

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 84

READT 011/14

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

BETWEEN **TONY GRINDLE (licensee)**

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20005)**

First respondent

AND **JENNIFER DAVIS (complainant)**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson

Ms N Dangen - Member

Ms C Sandelin - Member

HEARD at WHANGAREI on 27 August 2014

DATE OF THIS DECISION 23 October 2014

APPEARANCES

Mr W McKean, counsel for appellant

Mr R M A McCoubrey, counsel for the Authority

No appearance or participation by complainant Ms J Davis

DECISION OF THE TRIBUNAL

Introduction

[1] Tony Grindle (“the licensee”) appeals against the decision of Complaints Assessment Committee 20005 finding that he engaged in unsatisfactory conduct with regard to a complaint made by Jennifer Davis (“the complainant”). The licensee also appeals against the penalty imposed by that Committee.

[2] The complainant originally complained against both the licensee and a Ms Judith Copland who are both licensees for Mackys Real Estate, as a franchised office of Bayleys Real Estate. We understand that Ms Copland has accepted a finding by the Committee against her of unsatisfactory conduct.

Factual Background

[3] On 3 August 2012, the property at 106 Old Onerahi Road, Onerahi was listed for sale by its owners with Ms Copland. On 26 November 2012, Ms Davis advised that she wished to make an offer on the property. That evening, Ms Copland visited Ms Davis. An offer was written up the next day after Ms Copland had taken advice from Mr Grindle about the amount of deposit which should be required and the appropriate settlement period to be inserted in that offer.

[4] Ms Davis says that, on the purchase of the property, Ms Copland did not inform her that the settlement period had been set at 10 days from her selling her own property and that she was not given the option of seeking legal advice on this provision.

[5] On 28 November 2012, Ms Davis' offer was emailed to the vendors. On 2 December 2012, two additional offers were presented by Ms Copland and a multi-party offer document was signed by the interested parties.

[6] On 10 December 2012, the vendors accepted Ms Davis' offer, which was conditional on the sale of her own home. Clause 18 of the 10 December 2012 purchase contract for the complainant made that contract conditional upon the complainant selling her then home by 14 January 2013; and there were other conditions. That contract provided for payment of the balance of the purchase price (after allowing for the deposit paid), i.e. settlement, as "... 10 working days from the date of Clause 18.0 being satisfied or as mutually agreed by both parties". However, Ms Davis' home did not sell by the required date and an extension for settlement under her purchase contract was granted on 14 January 2013.

[7] On 31 January 2013, Ms Davis sent a text message to Ms Copland saying that she was in negotiations with prospective purchasers of her home. On 11 February 2013, Ms Davis advised Ms Copland that she had sold her home.

[8] On 20 February 2013, Ms Davis sent a text to Ms Copland saying that there was a mismatch between the settlement period for the sale of her home and that for the property she had purchased. We understand that she needed to settle her purchase on 6 March 2013 but could not settle the sale of her home until 16 April 2013 because the purchasers could not pay until then. This meant she might need to arrange bridging finance from 6 March to 16 April 2013. In fact, by paying compensation of \$1,975 to her buyers, she was able to settle both transactions on 6 March 2013.

Committee Decision

[9] In a decision of 23 August 2013 the Committee found it unusual that a 10 day settlement period had been stipulated in the agreement for purchase of the property by Ms Davis when that agreement was conditional on the sale of Ms Davis' own property. The Committee also found that Ms Davis had not given her full and informed consent to the insertion of the 10 day settlement clause.

[10] The Committee concluded that, given that this clause provided such a short time frame for settlement, there was a positive onus on the licensees to make it very clear to Ms Davis that it was important to ensure that the settlement period for the sale of her property also matched the settlement period for her purchase.

