.

[45] Of course, we received helpful and detailed submissions, not only from Ms MacGibbon, but also from Mr Waymouth related in quite some detail to the evidence and relevant law. Mr Waymouth dealt with a number of rules but the Committee had confined itself to Rules 5.1, 6.2 and 9.1.

[46] Mr Waymouth emphasised that the complainants seemed to have been buyers in the maximum range of $275,000 whereas the vendors sought $288,000 as their sale price. Mr Waymouth also emphasised the very limited contact between the complainants and the appellant and that there was really much silence from the complainants. He put it that, overall, based on his experience the appellant honestly thought that the complainants did not regard the property as suitable to them and he assessed them as merely general enquirers.

[47] Mr Waymouth seemed to be submitting that we should regard there as being a high threshold before any type of breach of standards could lead to a finding of unsatisfactory conduct and that not every finding of unsatisfactory conduct, i.e. a departure from acceptable professional standards, should attract sanction under the Act which should relate to significant breaches. We hesitate to generalise and prefer to deal with issues in terms of the particular facts of the case.

[48] Mr Waymouth emphasised that the appellant's sales technique was not of a pushy type and he preferred to be open and meticulously honest in responding to the interest of an enquirer. Mr Waymouth recorded that the appellant regarded these proceedings as major in his life and is most appreciative of being heard before us. We accept that the licensee is not a "*hard sell*" type of real estate agent and that characteristic needs to be taken into account.

[49] Mr Waymouth seemed to be putting it that, perhaps, with hindsight, the appellant should have been more proactive towards the complainants and could have assessed them as possibly being genuinely interested prospective purchasers. However, Mr Waymouth submitted that if there has been such an error of judgement on the part of the appellant, that does not cross the threshold to amount to conduct requiring discipline; and that the situation can be regarded as showing a complete absence of fault on the part of the appellant; and that his name ought to be cleared because he has done nothing wrong but takes the view that, if he has failed in some way, it was completely unintentional. Mr Waymouth also referred to the appellant as being immediately supportive when he realised that the complainants were genuinely interested in endeavouring to purchase the land.

[50] It is interesting that the appellant at all times, and even now, has the total support of the vendors who do not regard him as having failed them in any way whatsoever.

[51] Ms MacGibbon put it that it is for us to decide whether the appellant breached his obligations but that if he has, then it follows that he is guilty of unsatisfactory conduct. She put it that if there is a breach of any of the Rules then there has been unsatisfactory conduct. We agree that follows from the statutory structure of ss 72 and 73 of the Act but we (and the Committee) have an over-riding discretion to decide to take no action in the interests of justice and fairness overall.

Our Decision

[52] This is a case where we pronounced our views at the end of the hearing because we could see that the appellant is genuinely very stressed (and distressed) at the Committee having found him guilty of unsatisfactory conduct in the circumstances of this case. Part of what we then said was as follows:-

> *"Perhaps I should say at the outset we should all remember that as is obvious that we are here not to win or to lose but to try and do what we think is just. We're part of the justice system. Now technically we reserve our decision and will put careful views in writing but the three of us are so unanimous when we stand back and look at this objectively, that I've been asked to express what the outcome will be as distinct from the precise method of reasoning that we will use and the precise reference to authorities. We think it's certainly arguable whether there's been any error of judgement with regard to assessing the interest of the complainants. We're looking at it with hindsight and as I say it's very arguable whether there has been an error in assessing their stance or keenness. But even if here has been, it seems to us that people in commerce have to make judgement calls like that every hour of the day. That's how commerce operates and what this disciplinary system is concerned with is not just with so-called errors of judgement, when you get into that field you're dealing with competence or negligence and we don't think that even if there has been an error and at the moment I'm not saying whether there has or there hasn't been, there's certainly no lack of competence in issue. Well, simply put, we're not satisfied that the threshold of unsatisfactory conduct has been reached so that we will quash the decision of the Committee and I'd like to make it clear we don't do that lightly. As a Judge for 32 years I've never believed in being dismissive of the views of others when you're looking at them on appeal. …."*

[53] Simply put, we consider that it is very arguable whether there has been any error of judgement on the part of the appellant so as to warrant disciplinary measures. He is a very experienced real estate salesperson and had fielded many enquiries regarding this land and of course many other properties. In his experience he assessed the complainants as being only mildly interested in the land and to be simply making a general enquiry in a vague sort of way. With hindsight, he realises that does not seem to be the case and he misread the situation.

[54] Even if he has erred in such a situation, it seems to us that the appellant has merely made a judgement call which is required from people in trade and commerce every day; and we are examining that situation with hindsight. Certainly, there has been no lack of skill nor any incompetence or the like on the part of the appellant. He simply misunderstood the apparent interest of the complainants in the course of two phone calls and a few texts and e-mails. We do not think that conduct crosses the threshold so as to amount to unsatisfactory conduct as defined in s 72 of the Act.

[55] We have been provided with far more evidence than was available to the Committee. Indeed, the appellant did not give evidence of any type to the Committee who seem to have largely been confined to material provided for them by the complainants, who wish to no longer be involved in this matter.

[56] In terms of our above reasoning and in all the circumstances, we quash the finding of unsatisfactory conduct. This appeal is allowed.

[57] Pursuant to s 113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s 116 of the Act.

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Judge P F Barber
Chairperson

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Mr G Denley
Member

_____
Ms C Sandelin
Member