

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision No: [2016] NZREADT 10

Reference No: READT 044/15

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

BETWEEN

ASHIK ALI

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 302)**

First Respondent

AND

FITZGERALD LIMISELLA

Second Respondent

MEMBERS OF TRIBUNAL

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

HEARD at Auckland on 8 December 2015

DATE OF DECISION 11 February 2016

APPEARANCES

Mr P Sills for the appellant
Mr R E Savage for the first respondent
No appearance for the second respondent

DECISION OF THE TRIBUNAL

[1] Ashik Ali is a real estate agent licensed under the Real Estate Agents Act 2008. In July 2013 he was employed by Pinnacle ReMax in Campbell Road, Royal Oak. He had listed for sale a property at 27 Hollyford Drive, Manukau owned by Parveena Devi. Prior to the listing Mr Ali (known as Ricky Ali) prepared an appraisal for Ms Devi which consisted of a printout of the details of a number of properties that had recently sold in the vicinity of the property, a photograph of the property and some statistical data about recent sale prices. It was not accompanied

by a letter setting out a formal appraisal of the market value but Mr Ali handwrote on the document that he provided to Ms Devi his estimate of the appraisal price. This was \$450,000 to \$600,000. Unfortunately he did not keep a copy of this document. Ms Devi signed the agency agreement. Mr Ali based the commission calculations contained in the agency agreement and the listing authority form on a sale price of \$579,000. On the listing authority he showed a sale price range between \$450,000 and \$600,000. Following this appraisal Ms Devi (in conjunction with Mr Ali) decided to list the property for sale without specifying a price.

[2] The property was advertised in Trade Me where Mr Limisella saw the property. The advertising on Trade Me did not include a price. Mr Limisella and his wife were looking to purchase a property and emailed Mr Ali on 1 August to ask him about the property. There was some delay in Mr Ali's PA responding to the query. Mr Ali's PA was his wife and she had recently had a baby. By 6 August Mrs Ali had responded and provided him with the address of the property. On 12 August Mr Limisella texted Mr Ali and asked "*How much is the vendor looking for for the Hollyford Drive property?*". Mr Ali responded "*High \$400K plus*". He explained in evidence that he gave this response to Mr Limisella because he knew that Ms Devi had had an offer of \$490,000 for the property some months before. On 13 August Mr Ali showed Mr Limisella through the property. Mr Limisella told Mr Ali that he wanted to make an offer. Mr Ali said that he would get back in touch with him later that day. Mr Ali asked how much Mr Limisella wanted to offer for the property and was told \$450,000. He told the vendor of this verbal offer and she said that \$450,000 was not enough. At 6.30 pm Mr Limisella texted Mr Ali and asked for the agreement to be sent to him. Mr Ali said he would text him as soon as he could. Mr Ali arranged to email Mr Limisella copy of a draft agreement. Mr Limisella's evidence was that he and his wife were uncertain of how to complete this agreement and they sent another text to Mr Ali on 15 August saying "*Hi Ricky, is it possible for you to come over tonight at about 7.00 pm?*" Mr Ali responded a few minutes later saying "*How much do you want to offer? If \$450K then not enough. Thks, Ricky*".

[3] Between 16 and 19 August Mr and Mrs Limisella became very disillusioned with their endeavours to purchase the property through Mr Ali. They approached an agent at Barfoot & Thompson, a Mr She, to ask him to try to help them. He approached Mr Ricky Ali and asked whether he would be prepared to do a commission-sharing agreement with Barfoot & Thompson. Mr Ali agreed to this and Mr She presented an offer for \$465,000 from Mei Sang Khou. This was Mr Limisella's wife. This was not initially appreciated by Mr Ali and he presented the offer to Ms Devi who countersigned it at \$570,000. Mr Ali became suspicious and asked Mr She whether the Limisella's were the couple who had made the offer. He said "yes". Mr Ali called Mr Limisella on 19 August and there was an exchange of words between Mr Ali and Mr Limisella. Mr Ali said that he did not believe that Mr She had acted appropriately and that Mr Limisella should have made the offer through him. Mr Limisella then sent the text saying "*BTW you said price was high 400,000s plus so \$570,000 is a big jump, explain please. As an agent you cannot give misleading statements*". Mr Ali then sent a text back saying "*Owners have rite to write wat they want, its not in my hands*". He subsequently asked Mr Limisella if he would like to make a further counter-offer. Mr Limisella did not and did not purchase the property. However Mr Limisella was so incensed by these

conversations that on the evening of 19 August he wrote a complaint to the Real Estate Agents Authority.