[11] Part of the Committee's reasoning is as follows:

"3.6 We have carefully reviewed the responses from both licensees. While we can understand that the complainant was in a competitive multiple offer situation when she made her offer to purchase the property we do find it unusual that a 10 day settlement clause was suggested by Mr Grindle when the contract was conditional on the complainant selling her property. We can appreciate that these dates are a matter of negotiation but after full investigation of the evidence we do not believe that the complainant gave her fully informed consent to the insertion of this clause. We believe that it should have been evident to the licensees that requiring the complainant to settle 10 working days from the contract becoming unconditional was unusual and although legally possible would put extreme stress and pressure on those parties to complete settlement within that timeframe. We find under the circumstances that this clause should not have been used without first making sure the complainant fully understood its consequences and implications.

3.7 The Committee has also formed the view that given this clause provided for such a short timeframe to settle that there was a positive onus on the licensees to make it very clear to the complainant that when she entered into the contract for the sale of her home she should try to ensure that both settlement dates matched up and occurred on the same day. It is clear from our investigation this advice was not provided to the complainant at any stage despite numerous opportunities to do so when dialogue occurred.

3.8 We accept the argument that the lawyers for the complainant also had some responsibility to advise her of the potential problem with the settlement date and that it is not clear that they did so. That is not something over which we have any jurisdiction and notwithstanding the above comments we do not believe that whatever responsibility the lawyers may or may not have had absolves the licensees in this instance from their responsibilities to the complainant.

...

3.11 After full consideration we believe that the conduct of Ms Copland in this matter falls below the standard that one would expect from a reasonably competent licensee and we likewise find that the conduct of her supervising licensee Mr Grindle was also not satisfactory in that he did not highlight these issues to his charge. For these reasons we find both licensees are guilty of unsatisfactory conduct."

[12] The Committee found the conduct of Ms Copland to be unsatisfactory. The Committee also found the conduct of Mr Grindle, as her supervisor, to be unsatisfactory. By a further decision of 8 January 2014 both those licensees were each ordered to pay \$500 to Ms Davis and to undertake further training. In that decision on penalty the Committee stated:

"4.1 In its decision of 25 July 2013 [meaning 23 August 2013] the Committee found that it should have been evident to the licensees that requiring the complainant to settle 10 working days from the contract becoming

unconditional was unusual and although legally possible would put extreme stress and pressure on those parties to complete settlement within that timeframe. We found that under the circumstances this clause should not have been used without first making sure the complainant fully understood its consequences and implications.

- 4.2 *The Committee found that given this clause provided for such a short time frame to settle that there was a positive onus on the licensees to make it very clear to the complainant that when she entered into the contract for the sale of her home she should try to ensure that both settlement dates matched up and occurred on the same day. It is clear from our investigation this advice was not provided to the complainant at any stage despite numerous opportunities to do so when dialogue occurred.*
- 4.3 *We accept the argument that the lawyers acting for the complainant also had some responsibility to advise her of the potential problem with the settlement date and that it is not clear that they did so. That is not something over which we have any jurisdiction and notwithstanding the above comments we do not believe that whatever responsibility the lawyers may or may not have had absolves the licensees in this instance from their responsibilities to the complainant.*
- 4.4 *We have considered the submission and acknowledge that the complainant should bear some of the responsibility for what happened herself, and that other licensees and lawyers also potentially contributed to the situation the complainant found herself in. We have taken these factors into account in determining an appropriate penalty.”*

Salient Further Evidence

Evidence from the Appellant

[13] The appellant covered the above facts in greater detail to explain his own actions. It is helpful to consider the following portion of his evidence-in-chief.

