

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 45

READT 100/12

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **MALCOLM WALLER** of Christchurch, Complainant

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20006)**

First respondent

AND **SUZANNE ROBIN** of Christchurch, Real Estate Salesperson

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Mr G Denley - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 24 June 2014

REPRESENTATION

The appellant on his own behalf
Ms S G J Locke, counsel for the Authority
Mr M Parker, counsel for the licensee

DECISION OF THE TRIBUNAL

Introduction

[1] Malcolm Waller (the appellant and complainant) appeals against the 19 November 2012 decision of Complaints Assessment Committee 20006 (the Committee) that Suzanne Robin (the licensee), who works for Holmwood Real Estate Ltd (a Harcourt's Branch), had engaged in "*unsatisfactory conduct*" as outlined below. He submits that the Committee should have found "*misconduct*" on her part.

[2] "*Unsatisfactory conduct*" and "*misconduct*" are respectively defined in ss 72 and 73 of the Real Estate Agents Act 2008 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.*

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
- (c) consists of a wilful or reckless contravention of—*
 - (i) this Act; or*
 - (ii) other Acts that apply to the conduct of licensees; or*
 - (iii) regulations or rules made under this Act; or*
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.”*

Background

[3] The appellant and his now ex-wife, Fleur Waller, were joint owners of 15 Denman Street, Sumner. Fleur Waller and the licensee are friends.

[4] An agency agreement was signed between Mrs Waller and the licensee for Holmwood to sell the property, but the appellant did not sign the agreement as it appears he wished to acquire the property himself i.e. purchase the interest in it of his estranged wife.

[5] The licensee accepts that she did not have the appellant's authority to list the property for sale but believed Mrs Waller had delegated authority to sign an agency agreement on behalf of the appellant.

[6] The licensee received two offers for the house. These were both presented to the appellant, who refused to sign either of them, and then to Mrs Waller. Subsequently, the licensee discovered that ASB Bank were selling the property by mortgagee sale so that any listing agreement or contract for the sale of the property, would need to be with the ASB.

[7] The property was listed for sale on the licensee's website and a sign was put up outside that home, notwithstanding that the complainant as one of the owners of the property had not signed a listing agreement to sell the property with the licensee and still resided in it.

[8] The licensee arranged to have external and internal photos taken of the property without the complainant's consent. Allegedly, the licensee obtained keys to the property through the complainant's estranged wife, Mrs Waller, of whom she was a friend.

[9] The licensee approached the complainant on several occasions asking for the opportunity to list “his” property for sale, but the complainant refused those requests.

[10] In March 2012, ASB Bank decided to sell the property by way of mortgagee sale and instructed a salesperson working with Harcourts Grenadier Real Estate Ltd in Christchurch for this purpose. However, the licensee obtained an offer for the property which was accepted by ASB Bank. Accordingly, the property was sold by the bank as mortgagee.

[11] The appellant says that the acceptance of this offer denied him the opportunity to bid for his property at mortgagee auction and retain the family home of over 20 years.

[12] The appellant also alleges that the licensee marketed his home on her website, and by putting a sign on the fence of the appellant’s home, when she had no listing for the property. That is because the appellant, as one of the owners of the property, had not signed a listing agreement with the licensee to sell the property.

The Committee’s Decision of 19 November 2012

[13] The Committee did not consider that the licensee’s actions deprived the appellant of an opportunity to buy his family home at mortgagee auction. The Committee also found that the licensee sold the property through a valid listing obtained from the mortgagee by another Harcourts office, Grenadier Real Estate Ltd, which complied with the Act and the Rules in every regard.

[14] The Committee considered that there was always a risk to the complainant that he would not be able to purchase his family home (i.e. his estranged wife share of it) at mortgagee auction once his bank commenced mortgagee sale proceedings. It noted that the bank always had the option of selling the property prior to the auction once the owners’ rights under the Property Law Act 2007 were complied with; and, further, the actions of the licensee cannot be seen to have affected this. The Committee also said it could be argued that, due to the licensee’s efforts, both the vendors (including the complainant) and ASB Bank obtained a very good price for the property.

[15] Nonetheless, the Committee found that the licensee was in breach of the Act and the Rules in marketing the property for the owners without a valid listing agreement in place with Holmwood. Accordingly, the Committee found the licensee guilty of unsatisfactory conduct. The penalty imposed by the Committee was that the licensee be censured; and the Committee recorded that it considered no other orders necessary or appropriate.

The Stance of the Appellant Complainant

[16] The appellant argues that the licensee’s conduct constituted serious misconduct. The onus of proof rests on him and the standard of proof is the balance of probabilities.

[17] In his Notice of Appeal the appellant alleges that the licensee made untrue and misleading statements to the Committee; and that the licensee represented herself to ASB Bank as selling the house on behalf of Mr and Mrs Waller, that she approached ASB Bank with two offers and initiated the mortgagee proceedings, and deprived the appellant of an opportunity to acquire the property.