[4] He complained of:

- (i) That the property was listed as freehold when in fact it was cross-leased. Mr Limisella thought this was misleading (incorrect advertising).
- (ii) Mr Ali's text message asking how much they wanted to offer. He said his understanding was that all real estate agents had an obligation to present all offers to the vendor. He said that he considered that Mr Ali was incompetent or lazy and he therefore contacted Mr She to try and make progress with the offer.
- (iii) He complained that when he finally spoke to Mr Ali after he contacted Mr She, Barfoot's agent, Mr Ali threatened to lodge a complaint against Mr She.
- (iv) He complained that Mr Ali told him there was a building report but never sent it.
- (v) The price was misleading. He complained that the initial price indicated by Mr Ali of "high \$400,000s" was a significant variant to the counter offer of \$570,000.
- (vi) *Rule 10.2(b)*. Mr Linsella considered that Mr Ali should have been aware of current market conditions and that the appraisal price should not have been as wide. He noted that the ReMax website said that any appraisal should only be plus or minus 5% above the expected selling price.

[5] In response Mr Ali said that the price shown on the listing agreement of \$579,000 was only inserted to work out what the commission might be. He said that the listing form clearly stated a price range of between \$450,000 and \$600,000. He said he had prepared the comparative market appraisals in the way that he did for many previous clients. He told the Tribunal that his opinion on the market value had always been high \$400,000s.

[6] Mr Ali denied that Ms Devi had ever said that she would not accept anything less than \$550,000 for the property and said that up until the time that the first offer was made and he had the discussion with the vendor he did not know that she would not accept less than \$550,000 for the property.

[7] The Tribunal also heard from Ms Devi. Her evidence was that she had always wanted to receive \$550,000 for the property and told Mr Ali that from the time of listing the property. She said that the listing price shown in the agreement of \$579,000 was a figure which represented \$550,000 plus Mr Ali's commission. She was adamant that she made this clear to Mr Ali but did acknowledge under cross-examination that she would have been negotiable on that price.

The decision of the Complaints Assessment Committee

[8] The Complaints Assessment Committee found that there was misleading conduct by Mr Ali as to the price expectations of the vendor. They found that Mr Ali's evidence was in direct conflict with that of the vendor, the listing agreement itself and Mr She, the other licensee. The Committee concluded that the vendor had price expectations of \$550,000, but the complainant and Mr She were told by the licensee that Ms Devi would accept offers in the high \$400,000s and that the vendor would accept an offer of approximately \$500,000. The Committee rejected Mr Ali's response, which was that the vendor's price expectation was not known to him until he presented the complainant's offer to her.

Failure to send building report and incorrect advertising

[9] The Committee dismissed the complaints on these issues. They were not pursued on appeal.

Unprofessional communications and behaviour

[10] The Committee considered that the text messages sent by Mr Ali were unprofessional in tone, accuracy and nature. Mr Limisella had not complained about this.

The appraisal

[11] The Committee considered that the appraisal was careless and sloppy and not in accordance with ReMax's policy and was in breach of Rule 5.1.

[12] The Committee concluded that Mr Ali had been guilty of unsatisfactory conduct.

[13] Mr Ali appeals against this finding and submitted he had not misled the vendor as to her price expectation, the appraisal was adequate and the text messages were not inappropriate.

Discussion – The issues

The market appraisal

[14] The comparative current market appraisal was informal and sloppy. Mr Ali should have kept a copy of the appraisal and it should have contained a more detailed analysis about the likely sale price for the property. This should have been a range of high \$400,000s or low \$500,000s if that was Mr Ali's properly informed opinion. The Tribunal understand the property subsequently sold for \$500,000 through a different agency. This indicates that the price indication that Mr Ali gave initially to the Limisella's was accurate. The range given in the appraisal is certainly unhelpful to a vendor as the range is a 33% increase from the lowest price to the highest price. This makes it very difficult for any vendor to know the likely price at which the property should sell. However, we do not consider that this less than perfect appraisal falls sufficiently short of the required standards so as to amount to unsatisfactory conduct. The appraisal, while not perfect, does have recent sales

prices and some assessment of the likely sale price (R 10.2). It is sloppy but it is not a breach of R 10.2. Rule 10.2 requires an appraisal to be in writing to reflect market conditions and have comparable sales information. It had these elements. We would however urge Mr Ali to consider preparing a proper written market appraisal which gives a more defined and refined price expectation to the vendor. We do not consider the more general R 5.1 to have been breached.