- “4. *I commenced work for Bayleys in 2001.*
5. *I have been a manager since March 2012.*
6. *In August 2012 Bayleys was instructed by Peter and Helen Crawford (“the Crawfords”) to sell 106 Old Onerahi Road, Whangarei and to act as their licensee in the sale of their property. They were Bayleys client. Bayleys had a fiduciary obligation to the Crawfords (clause 6.1 of the client Care Rules). Bayleys had an obligation to act in their best interests (clause 9.1 of the Client Care Rules).*
7. *The contract for sale and purchase from Ms Davis for the Crawfords home came in through one of our licensees Jude Copland. She had already met with Ms Davis and she brought the agreement to me to assist in completing. The agreement had the settlement date blank. It had clause 18 which made the agreement unconditional on the sale of the Davis property at Stuart Road. The problem for our client with those types of clauses is that settlement could be some way off. It is often not in the*

client's interests to have a long settlement period after the agreement has gone conditional. That is because the client has already had to wait for the purchaser's house to sell. I wrote in the words: "10 working days after satisfaction of clause 18" as a starting point for discussion with Ms Davis. In my view this was not unusual given the length of time the purchaser wanted to take to sell her property.

8. *In a sale which is conditional on the sale of the purchaser's property it is often in the interests of the purchaser to ensure the settlement of their sale coincides with the settlement of the purchaser however there are no hard and fast rules. It is up to the purchaser how they want it to be done.*
9. *In this case, our contract was the first to be done. There was no other contract to marry up with. Ms Davis had not even instructed a licensee to sell her property at that time. She certainly had not entered into a contract to sell her property. That was to come much later. Therefore at the stage of the completion of the sale and purchase agreement for the Crawfords' home, we were not concerned with enquiring about having to marry up dates in other settlement agreements. It was important that this contract met Ms Davis needs as she determined them to be at that time.*
10. *I understood she had a lawyer acting for her who would ensure the terms of any future agreement for the sale of her home met her needs in terms of this agreement. Her lawyer (Smartmove) is a low cost specialist conveyancing legal practise.*
11. *I understood also that Ms Davis would have her own licensee acting for her in that sale and it would be that licensee's clear responsibility to ensure the terms of the agreement for the sale were appropriate given Ms Davis' obligations under this contract.*
12. *Therefore Ms Davis would have plenty of protection in ensuring dates on subsequent contracts matched the date in our contract.*
13. *I stress we had nothing to do with the subsequent sale of her home.*
- ...
15. *I explained to Ms Copland that the decision on the settlement date needs to be made by the purchaser, that they need to take into account all of the other dates and factors around their own situation, and they need to discuss it with their solicitor. I went some way to explain to Ms Copland that the decision of when someone takes possession of a property is not ours to make, it needs to custom fit the situation and circumstances of the purchaser.*
16. *In light of the agreement being conditional on a long period allowing the purchaser to sell her own house I thought that 10 working days was not unusual, so it was inserted with the very clear instructions to Ms Copland "make sure this is satisfactory with your purchaser. It needs to suit her.*

...

29. *This was not done. The first that I knew of the mismatch with Ms Davis' requirements was on the 20th of February when I received an unconditional notice from both the vendors and purchasers solicitors in respect of the Crawfords' property.*
30. *Her own sale and purchase was a protracted affair that necessitated her seeking an extension to the Crawford's sale and purchase agreement.*
31. *I accept that a common period for settlement after an agreement goes unconditional is 20 working days however there is never any hard and fast rules. This case is an example of that because I note that had there been a 20 day working day clause in the Davis agreement as a settlement date, she would still have found herself in the position where the two settlement dates did not coincide. Bayleys staff had no input into the sale of the purchaser's property. This occurred without our input, control or cognisance some 3 months after the purchase of the subject property.*

...

Summary

35. *I was not present when Copland and Ms Davis discussed the initial detail of the contract. I gave Ms Copland clear instructions to raise the settlement date with Ms Davis. The fact that Ms Davis asked for alterations to the deposit and the words were added to the settlement date gives me some assurance that Ms Davis did turn her mind to these terms when meeting with Ms Copland.*
36. *While a licensee might give a prospective purchaser advice on a future agreement that they will not be involved in, that advice could only be general and may in fact be dangerous given the licensee does not know the full circumstances of the later contract.*
37. *I believe that this issue has arisen because Ms Davis has sold her own property without being aware or taking due cognisance of the dates detailed in her contract with our client, some 3 months earlier. I also believe that if due care was shown during the sales process of her own property this situation would either have never arisen, or would have been dealt with at that time.*
38. *No Bayleys staff had any input into the sale of the Davis property.*
39. *Once we knew of the mismatch our intention was always to get the vendors to accept a delay on settlement. They had agreed to have some flexibility in the settlement date. I never gave any undertaking that this would be achieved but it was in my opinion the easiest method of resolving the situation."*

