BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 48

READT 006/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**BARFOOT & THOMPSON LTD**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (per CAC 20003)**
	Respondent

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 10 June 2014

DATE OF THIS DECISION 8 July 2014

COUNSEL

Mr T D Rea for the appellant
Mr M J Hodge and Ms N Copeland for the Authority

DECISION OF THE TRIBUNAL

Introduction

[1] On 18 November 2013, Complaints Assessment Committee 20003 found that Barfoot & Thompson Ltd had engaged in unsatisfactory conduct by virtue of its policy on the purchase of its listed properties by its own salesperson employees or contractors. This policy instructed the potential purchaser licensee to contact and negotiate directly with the vendor client.

Background

[2] The Committee had exercised its power to initiate an inquiry and investigate Barfoot & Thompson on the above policy because it had recently dealt with two separate complaints involving the purchase by its salespersons of properties listed with Barfoot & Thompson.

[3] The Committee's concern was that Barfoot & Thompson's in-house policy failed to ensure that it and its salespersons met their obligations to vendor clients under the

Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, particularly rules 6.1 and 9.1. In particular, the Committee was concerned that Barfoot & Thompson does not require an employee interested in purchasing a property to negotiate through the listing salesperson, or if the interested employee is the listing salesperson, through the branch manager.

[4] The rules 6.1 and 9.1 read:

> *"6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent;*
>
> *9.1 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."*

[5] Having determined that Barfoot & Thompson engaged in unsatisfactory conduct, the Committee ordered it to refund $5,000 of fees charged to each of the complainants and pay a fine of $2,500. Barfoot & Thompson Ltd was also censured.

Issues on appeal

[6] The two complaints which led to the Committee initiating its enquiry into Barfoot's policy referred to above are not before us at this stage, but it is necessary background to set out the allegations comprised in each of those as part of the context for our now considering the policy of Barfoot & Thompson Ltd referred to above.

Complaint One

[7] On 1 February 2012, Mr and Mrs Smith listed their property at 23 Cron Avenue, Te Atatu South, Auckland, with Ann Mushet and George Fong, who are licensed salespeople engaged by Barfoot & Thompson. The property was appraised as being worth $377,166.

[8] On 5 June 2012, a Mr Littler and his wife Ms Barnett, licensees with Barfoot & Thompson, viewed the property along with the rest of the Glen Eden Barfoot & Thompson branch sales team. Later that day, Mr Littler phoned Mrs Smith directly, identifying himself as a Barfoot & Thompson agent and mentioned that he may have an offer. Mrs Smith proceeded to tell Mr Littler how many offers had been made and approximately how much they were for. Mrs Smith also informed Mr Littler that their tenants had given notice and the vendors (Mr and Mrs Smith) wanted to sell the property before they needed to re-tenant it. Mr Littler then informed Mrs Smith that he and his wife were the prospective purchasers.

[9] Later that night, Mr Littler met with Mr and Mrs Smith at their property with a view to presenting an offer. This placed Mr and Mrs Smith in negotiations directly with the licensee/purchaser, albeit not the listing agent, without the benefit of an agent to represent them.

[10] Mr Littler initially presented to the vendors a $360,000 offer, conditional on a building inspection, finance, and Land Information Memorandum, from himself and/or nominee (Ms Barnett). This offer was countered verbally by the vendors at $370,000 and a purchase price of $368,000 was agreed. Mr Littler then produced a client consent form for Mr and Mrs Smith to sign.

[11] An independent valuation and builder's inspection was completed on 8 June 2012. The valuation recommended a market price of $355,000 and the builder's report revealed that the exterior cladding was different from that set out in the listing agreement. Mr Littler subsequently contacted the listing agent (Ann Muschet) and told her they were not prepared to confirm the agreement unless Mr and Mrs Smith reduced the purchase price by $10,000. It was then agreed that the sale price would be reduced by $8,000. The Committee accepted that this process was completed professionally at arm's length through the listing agent.

