

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 38

READT 080/14

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

**BETWEEN** **EILEEN DEVILLERS**

Appellant

**AND** **REAL ESTATE AGENTS  
AUTHORITY (CAC 303)**

First respondent

**AND** **IVAN RAKICH AND  
YONGSHIN WATKINS**

Second respondents

**MEMBERS OF TRIBUNAL**

Ms K Davenport QC – Chairperson  
Mr G Denley – Member  
Mr J Gaukrodger – Member

**HEARD** at AUCKLAND on 13 April 2015

**DATE OF DECISION** 18 May 2015

**APPEARANCES**

Ms Lawson-Bradshaw for the first respondent  
All other parties in person

**DECISION OF THE TRIBUNAL**

[1] Ms Devillers appeals against the decision of the Complaints Assessment Committee to take no further action on her complaint against Ivan Rakich and Yongshin Watkins.

[2] Ms Devillers owned a house situated at 2/609 Glenfield Road, Glenfield, Auckland. In late 2013 Ms Devillers listed her property with Ray White Glenfield having specifically chosen Ms Watkins and Mr Rakich as the agents that she wanted to sell her house. She was interested in making an offer on another property and needed a rapid sale in order to achieve this. The property was listed for sale on or about the first week in December 2013 with the auction date set for 21 December

2013. The listing agreement is dated 30 November 2013 and it contains the following notation regarding the commission:

*“Selling price \$725,000 to \$750,000 (commission): \$20,000 including \$500 plus GST. Selling over \$750,000: full commission plus \$1,000 marketing including GST.”*

The listing agreement showed that if a sale price of \$750,000 was achieved then the commission of \$24,700.25 would be charged.

[3] Ms Devillers told the Tribunal that she also felt that the arrangement that she had made to have the commission reduced should the price of \$750,000 not be achieved would ensure that the agents worked hard for her.

[4] Prior to the signing of the listing agreement a market appraisal was provided to Ms Devillers by Ms Watkins and Mr Rakich. This provided that the sale range was possible between \$720,000 and \$745,000. Ms Devillers says that orally she was assured that a figure in excess of \$750,000 was likely.

[5] Ms Devillers was not happy with the service that she received. Her complaints in summary are as follows. This is a summary of her written and oral evidence:

(a) **Poor Service:**

- Ms Devillers complained that the advertisements which were placed by Ray White contained a number of errors and it took a number of attempts by Ms Devillers to have the advertisements changed. She says she was required to identify and write much of the copy herself. Ms Devillers complained that the on-line advertising was filled with errors and her Trade Me presence was only on page 4. She said that she amended the advertisements herself and had to insist that they were amended by Ivan Rakich. She said that the billboard advertising her property did not go up until about the 7<sup>th</sup> of December.
- Very few people came through her house, i.e. inspected it. In her oral evidence Ms Devillers explained that it was not until mid January 2014 when she advised Ms Watkins that she would be terminating the agency agreement unless more interest was shown in the property that a number of people came “*out of the woodwork*” to inspect the property. Ms Devillers complained that this delay in arranging for people to come through the property or promoting the property to ensure that more people came through the property meant that she was forced to accept a lower offer for the property than she considered the property was worth.
- Poor service after the open homes. Ms Devillers complained that she had to ask the agent for feedback. She says that she got written reports in Week 1 and Week 2 but not thereafter.
- Ms Devillers complained about the attitude of the auctioneer in minimising the loss of her personal and valuable items during the open home campaign process. She also complained that the auctioneer coerced her into allowing the auction to go ahead. When

it came to the auction Ms Devillers told the Tribunal that she was uncertain as to whether she should have the auction. She said Ms Watkins advised her to speak to the auctioneer. She felt the auctioneer was patronising as he said to her 'you only need one person to come to the auction'. Ms Devillers said she went ahead with the auction against her better judgement.

