

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 53

READT 053/13

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

BETWEEN **PAUL C DAVIE** of Auckland, Real Estate Agent

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 2002)**

First respondent

AND **MANISH GORADIA** of Auckland, Complainant vendor

Second respondent

MEMBERS OF TRIBUNAL

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

HEARD AT AUCKLAND on 6 May 2014

DATE OF THIS DECISION 15 July 2014

REPRESENTATION

The appellant on his own behalf
Ms S M Earl counsel for the Authority
No involvement of second respondent since laying of complaint

DECISION OF THE TRIBUNAL

Introduction

[1] The appellant Paul Davie (“the licensee”) is a licensed salesperson under the Real Estate Agents Act 2008 (“the Act”). He is employed by Austar Realty Ltd trading as L J Hooker in the Blockhouse Bay area of Auckland.

[2] The complaint about the licensee’s conduct was made on 9 October 2012 by Manish Goradia (“the complainant”) who owned a property at 5/30 Makora Road,

Massey, which he listed for sale with the agency on 25 May 2012. The complaint was that the complainant had asked the licensee to withdraw his property from the market on 17 September 2012 and that the licensee did not respond to that request, and specifically, did not remove internet advertising or signage for the property.

[3] On 28 June 2013, Complaints Assessment Committee 20002 found that the licensee had engaged in unsatisfactory conduct in breach of Rule 5.1 (set out below) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. On 17 September 2013, that Committee imposed a fine of \$2,000 on the licensee and censured him.

Factual Background

[4] As stated above, the complainant listed the property with the agency on 25 May 2012. The listing agent was Kathryn Davie (wife of the licensee) and a sole agency applied for two months until 25 July 2012. After this time it became a general agency. After a while the complainant vendor decided the listing had become stale and decided to take the property off the market for the time being.

[5] Accordingly, on Monday 17 September 2012, the complainant e-mailed the licensee and asked him to immediately withdraw the property from the market and remove any signage from the property. The licensee responded to the complainant on the same day to say that he was out of town until Wednesday 19 September 2012 and that he would remove the sign at the property the following weekend. The licensee also told the complainant that there was a party interested in the property and he sought instructions as to whether the complainant wanted that interest pursued. The complainant responded that he did want to look at any offer.

[6] Accordingly, the following day the licensee e-mailed the complainant and advised him that he would need to sign an extension to the exclusive listing form in order for the licensee to present an offer from the interested party. He told the complainant that he (the licensee) would need to follow up with the buyer when he (the licensee) was back in Auckland on the coming Thursday. Then there is an undated e-mail from the complainant to the licensee saying that he (the complainant) had been waiting to hear from him since Thursday 20 September 2012 and would like to have an answer from him "ASAP". He also told the licensee that if he did not hear from him by 5.00 pm on Tuesday 25 September 2012, then the listing was to be withdrawn on 26 September and all signs were to be removed.

[7] It transpired that there was no offer forthcoming through the licensee from the other party. The complainant may have implied that the licensee had an extension to treat with the prospective purchaser but there was no written authority and the so-called prospective purchaser was only mildly interested.

[8] As part of his complaint, the complainant provided a 2 October 2012 screenshot of an advertisement on TradeMe for the property showing the property as being available for sale at that date.

[9] A diary entry provided by the licensee showed that on 9 October 2012 the licensee met with the complainant and explained that as of 27 September 2012 there was no agency agreement and that the complainant could list with anyone he liked.

[10] On 9 October the licensee also wrote to the complainant and stated that "your listing had been cancelled and the signage removed approximately two weeks ago

on 27 September 2012". The letter stated that the receptionist at the agency was instructed to remove all advertising from the internet on 5 October 2012.

The Committee's decisions

[11] As noted above, the Committee found that the licensee had breached Rule 5.1 of the Rules. The 27 July 2013 decision records that, in the licensee's response to the complaint, the licensee stated that he understood that he had a "*working period*" of seven days following termination of a listing to complete any "*current dealings*" in relation to the property and, on his analysis, this would have given him until 3 October 2012 to cease all activity in relation to the property. He stated that Trade Me did not remove the advertising the first time that it was instructed to do so and had to be contacted again causing the property to be on the website for two extra days over the weekend. Therefore, the licensee considered that the property was only marketed for two days after the expiry of the "*working period*" to which he referred.

[12] The Committee noted that the complainant was entitled to withdraw his property from sale at any time and that there was no dispute that the complainant had extended the period of the agency until 5.00 pm on 25 September 2012. The Committee found that the licensee was in error in believing that he had a further seven days from that date during which he could continue to market the property, i.e. there was no basis in the listing agreement for the "seven day" period asserted by the licensee, and the licensee had continued to market the property as if he had a listing for it for a period of 10 days i.e. from 26 September – 5 October 2012.

