

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 82

Reference No: READT 020/15

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

BETWEEN **ANN MAREE ROWE,
RICHMOND LOWE AND
AFFILIATED BUSINESS
CONSULTANTS LIMITED**

Appellants

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 306)**

First Respondent

AND **SUSHIL MANN AND SURAYA
RASALI**

Second Respondents

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport QC - Chairperson
Ms N Dangen - Member
Mr J Gaukrodger - Member

HEARD at AUCKLAND on 27 October 2015

APPEARANCES

Counsel for Appellants: Mr J Waymouth
Counsel for the REAA: Ms R Savage
Second Respondents: No appearance

DECISION

[1] Ms Ann Maree Rowe is a real estate agent who works for Affiliated Business Consultants Limited, a business broking company. Mr Richmond Lowe is another agent also employed by Affiliated Business Consultants Limited. Ms Rowe holds a salespersons licence and Mr Lowe an agent's licence.

[2] The events in question took place in November 2013 – February 2014. At this time Ms Rowe was in her probationary period as a licensee with her probation due to finish on 13 April 2014. Mr Lowe was her supervisor.

[3] The matter comes before the Tribunal by way of an appeal. The appellants appeal against the decision of the Real Estate Agents Authority (REAA) which found them guilty of unsatisfactory conduct.

The Facts

[4] The facts in this case arise from the sale of a restaurant known as “The Spicy Affair” at 65 Sandringham Road, Kingsland. Ms Rowe listed the business for sale and the second respondents were interested in buying the business. They made an offer in early 2014. However, unbeknown to the second respondents, the business did not have a current food licence.

[5] The Agreement for Sale and Purchase however did provide a time for due diligence to be carried out and when the buyers (the second respondents) discovered there was no food licence, the Agreement was cancelled. However, it took some time to have their deposit returned to them and they needed the assistance of the Disputes Tribunal in order to achieve return of their money. They complained to the Real Estate Agents Authority about the appellants and they claimed they did not know there was no food licence. However once the deposit was received they decided to take no part in the proceedings.

The Evidence

[6] Ms Rowe’s evidence was that she had been aware that the vendors did not have a food licence at the time of listing the business for sale but she said that she had been assured by the vendors that they would get the licence renewed prior to possession and settlement. Ms Rowe said that she told the vendor not to wait until the sale became unconditional to get the licence. She told the Tribunal the vendors then told her that the purchasers had agreed to get the licence. She reiterated in her Statement of Evidence that both the vendor and the purchaser were aware at all times that there was no food licence.

[7] Ms Rowe confirmed that she had drafted a copy of the Agreement for Sale and Purchase but this had been fully discussed with her manager Mr Lowe and that he prepared the final Agreement. Ms Rowe told the Tribunal she was within Mr Lowe’s hearing when she had the agreement signed but he was not sitting with her and the parties.

[8] She said that when she came to the execution of the Agreement she advised the parties of the need for legal advice and that she advised them as to the difficulties that they would or might have with respect to:

- Due diligence;
- Performance of the Agreement for Sale and Purchase;
- Legalities under the Agreement for Sale and Purchase;

- Obtaining the landlord's advice;
- Renewal of the food licence.

[9] She reiterated in her Statement of Evidence¹ that when she first discussed listing the business with the vendor she was aware that there was no food licence.

[10] However when Ms Rowe was interviewed by the investigator from the REAA, her evidence was slightly more equivocal² as to when she first knew that there was no licence. She told the investigator that she did not realise that there was no licence when she first listed the business for sale. She denied this position in her written brief.

[11] She was cross examined by Ms Savage. Under cross examination she said that she now could not remember whether or not she knew that the business had no licence at the time the business was listed for sale. She acknowledged that she should have written something in the document called "*consent by the purchaser prior to entry into the contractual document*" under "*disclosures*" about the lack of the licence and/or that the Agreement for Sale and Purchase should have contained a reference to this.

[12] By the end of her cross examination, she had fairly conceded that she was now unable to say when she knew there was no current food licence but believed it may have been after the property was listed. Her email of 28 February 2014 suggests she may have been aware of the lack of food licence shortly before the Agreement was signed.

[13] Mr Lowe, her supervisor, said that in all the years he had been in business that he had never enquired about the expiry date of a food licence and believed that this was something that lawyers ought to do. He said however that as a result of this case he would ask this question and he would ask to see and check the licence. He told the Tribunal that what was being sold when a business was listed for sale was the future profit of the business. In that context he did not consider that the food licence was relevant. He reiterated that he had every faith in Ms Rowe's ability, including her knowledge of the restaurant industry given her previous work experience. He told the Tribunal about his supervision policy and how he monitored her progress and ensured that Ms Rowe was aware of all of the requirements of the Act, including listing appraisals, presentations, marketing campaign and the sale process.