[12] We are told that Mr Littler and Ms Barnett then received $5,710.25 commission as selling agents for Mr and Mrs Smith.

Complaint Two

[13] On 2 July 2012, Emma Pine listed her property at 2/35 D'Oyly Drive, Auckland, with Victoria Cherrington of Barfoots for $389,000, after the property had been previously on the market for four months with no success. The property had previously been appraised as being worth between $385,000 and $410,000.

[14] The next day, Ms Cherrington presented an offer of $382,000 to Ms Pine, conditional on a builder's report, finance and LIM report. The offer also contained an escape clause in favour of the vendor. Ms Pine counter-offered at $383,500 and signed the consent form to allow an agent or related person to purchase the property. This requires the licensee to provide an independent valuation within 14 days. If the valuation is higher than the licensee's offer, then the vendor has a right to cancel the agreement.

[15] Ms Cherrington then engaged in negotiations with Ms Pine. In the course of those, Ms Pine informed Ms Cherrington that a property she wished to purchase next had just had an escape clause activated and, consequently, she was under pressure to quickly confirm the sale of her own property.

[16] On 9 July 2012 an independent valuation of the D'Orly Drive property was completed and recommended a market price of $380,000. A builder's inspection was also undertaken on the same day. No written report was made at the time but the builder verbally indicated several matters of concern which Ms Cherrington states she then discussed with Ms Pine. Ms Cherrington had contacted Ms Pine and told her what the builder had found and that she was not looking for a property that required "*so much expenditure*". The Complainant (Ms Pine) then sent a text to Ms Cherrington offering to reduce the purchase price to $375,000, being the amount she said she required to break even.

[17] On 10 July 2012, before the variation could be completed in writing, Ms Pine sent an email to Ms Cherrington asking if the price could be increased to $377,000 so that she could afford to take her children to see their father at Christmas. Ultimately, Ms Pine and Ms Cherrington agreed on $376,000.

[18] Ms Pine stated that she felt that Ms Cherrington was not looking after her best interests in the negotiations and that she was at a disadvantage because she had no access to advice on the transaction having been placed in negotiations directly with the licensee/purchaser with no agent to represent her. Each time variations were made to the agreement, Ms Cherrington left Ms Pine to consider the changes with her (ex) husband.

[19] As a result of the negotiations, the sale price went $34,000 below the top end and $9,000 below the bottom end of Barfoot & Thompson's initial appraisal, and $4,000 below the registered valuer's opinion. The sale became unconditional on 18 July 2012. Ms Pine's solicitor contacted Ms Cherrington's solicitor in regard to the purchase price being below the valuation. It was suggested that Barfoot's reduce its commission to cover the difference. However, this was refused and the right to cancel was recommended to Ms Pine if she had changed her mind. She declined this option and settlement occurred on 24 August 2012.

[20] A commission in excess of $15,000 was then payable, with Ms Cherrington receiving $5,148 plus GST as her share of it. The Committee found that this, in effect, gave a substantial discount on the purchase price.

DISCUSSION

Statutory framework

[21] The Real Estate Agents Act 2008 ("the Act") allows licensees to bid for and buy properties listed by them (or their employers) and sections 134-137 of the Act (which we summarise below) set out requirements that must be complied with. The Act must be read in conjunction with the Rules which set out the standards of conduct and client care that licensees must observe. That includes rules 6.1 and 9.1 set out above.

[22] There will be an inherent tension between a licensee's own interests and his or her duties to the vendor client, if the licensee is a prospective purchaser. As the Committee stated in its said decision against Barfoot & Thompson: *"a purchaser/employee cannot advise and protect the best interests of the client when their own agenda is to buy the property on the most favourable terms they can negotiate for themselves"*.