Did Mr Ali mislead Mr Limisella as to the price expectations of the vendor? - R 9.4

[15] Mr Limisella was led to believe that a price in the high \$400,000s would be acceptable to the vendor. We accept Mr Ali's evidence on the balance of probabilities that the vendor's insistence on obtaining \$570,000 - \$550,000 for the property (or thereabouts) was only made known to him (or was apparent) when the agreement prepared by Barfoot & Thompson was presented to Ms Devi. In reaching this conclusion the Tribunal have considered Ms Devi's evidence and the conclusions reached by the Complaints Assessment Committee on this point. We accept that the evidence given by Ms Devi is consistent with the figure of \$579,000 shown on the agency agreement, but we accept Mr Ali's evidence for the following reasons:

- (i) The agency agreement and appraisal expressed a price range of \$450,000 to \$600,000.
- (ii) Ms Devi had disclosed to Mr Ali that a previous sale for \$490,000 had been accepted but had not become unconditional.
- (iii) Ms Devi subsequently sold her property a few months later for \$500,000.
- (iv) Ms Devi agreed to list the property without naming a price.

[16] All of these factors taken together suggest that while Ms Devi clearly wanted to achieve the best possible price for her property she either did not convey this clearly to Mr Ali at the beginning of the agency agreement, or he heard Ms Devi's wish to achieve this price but considered it unrealistic.

[17] Our conclusion is that Mr Ali considered the price information that he initially gave to Mr Limisella was fair. He suggested an offer in the high \$400,000s, discussed this with Ms Devi, discovered her price expectations and informed the Limisellas of this by text.

[18] This method of communication was rather abrupt and the message could have been conveyed to Mr Limisella more appropriately. However it seems from the other evidence that we have heard that Mr Ali, then the father of a newborn baby, may not have been as focused on his real estate agency work at this time as he should have been. We are critical in the next paragraphs of his emailing a draft agreement to Mr and Mrs Limisella and there were delays in responding to their query and assisting them in making an offer, which no doubt contributed to the sense of frustration and disillusionment with Mr Ali. However on the evidence that we have heard we cannot conclude that Mr Ali intentionally misled the Limisella's as to the price expectations of the vendor at the time that he made the representations

to Mr Limisella on 13 August 2013. We therefore dismiss the Complaints Assessment Committee's findings on this point.

Text messages

[19] We do not consider that the text messages show any discourteous or unprofessional behaviour by Mr Ali. They are a frequently used method of communication. Mr Limisella did not find them discourteous or unprofessional. However, we have commented above on how we consider the text messages led to a breakdown in communication with the Limisella's. We dismiss the Complaints Assessment Committee's finding on this point.

The Agreement – other issues

R 9.9

[20] Mr Ali emailed a blank copy of the Agreement to Mr Limisella to complete. Rule 9.9 says "*A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for signature unless all material particulars had been inserted into or attached to the document*".

[21] We do not have a copy of the agreement for sale and purchase which Mr Limisella was sent by Mr Ali. Mr Limisella commented that he and his wife did not know how to complete the document and had to ask Mr Ali for assistance. He does not appear to have provided this. Mr Ali's evidence was that he was unwilling to drive to where the Limisellas lived as this was a fair distance from his house to assist them to complete the agreement. We consider that completing the agreement is an essential part of an agent's job and what the commission rewards the agent for doing. The purchaser does not have to complete the agreement nor to understand how to complete such an agreement. We consider that this conduct could have been a breach of Rule 9.9. However given the fact that this was not raised at any time by either the complainant or the Complaints Assessment Committee we cannot make findings on this point. We simply draw this to the attention of Mr Ali and strongly recommend that he does not do this again.

[22] We therefore conclude that while Mr Ali's conduct was sloppy it does not reach the required level of misconduct required to lead to a finding of unsatisfactory conduct

[23] For the reasons set out above we find that:

- (i) The text messages were not inappropriate.
- (ii) There was no breach of Rule 10.2, Rule 5 or R 9.4.

[24] The Tribunal accordingly allows the appeal and reverses the finding of unsatisfactory conduct made by the Authority.

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

DATED at Auckland this 11th day of February 2016

Ms K Davenport QC
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member