- She was also concerned that she had lost very precious roman coins and her son's Go Pro during the sale process. Although she acknowledged that the agents were very supportive when she told them of her loss, she said that their security was lacking.
- The property did not sell at auction and passed in at \$630,000. Ms Devillers complained that there was no contact with Ms Watkins that night and it was not until the next morning that she called and asked about an open home. Ms Devillers felt that there was no empathy or concern shown by Ms Watkins for her position. She said that she caught the Christmas slowdown and did not want to have an open home until later in January. She said she felt that nobody attended the open homes which were held in early January.
- Ms Devillers said that Ms Watkins made unethical remarks about Mr Rakich being drunk.
- Ms Devillers said that she talked to the agents about whether the three week lead-up to the auction period was possible and was told that it was. She said however they took an extra week to photograph the property and she had to provide them herself.

(b) ***Dishonesty and deceit:***

- (i) *Dishonesty in advising Ms Devillers of a number of people who had come through open homes*
- Ms Devillers said that at an open home in January Ms Watkins claimed that two groups came through the property when she knew that only one person had come through the open home because this person was her friend, Penny. She told the Tribunal that in fact her friend Penny was the only attendee at an open home but that Ms Watkins had reported that there were two attendees. She also complained that the information given to Penny was incorrect as to the price Ms Devillers wished to receive.

(c) ***Understanding her property:***

- (i) Ms Devillers' friend Penny says that she was told by Ms Watkins at the open home that the vendor wanted only \$750,000 for the property. However Ms Devillers said that this was much less than she wanted for the property.

(d) ***Deceit:***

- (i) Ms Devillers told the Tribunal that while interest increased in the property in January the offers she received were still very low. She

said the offer that was eventually concluded by her on 20 January 2014 was initially for \$680,000. She countersigned this at \$735,000 and after some additional to-ing an fro-ing an offer of \$712,000 was accepted. She complained that this process was very stressful because the initial offer was made two days before the offer was concluded and she did not know whether there had been any completed agreement until shortly before an open home was held on the 20<sup>th</sup> when she understood from Ms Watkins that a counteroffer had been made and they were waiting for Ms Devillers feedback.

- (ii) Ms Devillers says that when an offer was made and counter-offered by the purchasers the counteroffer was not presented to her for three days when it had already been signed by the purchasers. Ms Devillers says that she was constantly told by text that the purchaser had not signed when she found out from another agent that the purchaser had been waiting some time for her to get back to them.

(e) **Lack of care:**

- (i) Ms Devillers also complained that the response she received to her complaint was disrespectful and dismissive.

*Other issues*

[6] Ms Devillers said that despite a reduction in commission being negotiated down to \$8,000 she had not agreed to pay this to the agents and it was sitting in her solicitor's trust account. This was because she did not consider she had received good service from them.

[7] When questioned by counsel for the Real Estate Agents Authority about her complaint against Mr Rakich, Ms Devillers said that her major complaint against him was that his letter of response to her complaint written on 12 March 2014 was both incorrect and probably not written by Mr Rakich. She felt it was also disrespectful to her. She also denied she ever yelled at Ms Watkins.

*Ms Watkins' evidence*

[8] Ms Watkins told the Tribunal that Ms Devillers' property in Glenfield Road was a 'lovely property' but the driveway was very steep and sloped away from the road and five other houses shared the drive. Further the property had a very narrow turning circle. Ms Watkins felt that these access issues meant that it was less saleable than properties on a full site with better access.

[9] Ms Watkins said that she and Ivan Rakich had paid \$2,500 for the marketing and advertising of the property which had not been reimbursed by Ms Devillers. Ms Watkins said that the price assessment that they had given for the property was fair. Further she said she had worked very hard to try and market the property quickly so there had been a delay. She explained that prior to Christmas it was difficult to get a photographer to photograph the property. Further the week which was normally allowed between signing an agency agreement and the first week of marketing had not been possible because of the need to get on with the sale programme. This had led to some delays in the sale process including erecting a

signboard. However Ms Watkins still considered that she had done a good job of marketing the property. She said that she felt she had done all that she could to try and assist Ms Devillers. She explained that after the auction she did speak to Ms Devillers and told her that she could not get a better offer from the highest bidder. She said she rang her the next morning. However she acknowledged that she was fearful of speaking to Ms Devillers about the auction as she said she was concerned she might be angry.