[14] He confirmed Ms Rowe's evidence that he had checked a rough copy of the Agreement for Sale and Purchase and that he was satisfied that the Agreement for Sale and Purchase covered all important areas of due diligence, including liquor licensing and the landlord's consent. He said that four months into Ms Rowe's probation she was capable and competent and could explain and understand all the aspects of the Agreement for Sale and Purchase and what clauses were needed. He confirmed he was within earshot but not with the parties when the agreement was signed.

¹ At [17].

² See transcript of discussion at page 16 of the bundle of documents.

[15] Under cross examination, he did not deviate from this position and seemed unpersuaded that a food licence was an essential part of the business that was being sold. He thought that the food licence was more like having a “*horn on a car*” rather than an essential part of the car itself. He did not draw a distinction between the agency and Mr Rowe’s obligations to supervise.

[16] No evidence was provided on behalf of the agency except in the submissions of Mr Waymouth in which Mr Waymouth submitted that Mr Lowe’s Brief of Evidence had shown that there was no breach of s 36(2A) of the Lawyers and Conveyancers Act 2006³ as he had properly supervised Ms Rowe in the preparation of the Agreement for Sale and Purchase.

[17] Evidence was also given by Clyth MacLeod. Mr MacLeod’s evidence was to the effect said that having read the Briefs of Evidence of Mr Lowe and Ms Rowe, he considered that Mr Lowe did not need to be in face to face contact with the salesperson when the agreement was signed to discharge proper supervisory control. However he said that he trusted Mr Lowe’s subjective judgment implicitly and he believed he acted correctly and in accordance with acknowledged business practice for brokers. Mr MacLeod also said Ms Rowe acted in accordance with the acknowledged business practice for business brokers when listing the business and in preparation of the Agreement for Sale and Purchase. He noted it would be common to identify the food licence and see if it was current. The Tribunal must determine whether they accept Mr MacLeod as an expert and then if accepted weigh up his evidence in accordance with *Lake v Medical Council of NZ*.⁴

Discussion - Submissions

[18] Counsel for the REAA submitted that there were two critical issues for the Tribunal to consider in making its decision – due diligence by the agent and competency of the agents. Ms Savage submitted that a lack of a food licence was a significant thing for a business and a very significant matter for any purchaser. Ms Savage submitted that in accordance with the previous decisions of the Tribunal including *Donkin v REAA*⁵ there are certain issues that licensees must know when selling land or a business (i.e due diligence) and this includes a full understanding of what they are selling. Ms Savage submitted that Ms Rowe did not have this full understanding of the Spicy Affair. Ms Savage also submitted Ms Rowe did not amend the Agreement for Sale and Purchase (even though the Agreement specifically mentioned the liquor licence) or the purchasers’ acknowledgement to reflect the fact that there was no licence. This she submitted was a question of competency. For these reasons she submitted that it was open to conclude that Ms Rowe had been guilty of unsatisfactory conduct having failed to display due diligence or competence.

[19] She submitted that Mr Lowe’s supervision was inadequate and he should have accompanied Ms Rowe when she listed the property and when she had the Listing Agreement signed. She submitted that he needed to have an active involvement

³ This section prohibits agents with less than six months’ experience from drawing up Agreements for Sale and Purchase.

⁴ Auckland High Court 123/96, 23 January 1998, Smellie J.

⁵ [2012] NZREADT 44.

with Ms Rowe in the preparation and execution of the agreement. She submitted that Ms Rowe gave advice about legal rights and obligations to the parties and under section 36(2)(A) of the Lawyers and Conveyancers Act she was not allowed to provide such advice within a six month period of obtaining her licence. As Ms Rowe could not give this legal advice, Ms Savage submitted that the inevitable conclusion was that Mr Lowe's supervision was inadequate. She submitted that Mr MacLeod's evidence did not assist as to whether the Rules and the Act were breached and his evidence did not discuss the obligations of licensees in the circumstances of the case.

[20] Mr Waymouth submitted that there was no evidence of any breach of supervision by Mr Lowe or any inappropriate behaviour by Ms Rowe. He submitted that not every breach of the rules needed to amount to a disciplinary breach or lead to the imposition of a sanction. He submitted that while there may have been a "*breach simpliciter*" such a breach did not lead to an automatic finding of unsatisfactory conduct. Mr Waymouth stressed that Mr Lowe was not more than ten metres away from Ms Rowe in the office when she and the parties were signing the agreement. He submitted that she was being adequately supervised by Mr Lowe as he could hear everything that she was able to say and do.