[13] The Committee was of the view that this continued marketing fell short of the required standard of care that members of the public can expect from licensees. In its penalty decision of 17 September 2013 the Committee censured Mr Davie and imposed a fine of \$2,000 on him.

Further Evidence Before Us

[14] The only witness before us was the appellant licensee and we summarise some of his relevant evidence.

[15] It is clear that he works as a team with his wife, Mrs K Davie, who was the listing agent in this case. They both marketed the property but the complaint has been made against the appellant and not Mrs Davie. We firmly reject his, at least implied, efforts to push blame onto her.

[16] It seems that the complainant was unhappy with the marketing efforts of the licensee and decided to end the listing with a view to listing with some other agent who might take a fresh approach to marketing. The appellant opined that the complainant sought too high a price for his property in terms of its value and state of maintenance.

[17] Generally, the evidence of the appellant covered the facts as set out above. He sought to make something of a clause in the listing agreement which reads:

"(e) After the agency has ceased, cancelled or expired, for a further period of 60 days it is further agreed that any signs, photograph(s), electronic advertising, display materials, or marketing that you consider reasonably necessary may be displayed or used for your Agency's promotional purposes".

[18] For a time, the licensee seemed to be suggesting that provision allowed him to continue advertising the complainant's property for a further 60 days from notice of cancellation of the agency. In our discussion below, we deal with that point as not assisting the appellant in this case.

[19] Insofar as the appellant seemed, at various stages, to be suggesting that at the agency it was not his job to remove advertising material, that cannot detract from him being a responsible marketing agent for the property. Similarly, insofar as communications may have been written by Mrs Davie, they were written on behalf of the appellant.

[20] The appellant admits that no action was taken to remove the advertising on TradeMe until 5 October 2012 despite the complainant having terminated the agency on 17 September 2012.

[21] There is no dispute that it took TradeMe four days to remove the advertising and the appellant had needed to make two requests to achieve that.

[22] There seemed no dispute that, as between complainant and licensee, it was accepted that the listing be terminated as at 5.00 pm, Tuesday 25 September 2012, but that there was still advertising for the property on TradeMe as at 5 October 2012 and that it did not seem to be removed until about 9 October 2012.

[23] By the end of the hearing, the appellant seemed to accept that neither he nor his agency had authority to continue advertising from and including 26 September 2012, but that little was done to terminate advertising by his agency for at least 10 days.

[24] The appellant's grounds of appeal can be summarised as that for a time he seemed to be denying responsibility on the basis that he was not the listing agent; that certain facts taken by the Committee were incorrect; that the listing agreement authorises electronic advertising for a period of up to 60 days; that the fine was too high; and he should have been informed by the Committee of his right to apply for non publication or name suppression under s.108 of the Act.

[25] In the course of this decision we deal with all those issues.

Statutory Context

[26] Section 72 of the Act defines "*unsatisfactory conduct*" 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."*

[27] The said Rule 5.1 provides:

“5 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work. “

[28] Rule 9.15 of the Rules is also relevant and reads:

“9.15 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.”

Discussion

Unsatisfactory Conduct

[29] Key issues in respect of the Committee’s finding of unsatisfactory conduct are whether the licensee had authority to continue advertising the property after the listing was withdrawn by the complainant, and whether any ongoing marketing of the property amounted to unsatisfactory conduct.

[30] The licensee was a salesperson for the property. He wrote to the complainant about its marketing on 27 July 2012; he was listed as an agent for the property on TradeMe advertising; and he met with the complainant to discuss his complaint on 9 October 2012. The emails from the complainant relating to withdrawing the property from the market were dealt with by the licensee who wrote to the complainant to confirm that the listing had been cancelled. The internal processes of the agency relating to withdrawal of listings do not affect the licensee’s responsibilities under the Act and the Rules.

[31] Once the listing agreement was terminated (i.e. from close of business on 25 September 2012), the licensee had no authority to continue marketing the property. Advertising remained on TradeMe until at least 5 October 2012 (taking the date that the licensee says he instructed the advertising to be removed from that website, although it appears it was not removed until around 9 October 2012).

[32] The clause contained in the listing agreement at para 1(e) of its Terms and Conditions (and set out above) does not authorise continued marketing of the property for a period of 60 days after the property is withdrawn from the market. This would be in clear breach of Rule 9.15 (set out above) (now Rule 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012). The clause 1(e) relates to the use of advertising material for “*promotional purposes*”. The usual example of the clause being invoked in practice is where a property is advertised as being “*sold*” by the agency. That clause in the listing agreement does not permit continued marketing of the property as if it were still for sale when the vendor has taken the property off the market.

[33] There was a period of at least 10 days over which the property continued to be marketed as being for sale contrary to the vendor’s instructions. This was in breach of Rules 5.1 and 9.15. The licensee has not, and cannot, point to having taken all reasonable steps to avoid the breach of the Rules. The Committee was therefore entitled to reach its finding that the licensee had engaged in unsatisfactory conduct.