[18] In a memorandum to us, the complainant emphasised his submission that the licensee's actions in dealing with the property constituted not simply unsatisfactory conduct but also serious misconduct. He emphasised that the licensee and Mrs Waller had a decades-old friendship and that he and Mrs Waller were in the midst of a contentious relationship dissolution, as he put it. He said that he had made repeated attempts with his estranged wife to clear the way for him to remedy their mortgage defaults with the bank and he buy out his wife, but the latter did not want him to retain the house under any circumstances. His grievance is that the licensee knew all this, yet listed the property with full knowledge that he did not wish to sell and had refused to sign a listing agreement.

[19] He noted that the licensee defended her action by saying she had been advised by his wife that her lawyer had said it was permissible to sell the house without his authority because the property was going to a mortgagee's sale.

[20] The complainant also noted that the licensee posted the property on Harcourts' marketing system on 23 January 2012 indicating that it was necessary to sell the property before the bank mortgagee did. A mortgagee's auction had been scheduled for 9 March 2012 and it seems the licensee had Mrs Waller sign a listing agreement only hours before the complainant was told of that.

[21] It also seems that on 30 January 2012 the licensee had shown prospective purchasers the home without the complainant's authority and received two written offers. On 31 January 2012 the licensee met Mrs Waller and presented the two offers. Apparently it was only then that it was ascertained that any sale of the property would be a mortgagee sale so that the bank would be vendor.

[22] The submission of Mr Waller (the appellant/complainant) is that the licensee deceptively represented him as a vendor and initiated the mortgagee sale by approaching the bank with the two offers on 31 January 2012 at a time when he was trying to settle matters with the bank, avoid a mortgagee sale, and so keep the family home.

[23] The complainant also accuses the licensee of various alleged untrue and misleading statements such as that he was willing to sell the home subject to a valuation and that he had happily provided access to the property for the purposes of valuation and impending sale.

[24] The complainant appellant ended his submission as follows:

"Suzanne Robin, in refusing to abide by explicit instructions that I did not want my property listed with her, and in making representations and comments that were deceptive and misleading, at the end of the day, whether wilfully or otherwise, aided her longstanding friend, Fleur Waller, in Fleur's self professed aim to ensure that I did not retain the house at 15 Denman Street."

The Stance of the Licensee

[25] Mr Parker (as counsel for the licensee) provided detailed typewritten submissions on behalf of the licensee and we set out parts of them as follows:

"The initial complaint

[4] *The initial complaint (a copy of which appears at page 1 of the aforesaid bundle) expressed three concerns, namely:*

- “(i) A photo of my home was put on her website when she was not listed to sell it; and*
- (ii) Susanne’s sign was put on my fence when she was not listed; and*
- (iii) An offer was put through to the bank through Susanne and Holmwood Harcourts without a C.M.A. which is illegal by what I’ve been told.”*

[5] *The CAC said this in its decision:*

“The Committee accepts that the Licensee was put in a difficult position and was motivated by a desire to help a friend. Indeed it could be argued that due to the Licensee’s efforts both the vendors (complainant included) and ASB Bank obtained a very good price for the property. We find nonetheless that she was in breach of the Act and the Rules in marketing the property for the owners without a valid listing agreement in place with Holmwood. The Committee therefore find the Licensee guilty of unsatisfactory conduct.”

...

[8] *Mr Waller’s appeal as set out in the Notice of Appeal appears to be an enlargement, if not a repetition, of submissions he has already put to the CAC, and seems to be also based upon speculation resulting in an unsubstantiated belief:*

“I am seeking to appeal the decision of the CAC, because I believe there is evidence indicating that Suzanne Robin’s actions ... constituted not simply unsatisfactory conduct but serious misconduct ... Suzanne Robin and Fleur Waller had a long standing, decades-old friendship ... What these facts indicate, I believe is that Suzanne Robin, imputatively and deceptively representing me as a vendor, effectively initiated the mortgagee sale of my house ...”

[9] *It is quite clear from the evidence before the CAC, which is uncontroverted by any contrary evidence, that Ms Robin was given legal advice received from Mrs Waller’s solicitors, and apparently the Bank’s solicitors, that Mrs Walker was entitled to place the subject property with the Second Respondent for sale. There was no basis for any finding of deceptive conduct. ...*

[11] *The only matter with which Ms Robin takes issue is the following paragraph from the CAC Decision:*

“Unfortunately the Committee’s investigator has been unable to contact Ms Waller’s solicitor to provide confirmation of the advice given. The Committee in the absence of that advice believes that what occurred was a breach of the Act and the Rules in marketing the property without both vendors’ signatures.”

