

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 56

READT 099/14

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

BETWEEN **KATHRYN MARTICK**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 3003)**

First respondent

AND **STUART AND JOANNE MILES**

Second respondents

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Ms N Dangen – Member
Ms C Sandelin – Member

HEARD at AUCKLAND on 23 JUNE 2015

DATE OF DECISION 20 July 2015

APPEARANCES

Mr V Martick (the appellant's husband) for the appellant
Ms Lawson Bradshaw for the first respondent
Mr Miles via telephone link

DECISION OF THE TRIBUNAL

The Issue

[1] Mr and Mrs Miles were the owners of a property at 40 Hobson Terrace on Waiheke Island. In 2013 they decided that they wanted to sell their property as they lived overseas. They had not been back to the island since 1999.

[2] Mr Miles initially decided to list the property on a general agency with three companies as follows:

- Bayleys who provided a market appraisal of the property with a recommended selling range of \$480 to \$560,000. They recommended a sale by a fixed price. A general listing agency agreement was signed with Bayleys with a listing price of \$525,000.

- Waiheke Realty Limited also provided an appraisal recommending a listing price of between \$480,000 and \$490,000 with a listing price of \$525,000. A general agency agreement was signed at this price with them.
- Waiheke First National also had a general agency agreement. The appraisal given by First National was \$450,000 to \$475,000.

[3] The property was listed on a general agency with these agencies from about early October 2013. The property did not sell and the evidence is that the price was dropped by Mr Miles to under \$475,000 after the property had been on the market for a month.

[4] On or about 20 November 2013 there was an email exchange between Mr Miles and a Graham Ward at Harcourts, Waiheke Island. Mr Miles asked Mr Ward to give him a rental appraisal. Mr Ward did so. Mr Ward's rental appraisal described the house as "*very well lived in*" and said that the current rental would be low to mid \$300's per week but if the house had a 'makeover' then the rental would be low to mid \$400's per week. At the same time Kathy Martick from Harcourts was asked to provide a current market appraisal. Ms Martick provided Mr Miles with a copy of the appraisal on 20 November 2013. This was accompanied by an email which said: "*attached is an appraisal of your home. I have not been inside but had a good look through the windows*". The market appraisal of the property gave a market value of low to mid \$500,000. Ms Martick suggested listing the property for sale by auction with the auction to be held on 14 December.

[5] It is interesting to note that Bayleys' appraisal, (which put the property in the late \$400,000 range), had 18 comparable properties listed and in her appraisal Ms Martick had 15 but only four were the same properties.

[6] Mr Miles spoke to Ms Martick on the telephone, was impressed by her enthusiasm and took steps to cancel the general agencies and list the property with Harcourts. Shortly after he cancelled the general agency he was presented with an offer from one of the general agencies for \$460,000 (from First National) on 22 November 2013. Mr Miles rejected this offer.

[7] The property was passed in at auction but sold on 30 December for \$427,500. Mr Miles was naturally distressed that the eventual sale price was almost \$100,000 less than the appraisal and less than he had been offered by the First National client.

[8] Mr Miles complained to the Real Estate Agents Authority about the appraisal. The complaint that he made was that the appraisal was over-inflated, that the proposal to market the property through an auction campaign was wrong and that the licensee had conditioned Mr and Mrs Miles down on price expectation over time.

[9] The Complaints Assessment Committee found that Ms Martick had been guilty of unsatisfactory conduct because:

- The market appraisal did not realistically reflect the market conditions at the time as the licensee appeared to have taken into account the most favourable sales of properties that were of a similar size and ignored the less favourable comparisons.

[10] The Complaints Assessment Committee commented:

“In light of the condition of the property (needing a makeover) this seemed ill-advised.

- The licensee admits she did not carry out a full inspection of the property before completing the appraisal.
- The licensee stated in her submission she had only realised the poor state of the property after she began marketing it.
- The licensee did not appear to factor into her calculations that the property had been exposed to the market with other agencies at \$525,000 for 30 days without an offer.
- In light of the rental appraisal that was obtained Ms Martick did not appear to check the value against the potential income that could be earned from the property.

[11] The Complaints Assessment Committee commented that an appraisal is not meant to be a registered valuation but in this case they felt that Ms Martick had been overly optimistic about the value of the property and that her failure to inspect the property before completing her appraisal showed a lack of care on her behalf and was a breach of Rule 5.1. They concluded that the licensee misled the complainants in regard to the potential sales price in order to win an exclusive agency in breach of Rule 6.4.