Publication of Decision

[34] In its said decision the Committee indicated that it had deferred making a decision on publication. At that point the licensee was made aware of the possibility of publication. In the later penalty decision, the Committee stated that the Authority would publish the decision after the period for filing an appeal had ended unless an application for an order preventing publication had been made to us as part of the appeal. No application was made.

[35] In any event, the licensee has provided no grounds which would have supported an application for an interim non-publication order other than alleged reputational impact. We have recently confirmed that the starting point must always be publication because this reflects Parliament's intention in passing the Act, namely, to promote and protect consumer interests. If a general allegation of reputational impact alone were sufficient, this would, in practical terms, amount to automatic name suppression on all appeals. This aspect of the appeal is without merit.

Penalty

[36] It is well established that decisions of disciplinary Tribunals should emphasise the maintenance of high standards and the protection of the public through specific and general deterrence. While this may result in orders having a punitive effect, this is not their purpose *Z v CAC* 2009] 1 NZLR 1; *CAC v Walker* [2011] NZREADT 4.

[37] The Act was introduced specifically to better protect the interests of consumers in respect of real estate transactions. A key means of achieving that purpose was the creation of a wide range of discretionary orders available against a licensee on findings of unsatisfactory conduct or misconduct, including significant financial penalties. The orders available on a finding of unsatisfactory conduct under s.93 of the Act are wide ranging, including orders for refunding fees charged for the real estate agency work subject of the complaint and fines of up to \$10,000 against individual licensees.

[38] In *CAC v Spencer* [2013] NZREADT 55 at [15], we agreed in principle that penalties under s.93 should promote accountability and include a deterrent element, with financial penalties set at a level to provide an effective deterrent taking into account modern commission rates.

[39] Ms Earl submitted for the Authority that financial penalties must be set at a level so as to "bite" (as she put it) in terms of the commercial reality of commission rates. Given that the maximum fine for an individual licensee found to have engaged in unsatisfactory conduct is \$10,000, she submitted that the Committee's fine of \$2,000 is a reasonably low-level penalty and properly reflects the conduct of the licensee.

[40] As we emphasised in *McIntyre v the Real Estate Agents Authority and Ano* [2014] NZREADT 26, when a listing comes to an end it is a professional responsibility of any licensee who has been handling the marketing of the property to tidy up and cancel or sever all advertising in any form. In the present case the licensee was rather tardy at doing that and he has not provided any sensible excuse for that failure. A vendor is entitled to change listing to some other agency and, subject to proper protocols for effecting that, the dispensed-with licensee must bow out of the marketing picture.

[41] It seems that the complainant has the purpose of seeking some type of compensation from the appellant. However, there does not seem to have been any quantifiable loss to the complainant who became disinterested in these proceedings some time ago.

[42] To the licensee's credit, he accepts he was too slow to cancel the said marketing but he did not intend to prolong matters and he asserts that he will not offend that way again. Indeed, earlier this year he has voluntarily undertaken relevant courses on advertising and marketing procedures in real estate.

[43] Also, he accepts that his offending is a concern to us and the industry, although he emphasises that as soon as he realised that the property was still being advertised on TradeMe, he took action with the assistance of his wife. He puts it to us that his offending was an oversight and, perhaps, we could regard it as rather technical, and he would be willing to accept further relevant training. He also records that he now understands the correct interpretation of the said clause (e) in the listing agreement to which we have referred above. He emphasises that he will be much more diligent in severance of listing arrangements in the future and will never allow himself to be put in such a position again.

Our Conclusions

[44] At the end of the hearing we had our Chairman announce our basic conclusions which we now summarise.

[45] We unhesitatingly confirmed the finding of the Committee that there had been unsatisfactory conduct by the appellant as outlined above. Although the appellant is prepared to do a further training or educational course, we considered that he has learnt his lesson which is that the agent must obey a vendor's wishes about listing and promptly terminate a listing in terms of proper protocol. We indicated to the appellant that we felt the concept of "*a censure*" implied too much of a black mark in this case against the appellant and that, while we do not like appearing to tinker with a sensible decision of a Committee of the Authority, we felt that a fine in this case could be kept at \$1,000. We noted that we had heard much more evidence and submissions than were available to the Committee.

[46] However, we emphasise that an agent must promptly obey all lawful instructions from the vendor principal and an agent must not continue marketing a property against the wishes of the vendor. Here the appellant was somewhat tardy in applying the vendor's instructions.

[47] We consider, with respect, that the decisions of the Committees of the Authority on these disciplinary matters are extremely well done and we do not fault the relevant reasoning in this case. However, for reasons we have indicated above, we remove the censure and reduce the fine of the appellant to \$1,000 to be payable within two weeks to the Registrar of the Authority at Wellington.

[48] 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

Mr G Denley
Member

Ms N Dangen
Member