[14] In cross-examination the licensee again covered his discussions and advices to Ms Copland which seemed quite detailed and sensible to us. He added to us that he would now agree that the 10 day period for settlement "is a little short" but pointed out that, in the present case, there were three offers before the vendors' two of which provided for a 10 day settlement.

[15] The appellant put it that, in his view, the lawyer for the purchaser of the complainant's property should have matched up settlement dates in terms of that purchase and the complainant's sale of the above property. He added that, as it happened, a 20 day settlement period would still not have fitted in with the parameters of each transaction.

Evidence from Mr S A Wong

[16] Mr Wong is a Whangarei lawyer and a partner of counsel for the appellant. We take into account that his evidence could be regarded as not independent. Nevertheless, Mr Wong is a very experienced conveyancing lawyer in Whangarei.

[17] In terms of the question whether a 10 working day settlement period is unusual i.e. 10 working days between the contract becoming unconditional and settlement, he responds that there is no normal settlement period and it is a question of what the parties want. Indeed, in his affirmation for us, Mr Wong remarks:

- “9. Settlement periods can last for a number of months. I have done transactions where the settlement period was two working days. The only hard and fast rule that I can say is that it depends on what the parties want.*
- 10. I would certainly not describe 10 working days between a contract going unconditional and settlement as unusual.*
- 11. I have to accept I would prefer it if the settlement period was longer because that gives my team a longer period to get things in place. However my wishes are not relevant. What is relevant is what the parties want.*
- 12. In a situation where an agreement is conditional on the sale of the purchaser's property, it is not unusual for the eventual settlement to be some way off after signing. That is simply because it takes time for the purchaser to sell their property. In that situation there is still no hard and fast rules about what is an appropriate settlement period. Again it will depend upon what the parties are prepared to agree to.*
- 13. Acting for purchasers in the sale of their property, I look to see if they wish to move out of their property and move into their new property on the same day. If that is their intention then I look to see that the respective settlement dates on the two agreements coincide. If they don't coincide I give advice to the client about the need to make arrangements for storage of their property and their accommodation in the meantime.”*

[18] As it happens, all three of us have conveyancing experience and we agree with Mr Wong's views as set out above.

Statutory Context

[19] The relevant sections of the Real Estate Agents Act 2008 are 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.*

50 Salespersons must be supervised

- (1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.*
- (2) In this section properly supervised and managed means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure –*
 - (a) that the work is performed competently; and*
 - (b) that the work complies with the requirements of this Act.”*

[20] Section 50 of the Act requires strict compliance with its terms; and this is fundamental to the proper functioning of the real estate industry; refer *Hutt City Ltd v The Real Estate Agents Authority* [2013] NZREADT 109, at [46]. To merely tell a salesperson not to act in a particular way, or having agency policies which refer to specific conduct, is not enough to discharge the obligations under s.50. In *Donkin v Real Estate Agents Authority* [2012] NZREADT 44 at [12] we had made a similar comment that we do not consider that a simple assertion that staff have been told to act in a certain way is a proper discharge of the obligation to supervise under s.50; more is required. In *Donkin* the licensee’s supervision was considered sufficient because she had given clear instructions to the staff member concerned on what was required. We note that in *Hutt City Ltd* we had added that the requirements of s.50 need to be applied “*in terms of sensible business practice and common sense*”.