[12] The Committee noted that the agent had done her best to market the property but they were not certain that sale by auction was the best recommendation given the small size of the Waiheke market.

[13] The Committee concluded by saying:

“The Committee looked at the actions of the licensee as a whole. She failed to carefully inspect the property before completing her appraisal. This was lacking skill or care of both in our view (Rule 5.1).

She recommended ending the general agencies with the three existing agencies so she would become the sole agent and recommended a marketing method which removed a set price with no price to a more limited market. Even taking the most generous view to the licensee this appears to be self-serving and a breach of Rule 9.1.

Finally the complainants believe they were misled by the licensee and the Committee is persuaded by the evidence before us that they were. This is a breach of Rule 6.4.”

[14] The Complaints Assessment Committee invited penalty submissions. In the Complaints Assessment Committee’s penalty decision dated 28 October 2014 they

noted that Ms Martick submitted that she was coerced by her manager into saying that she had not been into the property but in fact said that she did complete an internal inspection of the property. The Committee considered this information and said that either she was careless in not viewing the property or she was dishonest in saying she had not when she had. On either conclusion the Committee considered the actions of the licensee were undesirable. The Committee therefore determined that Ms Martick would be censured and she would pay a fine of \$1,500.

[15] Ms Martick appeals these two decisions. Ms Martick did not appear at the hearing except on the telephone; she was apparently overseas. Her husband Victor Martick appeared for her and submitted as follows:

- There was no over-inflation of the value of the property.
- The difference between Ms Martick's appraisal and the other appraisals were minimal.
- The appellant did in fact inspect the property but because this involved accessing the property using another agency's lock box she had been told by her manager not to state this.
- That she had done an excellent job in negotiating the sale and the commission.
- That she knew the area well and had excellent contacts.
- That she had factored into her appraisal the fact that there was going to be a new septic tank installed on the property which she felt was worth about \$20,000.
- She did not realise the bad condition of the property until she got a LIM when she realised that the wet-back stove was not properly permitted.

[16] Mr Miles, also present on the telephone, said that early on in the general agencies he had accepted that a new septic tank would be required. He said he had been told by one of the other agencies that the septic tank needed to be fixed to sell the property but would not increase its value.

[17] The Tribunal have carefully considered the evidence that Ms Martick has given and the two different explanations she gave about whether she properly appraised the house by accessing it or simply looked in the windows. As a result of our consideration we agree with the conclusions reached by the Complaints Assessment Committee.

[18] Our reasons are that her appraisal was too high. As can be seen from the Bayleys' appraisal, despite being a relatively small market Ms Martick chose only four of the same properties as the Bayleys' assessment. The other three agencies were all consistent in appraising the property and believing the property would sell for under \$500,000 but Ms Martick managed to convince Mr Miles that it would sell for

significantly more than that. For this reason he rejected an offer of \$460,000 and ended up under some pressure selling the property at the end of January for \$425,000.

[19] We agree with the Complaints Assessment Committee that Ms Martick seems to have been too keen to ensure that she received the listing. She did not take enough care to ensure that she gave an accurate appraisal and that she fully inspected the property that she was selling. There did not appear to be urgent time constraints and Ms Martick should have gone into the property. How she got access to the property seems a minor consideration, especially given the fact that Mr Ward from Harcourts had earlier emailed Mr Miles with a rental appraisal which appears to have been carried out after a proper inspection of the property thus indicating that he at least got into the property. If Ms Martick was told to lie about this matter by her manager then she should not have done so. Honesty needs to be an integral part of an agent's character. If she did in fact go into the property then this should have been disclosed to the vendor.

[20] We also agree that an auction following a general agency of a tired property where the price had been lowered and with a CV of \$370,000 is not likely to have led to a significantly higher sale price than that which was offered at the end of a month-long general agency.

[21] Further while we did not have the opportunity to see Ms Martick her evidence on the telephone was not convincing enough to convince us that she had carried out the appraisal with proper due care.

[22] Accordingly the Tribunal dismisses the appeal and upholds the decision of the Complaints Assessment Committee both on liability and penalty.

[23] The Tribunal draws the parties' attention to the provisions of Rule 116 of the Real Estate Agents Act 2008.

Ms K Davenport QC
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member