[10] She told the Tribunal that she found Ms Devillers demanding and disrespectful and that her response to Ms Devillers' complaint had been written in all honesty but she did not intend to belittle or put down Ms Devillers. Ms Watkins explained that she observed Ms Devillers screaming and yelling in her office over the issue of commission after the property was sold.

### ***Discussion***

[11] In order for an agent to be found to have been guilty of unsatisfactory conduct or misconduct under the Real Estate Agents Act 2008 the Tribunal must be satisfied that the conduct of the agent is such that it falls significantly short of the conduct to be expected of a real estate agent in the circumstances of the case before the Tribunal.

[12] The behaviour and actions of the agent must be shown to be either a breach of the rules of the Act or conduct which would otherwise be condemned by any professional body, for example fraud, deceit, dishonesty etc.

[13] It is also acknowledged by the Tribunal that it is sometimes difficult for laypersons acting on their own appeal to articulate their concerns in a way which identify which rules the agent may or may have not breached.

[14] The Tribunal has reached the conclusion that this appeal will not be allowed for the reasons set out below. They acknowledge that the sale process appears to have been a very difficult and stressful time for Ms Devillers. The proximity of Christmas obviously contributed to make the sale process more prolonged and stressful than it ideally should have been for Ms Devillers. However we cannot find anything in the complaints that Ms Devillers has made which would justify a finding that the agent had been derelict in their duty towards her. We explain our reasons.

[15] First Mr Rakich: there was insufficient evidence presented by Ms Devillers against Mr Rakich to justify any finding against Mr Rakich.

[16] We now consider the complaints against Ms Watkins. The Tribunal consider that the Rules identified by the Complaints Assessment Committee, namely Rules 5.1, 5.2, 6.1, 6.4 and 9.3 would be the relevant Rules applicable to this case. We deal with each of her complaints in turn:

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

*5.2 A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules), and other legislation relevant to real estate agency work.*

*6.1 A licensee must comply with fiduciary obligations to the licensee's client.*

6.4 *A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.*

9.3 *A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest, unless otherwise instructed by the client.*

(i) ***The appraisal***

We agree with the Complaints Assessment Committee that the appraisal made by the agents was appropriate. In addition, as Ms Devillers acknowledged, the reduction in the commission agreed by the agents meant that she effectively achieved a sale price of approximately \$720,000 (the bottom price in the appraisal). Having said that the Tribunal acknowledge that Ms Devillers considered that the appraisal was conservative. The eventual sale price indicates that it was probably somewhat optimistic – but within the range of reasonable.

(ii) ***Lack of care in the advertising***

The Tribunal note that it was unfortunate that the advertisements were not provided to Ms Devillers prior to being put on the internet so that she could check the copy and the spelling mistakes. We do not know whether this was because of the need for urgency or because it is not Ray White's practice. However we accept the evidence of the agents that this was remedied in a speedy manner and for this reason do not consider that this amounts to a breach of any of the Rules. Ideally an agent should let the client check the copy but the failure to do so in these circumstances is not a breach of the Rules.

(iii) ***Signage***

We accept the evidence of Ms Watkins that the agency did not have the usual week between signing the agreement and the commencement of the marketing campaign in order to ensure that the signage was available. The signage was erected by 7 December which was at the end of the first week of their marketing campaign. Whilst it would have been better, [as the Committee noted], to have had the sign board erected prior to the campaign commencing we accept that the reasons for this were the need to press on with the auction timetable and that the property was otherwise advertised during this time. This was unfortunate but not a breach of the Rules.

(iv) ***Thefts***

There is insufficient evidence to determine that there was any lack of security by the agents which led to the thefts. We acknowledge how very distressing the loss of this property would be for any vendor.

(v) ***Lack of communication following the open homes***

The only evidence that we can find of a lack of communication is in the lack of report for the third open home and perhaps in early January 2014 (although we were not clear how many open homes were held during this

time). However Ms Watkins says that she gave the vendor a verbal report following the open home on the day prior to the auction. This does not appear to have been disputed. We therefore conclude that the actions of the agent with respect to this complaint do not fall short of the appropriate standard and are not in breach of the Rules.