[21] He submitted that the Tribunal should take into account Mr MacLeod's expert evidence and reminded the Tribunal that in accordance with the decision in *Lake v Medical Council of NZ*⁶, the Tribunal cannot substitute its own view for that of the expert⁷.

Discussion – The reasons

[22] Having considered all of the evidence, the Tribunal find that it is unlikely that Ms Rowe was aware at the time of signing the Listing Agreement that the business did not have a current food licence.

[23] It is essential that any salesperson [whether a business or traditional residential agent] understands what they are selling. For the sale of a business supplying food, the currency of the food licence is critical. We agree with the Complaints Assessment Committee that Ms Rowe had an obligation to find out whether or not there was a current food licence and advise the purchasers. She should have done this in writing. This would have removed any uncertainty and inconsistency between Ms Rowe and the purchasers' evidence as to whether or not they knew about the lack of licence. Ms Rowe should also have recorded the discussion that she had with the vendors and advised the purchasers accordingly. Ideally she would have noted these matters on the Agreement for Sale and Purchase or on the Consent by Purchaser document⁸.

[24] Given the lack of advice in writing and the uncertainty about the date that the purchasers knew of the lack of licence the Tribunal have decided that on the balance of probabilities Ms Rowe did not provide the purchasers with information

⁶ See footnote 4.

⁷ The Tribunal can however decide that the evidence does not reflect the correct standards required to maintain public confidence in the profession or to maintain standards.

⁸ See pg 41 of the bundle of documents.

that should by law or fairness have been provided to them and is therefore in breach of Rules 6.2 and 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. On the facts that we have, we do not consider that she breached Rule 5.1. She was in her probationary period and it was Mr Lowe's job to properly supervise her.

[25] In the circumstances however, given that she was a new agent, we consider that a finding of unsatisfactory conduct is all that is required and no penalty is required. The Tribunal amend the Authority's penalty decision to record that the penalty imposed upon Ms Rowe shall only be the finding of unsatisfactory conduct and no additional penalty.

[26] In reaching this conclusion the Tribunal have considered and rejected Mr MacLeod's evidence. Mr MacLeod's evidence does not correctly state the standards required of an agent as reflected in the Tribunal's previous decisions, nor is it factually correct. Further his evidence was based on Ms Rowe's evidence about what she did and when she appreciated there was no licence which was later found to be wrong. He also stressed it was common to view the food licence – when this was not done in this case.

Mr Lowe

[27] The Complaints Assessment Committee's decision relating to Mr Lowe and Affiliated Business Consultants Limited should remain unchanged, together with the fine. Mr Lowe did not discharge his obligations to supervise Ms Rowe. We were surprised that Mr Lowe considered that the food licence of a restaurant was not of significant interest to a purchaser. It is a significant part of what is being sold and must inevitably reflect on the value of goodwill of the business, i.e. the price. Mr Lowe should have been aware that this was likely to potentially be an issue for the purchasers and should have at least asked Ms Rowe whether there was a licence. He should have ensured that she was fully supervised when the Agreement for Sale and Purchase was prepared and signed and been there in person and when the Listing Agreement was entered into. In this way he could ensure that all relevant matters about the business were canvassed and recorded in the documentary material held by Affiliated Business Consultants Limited.

[28] We therefore consider that Mr Lowe is in breach of section 50, as is the agency ABC (through its agent Mr Lowe) for failing to ensure that Ms Rowe was properly supervised which included physically sitting with Ms Rowe when she was having the agreement signed and double checking that all important details were recorded on the agreement. Further, the fact that Ms Rowe gave advice to the parties and was alone when the agreement was signed is in breach of section 36(2)(A) of the Lawyers and Conveyancers Act. Ms Rowe was not able to provide this advice. Mr Lowe needed to do this. His failure to do so confirms his lack of supervision of Ms Rowe.

[29] The Tribunal therefore upholds the decision of the Complaints Assessment Committee with respect to Mr Lowe and Affiliated Business Consultants Limited but varies it with respect to Ms Rowe's penalty.

[30] The Tribunal draws the parties' attention to the appeal provisions in section 116 of the Real Estate Agents Act 2008.

DATED at Auckland this 30th day of November 2015

Ms K G Davenport QC
Chairperson

Ms N Dangen
Member

Mr J Gaukrodger
Member