[23] We recognised this inherent tension in our recent decision *Allington v Real Estate Agents Authority* [2014] NZREADT 6 where the listing agent for a property for sale by auction was interested in purchasing it. The price range indicated on the listing agreement was $650,000-$800,000. The licensee obtained the consent of the vendors to continue to market their property having disclosed an interest in purchasing the property herself. A pre-auction offer of $710,000 was submitted by the licensee. On the same day, a brief valuation was provided at $720,000. However, a full valuation was not available until a later date. The pre-auction offer was not beaten at the auction. The complainant (another potential purchaser) claimed that the licensee had advised him that no pre-auction offer less than $850,000 would be sufficient to stop the auction.

[24] We found that when this type of situation arises, a careful agency should ensure that steps are taken to ensure fair dealing between all the parties. We upheld the Committee's decision to take no further action against the licensee. We were not satisfied, on the balance of probabilities, that the licensee misled the complainant regarding the price expected by the vendor. While that case was focused on whether, as a matter of fact, the licensee misled a potential purchaser, we made the following statement on the conflict of interest:

> *"[54] Once the licensee decided that she and her partner were interested in buying the property, they disclosed that position to the manager of the agency and to the vendors. The licensee then followed agency policy for such a*

> *situation. However, it would have been better if the licensee had stood aside from the marketing process of the property by her agency completely, and had simply attended the auction as a member of the public to bid for herself and compete with any other bidders. In these conflict of interest situations arising from a licensee, in effect, bidding against a client of her employer agency, it is important that there be clear compliance with ss 134-137 of the Act and that that licensee be completely removed from the sales process. That needs to be assigned to the control of the office manager or another salesperson, and the licensee's name and contact details need to be immediately removed from all marketing material."*

[25] The Authority submits that where a licensee continues to act for a vendor once he or she has become interested in the transaction as a potential purchaser, there is a real risk of perceived unfairness as far as other competing purchasers are concerned, as well as of unfairness or risk of other breaches of duty to the vendor client who, while remaining liable to pay the agent's fees, in effect loses the benefit of having a professional agent act for him or her in negotiations.

[26] We agree with Mr Clancy that salespersons and employing agents must be mindful of these risks (which may engage several important provisions of the Rules) and adopt careful and robust policies and procedures to minimise any perception that the licensee is at an unfair advantage given their "inside" role as regards the vendor. The risk of unfairness to both the vendor client and competing potential purchasers must be eliminated.

Barfoot & Thompson's Policy

[27] Counsel for the appellant (Mr T D Rea) contends that Barfoot & Thompson's policy is adequate and it is not required by the Act to ensure that a separate individual licensee becomes involved in negotiations with a client vendor where another licensee employed or engaged by the company wishes to acquire an interest in the property.

[28] It is submitted for the Authority that the Barfoot & Thompson policy is inadequate, even though it is not contrary to ss 134 – 137 of the Act, as it fails to allow for the fact that licensees must also comply with the Rules. It is put that compliance with certain provisions of the Act will not always be sufficient to ensure that, for example, all parties are dealt with fairly, and all fiduciary obligations are met; and that employer agents must ensure that their policies are flexible and recognise that what is required in any particular case may vary.

[29] The Authority accepts that there may be instances, in the case of very commercially savvy professional vendors for example, where a separate licensee is not required to act as an intermediary negotiator between the client and the licensee purchaser. However, it is submitted for the Authority that the Committee was correct to find that, in cases involving most consumer clients, steps of that kind will be required in the interests of fairness to protect the client and to avoid the perception of conflict of interest. Mr Hodge adds that Barfoot & Thompson's policy does not provide for such measures and allows factual scenarios such as in the two underlying complaints to develop.

[30] It is submitted for the Authority that the Committee was correct to find that Barfoot & Thompson's policy is inadequate, has fallen short of the standards expected, and has engaged it in unsatisfactory conduct.

The Formulation of Practice Rules

[31] The appellant submits that it is the role of the Authority, rather than us, to "formulate practice rules" and cites in support the High Court decision of *Brown v REAA* [2013] NZHC 3309 referred to below. We agree that it is not our role to legislate, but a disciplinary tribunal in an occupational context has a standards setting role. This is certainly the case under the Act. The complaints and disciplinary scheme forms a crucial part of the Act and in achieving the Act's purposes which include raising industry standards. We have a key role to play in determining what represents good agency work and what minimum standards of practice are. We would abdicate our function if we decided we cannot rule on such matters in the absence of prescriptive rules or guidance from the Authority.