[12] *It is submitted that the CAC was wrong to in effect place the burden of proof upon Ms Robin in relation to advice given by Ms Waller's solicitor to Mrs Waller which she then acted upon in placing the property with the Second Respondent.*

[17] *As far as Mr Waller's speculation in the first paragraph of the third page of his statement is concerned (whether Ms Robin sought to sell his house prior to 24 January 2012), she has already responded to that in her letter of 18 June 2012, to the Real Estate Agents Authority, in which she said this, having explained the interaction between herself and Mrs Waller and Mr Waller in September 2011:*

"On the 20th January 2012 Mrs. Waller phoned and informed me that her lawyer, Lauraine Frampton from White Fox and Jones, had advised her that the property was going to mortgagee sale, and that Mrs Waller could still sell the property and did not need Mr Waller's authority to sell the house. Also the bank would look at an offer if it was a good one. Based on that statement I assumed that Mrs Waller had the legally delegated authority to sign an agency agreement on behalf of both vendors. I proceeded to complete the agency agreement and Mrs Waller duly signed that she had the delegated authority to sign on behalf of Mr Waller (see page 3 of Attachment 1). With hindsight, and with the knowledge that I know have, I realise that it was not appropriate to proceed on the assumption that what I had been told was correct in law. I also very much regret that Mr Waller feels aggrieved by my actions. However, based on the knowledge that I had at the time, I did proceed and acted in good faith to achieve the best possible outcome that I could for the vendors ...

On 23 January the property went into the Harcourt's marketing system. On the same day Bee Banks, salesperson licensee of Harcourts Grenadier Real Estate, erected a mortgagee sign on the front of the property and advised me that she would not be offering open homes until the 5th of February. On the 27th of January Mrs Waller gave me a key to the property ... On the same day I advised Mr Waller that I had a listing on the property ..."

[26] Mr Parker submits that the CAC's determination of unsatisfactory conduct should be confirmed and that there has been no misconduct by his client.

The Stance of the Authority

[27] The Authority's position is that the Committee's finding of unsatisfactory conduct was available on the material contained in the bundle of documents.

DISCUSSION

[28] By asking us to deal with this appeal "*on the papers*", the parties are, in effect, seeking that we have a second look at the findings of the Committee and give the issues thought from our perspective.

[29] We take the view that the Committee's reasoning is sound.

[30] It is, of course, a concern that, somehow, the complainant did not buy out his estranged wife's share of the family home when, apparently, he wished to do that. Perhaps, he was a little slow off the mark to progress that concept. However, we are concerned with the conduct of the licensee.

[31] It may well be that the estranged wife, a close friend of the licensee, did not wish the complainant to acquire her share of the property, but it does not seem to us that the licensee deprived the appellant of that opportunity.

[32] It is not clear to us why the appellant/complainant did not successfully treat with the bank with a view to buying out his wife's share of the former matrimonial home. The licensee was not to know whether the complainant would or could acquire the property and it is understandable that she kept herself involved in endeavouring to market it. When she achieved that for the bank, the property was properly listed.

[33] On the balance of probabilities, we cannot be satisfied that the licensee made misrepresentations or set out to block the appellant from buying his wife's share of the property.

[34] It was sloppy of the licensee to accept the hearsay that Mrs Waller's lawyer had apparently advised that Mr Waller's consent was not needed for listing the property for sale. However, as far as can be inferred from the facts put to us, the licensee was trying to obtain the best sale price for Mr and Mrs Waller.

[35] Having said that, we agree with the Committee that it is unsatisfactory that the licensee had for a time marketed the property in breach of the Act and its Rules because the complainant (the estranged husband) had not and would not complete the necessary listing agreement for Holmwood Real Estate Ltd, as the licensee's employer, to market the property. In the context we have outlined above of there being a need for the property to be urgently marketed to avoid a mortgagee sale and the pressure on the licensee from Mrs Waller to do that, and with apparent legal advice to Mrs Waller that she could, the licensee's actions are understandable. However, they were unacceptable but do not amount to "*misconduct*" as defined in s 73 of the Act.

[36] In all the circumstances we cannot find that the licensee's conduct was disgraceful, seriously incompetent or seriously negligent, or a wilful or reckless breach of the law in terms of the definition of "*misconduct*" in s 73 of the Act.

[37] It is possible to regard the penalty imposed by the Committee as a little kind and to consider that, perhaps, the licensee should also have been fined – if only, in effect, to contribute to the cost of the hearing before the Committee. Nevertheless, a finding of unsatisfactory conduct and publication of the decisions of the Committee and of this Tribunal reflect a just outcome in all the circumstances.

[38] Accordingly, this appeal is dismissed and the findings of the Committee stand.

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

Judge P F Barber
Chairperson

Ms N Dangen
Member

Mr G Denley
Member