[21] It is noted that rule 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the Rules) states: “*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.*”

The Stance of the Authority

[22] It is submitted for the appellant (and counsel for the Authority agrees) that the main issue is whether or not Mr Grindle supervised Ms Copland sufficiently.

[23] Mr McCoubrey noted that, in his brief of evidence, Mr Grindle stated that when he first reviewed Ms Davis' sale and purchase agreement he inserted the clause "*10 working days after satisfaction of clause 18*" (clause 18 made the agreement conditional on the sale of the property). In his opinion, 10 days of settlement is not unusual. It is put for the Authority that, regardless of whether or not the time period was unusual, we may decide that it was of such a short length that further comment on the marrying up of settlement dates was required by Mr Grindle to Ms Copland so that she advised Ms Davis accordingly.

[24] Mr McCoubrey also notes that in addition, Mr Grindle has said that when the purchase agreement by Ms Davis was drawn up, Mackys Real Estate had not been engaged by Ms Davis to sell her property; nor were they. Therefore, not only were they not concerned with marrying up settlement dates, but they had no other contract with which to marry up such dates.

[25] Mr McCoubrey notes further that, Mr Grindle has said, in relation to his supervisory input, that he instructed Ms Copland to discuss the matters of amount of deposit and settlement date with Ms Davis. Mr Grindle says that he instructed Ms Copland that the decision when to take possession was not up to the licensee, but rather a matter of consideration for the purchaser (Ms Davis). He also says that he explained to Ms Copland that she must ensure that the settlement date was satisfactory to the purchaser, and to discuss this with her. Mr Grindle has emphasised that he was not aware that Ms Copland would not follow his instructions. However, Mr McCoubrey observes for the Authority that supervision requires more than just the provision of instructions. He also notes that there is no written evidence from Ms Copland that she received these instructions from Mr Grindle.

[26] Mr McCoubrey also noted that Mr Grindle stressed that neither he nor Ms Copland saw Ms Davis' sale agreement for her own property so that they did not have the opportunity to try and match the dates. Mr McCoubrey put it that does not provide a complete answer to the issue whether or not the licensees should have advised Ms Davis that it would be wise to try and match the settlement dates in light of the short settlement period.

[27] Mr McCoubrey covered that it is also argued for the appellant that the Committee's decision was based on a confusion of the definitions of "*customer*" and "*client*" in the Act. It is submitted for the appellant that particular rules referred to by the Committee (e.g. rule 9.1 set out above) do not apply because Ms Davis was not a "*client*" of Mackys Real Estate during the alleged conduct (presumably, meaning she was a purchaser from their vendor client). Mr McCoubrey puts it that Ms Davis was still a "*customer*", if not a client, and that it was Mr Grindle's suggestion that she have a 10 day settlement period for her purchase; and that, should we consider 10 days to be a short period for settlement, it is open to us to consider that, given his recommendation of settlement period, Mr Grindle also had a duty to go further and suggest Ms Davis consider marrying up settlement dates.

[28] We accept that rule 9.1 is aimed at vendors but there are other rules requiring skill, compliance, and care at all times from an agent when carrying out real estate agency work (e.g. rule 5.1).

[29] Mr McCoubrey submits for the Authority that it is for us to determine whether the decision of the Committee was open to it on the evidence it had, and that its decision was correct.

The Stance of the Appellant

[30] In terms of our own views which we set out below, we need not detail the very helpful submissions from Mr McKean other than to say that the appeal is based on the following two grounds:

- [a] The evidence did not support a finding of unsatisfactory conduct by the appellant; and
- [b] The appellant, as supervisor of the agent involved, had complied with his obligations to properly supervise and manage that agent.

[31] It is submitted for the appellant that, as supervisor, he gave appropriate instructions to Ms Copland to raise the issue of the 10 day settlement period with the complainant and it was reasonable for the appellant to assume that those instructions would be and were followed. It is also submitted that the 10 day settlement period in this case was not unusual in the context of this case.