[32] In any event, the Committee's decision cannot be interpreted as creating a wholly new rule. The Committee has interpreted and then applied existing rules to the said individual licensees and to Barfoot & Thompson Ltd in the present case.

[33] In effect, the Committee found that a vendor client, in the position of either complainant, is reasonably entitled to expect when engaging a licensee that such vendor will have a licensee to negotiate on their behalf and, in doing so, provide robust, objective, and practical assistance and advice on the quality of any offer made, including whether it should be accepted and any risks of declining the offer.

[34] The Complainants did not get such assistance but had, themselves, to negotiate directly with licensees who were looking to purchase in their own interests.

[35] Inter alia, Mr Rea emphasises that the company policy of Barfoots ensures proper compliance with ss.134 to 137 of the Act which, he puts it, reflect Parliament's recognition of a conflict of interest implicit in licensees' acquiring clients' property, and which prescribe a course of conduct to be followed by licensees to ensure there is no breach of fiduciary duty so that the consumer protection purpose of the Act is achieved. He submits that there is no requirement for Barfoot & Thompson Ltd, or any agency, to have in place a policy requiring further steps to be taken in addition to compliance with ss.134 to 137.

[36] Accordingly, Mr Rea says the essential issue under this appeal is whether the Committee was correct to find that there is an additional requirement, beyond compliance with ss.134 to 137 of the Act, such as to involve another licensee within the same agency or from elsewhere to conduct negotiations when a licensee in the listed agency seeks to acquire an interest in the land of a vendor client of the agency.

[37] Inter alia, Mr Rea emphasises that the Committee's finding that there is an additional requirement, beyond compliance with ss.134 to 137, of having a different individual undertake the real estate agency work on behalf of the vendor is inconsistent with the express wording of s.134. He presented his supporting arguments in helpful detail.

[38] Mr Rea also submitted that the purported additional requirement imposed by the Committee amounts to judicial law-making which (he puts it) must be contrary to the Act.

[39] Mr Rea acknowledges that s.12 of the Act sets out the Authority's functions which include to *"develop practice rules for the Minister's approval and maintain these rules for licensees, including ethical responsibilities"*, (s.12(1)(d)), and to *"set*

professional standards for agents"; (s.12(1)(i)). In that context he referred to *Brown v Real Estate Agents Authority* 2013 [NZHC] 3309 where (at para [78]) Priestley J agreed that if the Authority wished to address the industry problems or concerns in that case, then "the way to do it is to formulate rules, guidelines, and parameters". However, that case related to a scheme for marketing apartments based on tele-marketing to attend a so-called investment seminar where there may have been *"extravagant puffery"*. Mr Rea added that in the present case, there would need to be an amendment to the Act because (in his submission) ss.134 to 137 are in the nature of a formal code and the requirements of the Committee are, in Mr Rea's submission, inconsistent with the express words of s.134(1). We do not accept those views.

[40] Mr Rea then submitted that consistent with well established legal principle no further requirement can be imposed without statutory amendment to the provisions of ss.134 to 137 and no further requirement can be imposed in the absence of the Act imposing a duty or obligation either by express words or by necessary implication which, he submits, it does not. We agree that the provisions of ss.134 to 137 cannot be contradicted.

[41] The relief sought for Barfoot & Thompson Ltd by Mr Rea is that we order that the Committee's determination be reversed and that we also determine there has been no unsatisfactory conduct by Barfoot & Thompson Ltd.