(vi) ***Poor communication during the failed auction***

We have insufficient knowledge about the actions of the auctioneer and therefore make no finding on this point. Further he is not a party to this appeal.

(vii) ***The failure by the agent to communicate with her after the auction***

Ms Watkins' evidence is that she spoke to Ms Devillers after the auction but did not follow up with a phone call until the next day. Her evidence was because she thought Ms Devillers was angry. This is less than optimal behaviour as any vendor who does not sell their property at auction will necessarily be distressed and will want to know the plan for sale going forward. We consider that Ms Watkins ideally should have contacted Ms Devillers the night of the failed auction but consider that a response the following day is still within the acceptable limits for the agent. This conduct may have been explained by the breakdown in communication between Ms Watkins and Ms Devillers but is suboptimal. However it is not sufficiently serious to make a finding for unsatisfactory conduct against Ms Watkins.

(viii) ***Not appropriately marketing the property following the auction***

The Tribunal has insufficient evidence as to the way the property was marketed following the failed auction, however we note that the Christmas and New Year period is a slow time for all real estate sales. Nonetheless the open homes were advertised on Ray White's website. It appears that the open homes and marketing re-commenced on or about 5 January and this seems to be an acceptable time for them to commence again following the Christmas vacation. We do not uphold this area of complaint against Ms Watkins.

(ix) ***Misleading a potential buyer***

This complaint concerned the evidence of Ms Penny Neale who did not come to the Tribunal to give evidence. She provided a statement but did not attend in person. Ms Watkins explained that she had spoken to Ms Neale and her error was only in saying that a couple came through the property rather than one person. She said this was a simple error. She was adamant that she had told Ms Neale that Ms Devillers wanted in excess of \$750,000. Because Ms Neale did not come to the hearing the Tribunal was unable to test the veracity of her evidence against Ms Watkins' evidence. Therefore we cannot be satisfied on the balance of probabilities that Ms Watkins did make the erroneous statement that Ms Devillers claims she made. We consider that the error in reporting that two persons came rather than one is regrettable but again not sufficient to amount to unsatisfactory conduct.

(x) ***The communication concerning the countersigned offer***

The evidence is that the signing process took about three days. The only evidence of delay is that of Ms Devillers where she says that when she was finally told that the purchasers had countersigned the offer she understood that the offer had been signed some time before. We cannot find any evidence to support this, nor would it seem to be usual for this to happen. An agent generally wishes to conclude the sale as quickly as possible and we are confident it was only a matter of a short time between the counteroffer being signed and the offer being presented to Ms Devillers. We do not uphold this appeal point.

(xi) ***The behaviour of Ms Watkins at the meeting on 20 January***

Ms Devillers did not seem to pursue this point except to say she denied that she was yelling. Ms Watkins likewise denied that she in any way raised her voice. We are unable to reach a conclusion as to whether there was any inappropriate behaviour in this meeting and we therefore cannot reach a conclusion that there was any wrongdoing by the agent.

[17] We note that the complaint was made immediately following the sale process which is evidence of Ms Devillers' unhappiness with the sale process and (probably) the price that she received for her house. We have every sympathy for the stress that the sale process takes on a vendor, especially when the price achieved is not that expected and when the process takes longer. The Complaints Assessment Committee noted that the difficulties may have been exacerbated by the difference in language and culture between the parties. We make no comment on this point but do note that what seemed to the Tribunal to be the most significant issue for Ms Devillers at the hearing was the disrespect that was shown to her in correspondence. She says that the letters written in response to her complaint were disrespectful. We acknowledge that this must have been very hurtful for Ms Devillers who felt that she was only articulating her genuine concerns. However, having heard both witnesses we observe that the vendor and the agents seem to have had an inability to communicate properly, which has led to the feelings of distress experienced by Ms Devillers, accompanied as it was by a less rapid sale in what she described as a "*booming auction market*".

[18] However for the reasons set out above we have concluded that the agent's conduct does not amount to unsatisfactory conduct. We therefore dismiss the appeal against Ms Watkins as well.

[19] Accordingly the appeal against the conduct of Mr Rakich and Ms Watkins is dismissed .

[20] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.



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Mr G Denley  
Member

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Mr J Gaukrodger  
Member