[32] Naturally, Mr McKean emphasised various aspects of the evidence which we have covered above and will deal with in our reasoning. Inter alia, he emphasises that the complainant was represented by a lawyer in terms of her purchase effected through another real estate agency firm. He submits that the appellant provided sufficient and appropriate supervision and management of Ms Copland. He submits that the appellant's instructions to her in relation to the settlement date were appropriate and sufficient; and that the decision about what settlement date should be inserted was for the complainant to make rather than the appellant. Mr McKean continues that it is difficult for a supervisor to advise agents "*relating to a contract which is not yet in existence*" (as he put it). It is also emphasised for the appellant that the present situation was a competitive bid scenario, that the complainant had to put her best offer forward to outbid the others; and that a conditional period, and/or settlement period, offered might be considered by the vendor as too long. We take those factors into account.

[33] Mr McKean also submits that there is evidence that a 10 day settlement period is not unusual. He puts it to be illogical to conclude that the 10 day settlement period was the cause of the apparent extreme stress to the complainant as the cause of that was the mismatch in settlement dates between her purchase agreement and her subsequent sale agreement. Mr McKean adds that it is illogical to blame that mismatch on the licensee who was only involved in preparing the first agreement for the complainant's purchase, whereas it was the subsequent sale agreement which created the mismatch months later. He put it that it was the settlement date inserted in that later agreement to sell which was the cause of the stress for the complainant or, alternatively, that was caused by the failure of the complainant's lawyer "*to utilise the agreed flexibility in the settlement date agreed to with the appellant's client*" (as Mr McKean put it to us).

[34] Mr Grindle also appeals the penalty imposed as a consequence of the Committee's decision finding unsatisfactory conduct.

Discussion

[35] As Mr McCoubrey put it in his final oral submissions, there is a tension in terms of a real estate salesperson's duty to the purchaser customer and to his or her vendor principal, although the agent must act fairly for all parties to a transaction. Mr McCoubrey accepts that the issues in this case are matters of fact for findings by us. Of course, he pointed out that rule 6.2 must be complied with. That rule states: "*A licensee must act in good faith and deal fairly with all parties engaged in a transaction*". He also remarked that no matter what the problem, it is desirable that a purchaser be comfortable with events and not merely the vendor principal of the agent.

[36] In his final oral submission, Mr McKean reiterated that there can be confusion for an agent as to that agent's obligations to a "*client*" (i.e. the vendor) or to a "*customer*" which is a wider concept but that, in this case, the facts speak for themselves.

[37] We agree that the practical issues in this case are whether it was reasonable that a 10 day period for settlement be inserted in the first contract, i.e. for the complainant's purchase of the said property, when that could be too tight a timeframe to ultimately complete the complainant's sale; and in this case there was a mismatch in that sale contract regarding its settlement period in relation to the previous purchase contract.

[38] On the particular facts of this case, we consider that, the simple answer to the above issues is that, in these times of electronic dealings and settlements, 10 days is not necessarily too short a time between fulfilling the conditions in a contract and settling the transaction. We do not think that the inclusion in the complainant's purchase contract of such a 10 day period for settlement was inadequate overall, nor does it constitute any failure by the appellant licensee and, certainly, not in the context where he seems to us to have appropriately supervised Ms Copland as covered above.

[39] In any case, it seems to us to be elementary that the matter of matching the settlement period in the later contract of sale by Ms Davis to sensibly fit with her previous purchase commitment rests with her (the complainant) and, more particularly, with her lawyer or, perhaps, the real estate agent involved in the later sale transaction. It seems to us that the licensee took reasonable steps to assist Ms Davis in all the circumstances. We find no failure on the part of the appellant. Having said all that, we are not dismissive of the said views of the Committee as general and relevant advice.

[40] For the above reasons we quash the finding of the Committee and, consequentially, its penalty against the appellant. This appeal is allowed and there is to be no further action in this case against the appellant.

[41] 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

Ms C Sandelin
Member