Our views

[42] We consider that the contents of ss.134 to 137 of the Act are relatively straightforward. If a licensee working for a vendor in respect of a particular property wishes to buy that property, then the licensee must obtain the consent of that vendor to make that acquisition and to continue acting as an agent in respect of the transaction. The vendor's consent must be provided in a prescribed form and the vendor must be provided with a valuation from an independent registered valuer at the licensee's expense. That valuation must be provided to the vendor either before the licensee seeks the vendor's consent or, if the vendor agrees, within 14 days after the vendor gives such consent. There are further related requirements and consequences in those ss.134 to 137 but, for present purposes, we have distilled their content. Essentially, failure to comply with s.134 may lead to cancellation of the contract and will lead to no commission being payable.

[43] We can accept the submission of Mr Rea that those sections can be regarded as a type of code to cover the situation where a licensee acting for a vendor, or having an indirect connection with such a situation, may endeavour to purchase the property for himself or herself. However, we also think it elementary that those provisions of the Act do not exclude the need for the licensee to observe the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (or, as the case may be, 2012) and the Committee has expressly emphasised the need for rules 6.1 and 9.1 to be complied with and they are set out above. It could not be that any type of code set out in ss.134 to 137 inclusive of the Act overrule the need for an agent to comply with his or her fiduciary obligations to the client arising as an agent as required by Rule 6.1. Nor could there be an overruling of the requirement from Rule 9.1 that the 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.

[44] We observe that there are other rules applicable to the situation consequential to the said policy of Barfoot & Thompson Ltd, e.g. under Rule 9.2 a licensee must not

engage in any conduct that would put a client, prospective client, or customer, under undue or unfair pressure.

[45] Simply put, we consider that there is no conflict between the provisions of ss.134 to 137 inclusive of the Act and the various conduct and client care rules. We certainly accept that the sections of the Act take precedence in that no rule can alter the meaning or effect of a statutory provision. However, the relevant rules do not run counter to ss.134 to 137.

[46] We think it to be self-evident that once an agent, in a real estate firm which holds a listing of a particular property, wishes to treat with the vendor then a concerning conflict of interest arises. To permit such a conflict of interest to continue would breach the rules. The statutory provisions of the Act permit a transaction between such an agent and vendor, but only subject to observance of the statutory requirements and of the rules to achieve informed consent by the vendor.

[47] The Act permits such a transaction to take place subject to compliance with ss.134 to 137, but we are concerned with the conduct of the agent/licensee in the course of negotiating such a transaction. We consider that whenever an agent assisting a vendor, or working for the agency firm of a vendor which is marketing the vendor's property, becomes interested in negotiating himself or herself with the vendor, then that agent must completely step aside from treating directly with the vendor and the vendor must be advised and assisted by another agent/licensee, preferably from another real estate firm. When such a situation develops, the manager of the listing real estate agency should take control and direct an arms-length negotiation process. If the agency comprises only the one licensee who is interested in treating with the vendor, then the property needs to be relisted with another agency, although it may be appropriate for the agent to hand negotiations over to his or her lawyer.

[48] As the Committee has covered in its well considered decisions in this case, presently there are unsatisfactory features in the process or policy of Barfoot & Thompson Ltd in terms of one of its agents dealing with one of its listed vendors; but we accept that process seems to have been in vogue in the real estate industry in New Zealand for decades. However, it no longer fits with the relevant legislation or fair-trading commercial practice. Nevertheless, there is no suggestion of any prohibition on agents buying from a vendor listed with their agency, but the best interests of the vendor must be preserved. Also, compliance with ss.134 to 137 permits the agent to receive commission.

[49] When a vendor lists a property with a real estate firm, that vendor is entitled to expect experienced and independent advice given with full integrity by way of full assistance to the vendor; and there also needs to be the appearance of that. When an agent who is supposed to be advising a vendor, or who is part of the listing firm, seeks to negotiate with the vendor, then there must be a transparent and arms-length agency policy. At material times to this appeal, that has not been that situation at Barfoot & Thompson Ltd and that situation has been carefully analysed by the Committee.

[50] We agree with the reasoning and determinations of the Committee, and confirm its penalty orders. Accordingly this appeal is dismissed.

[51] 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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Ms N Dangen
Member

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Mr G Denley
Member