

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 17

READT 047/15

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

BETWEEN **SIJO THOMAS**

Applicant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 304)**

First respondent

AND **MARKUS LANG (Deceased)**

Second respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Mr G Denley- – Member
Ms C Sandelin- – Member

HEARD at AUCKLAND on 15 December 2015

DATE OF DECISION 16 February 2016

APPEARANCES

Mrs C Eric – for the appellant
Ms R E Savage – for first respondent
No appearance on behalf of second respondent

DECISION OF THE TRIBUNAL

[1] The appellant is a real estate agent who was formerly employed by Barfoot & Thompson. In late August 2013 Mr Thomas showed a Ms Jennifer Loveridge through a property at 12 John Street, Mangere. Ms Loveridge attended with a male friend. There is some dispute as to whether this person was Mr Lang (the ultimate purchaser) or another person. In any event after Mr Thomas met Ms Loveridge and the gentleman they advised him that they wished to make an offer for 12 John Street, Mangere. The male visitor gave to Mr Thomas a piece of paper on which there was typed a GST clause that they wished to have inserted into the agreement. Mr Thomas prepared the agreement including this GST clause. He pasted it into the agreement.

[2] The vendor declined to accept the GST clause. Mr Thomas's evidence is that he told Mr Lang (the purchaser) that the vendor did not want the GST clause in the agreement, and so Mr Lang drafted some additional clauses, in his own hand, to add to the further terms of sale. These included completion of additional works on the property, erecting boundary fences and a concrete pad for parking.

[3] Mr Thomas's initial statement, which was a written response to a complaint, suggested that it was Mr Lang who gave him the additional clause. His brief of evidence for the Tribunal said that it was Ms Loveridge who dictated the clauses to Mr Thomas.

[4] However it is what Mr Thomas did next that is the issue in this case. He typed up these additional clauses on a separate piece of paper and pasted them on top of the GST clause that he had previously been asked to insert. These additional clauses were initialled by both the vendor and the purchaser and the agreement settled some months later. Shortly prior to settlement Mr Lang noticed the absence of the GST clause and commenced discussions with his solicitor and Mr Thomas about the absence of the clause. Mr Lang has unfortunately tragically died since making the complaint. However on 27 March 2014 he wrote to the Complaints Officer at Barfoot & Thompson and made this complaint:

"I have attached a letter from my lawyers Clark and Gay in Waihi ... I have entered into an agreement last year and this problem was brought to my attention upon settlement that the GAT [sic, presumably GST] clause had been covered over with other clauses in the agreement. This is a serious matter given the fact that the vendor is GST registered. The issue is currently in the hands of a lawyer in Auckland who is trying to (sort) out this mess. Our issue is with the agent Sijo Thomas of Papatoetoe who I believe did this intentionally.

[5] Mr Lang's solicitor's letter was copied into the email. This read:

"We advised last Thursday 20 March 2014 when settlement was scheduled to take place we discovered that the additional further terms of sale had actually been glued over the standard GST clause which our client includes in all of his purchases. This was discovered upon advice from our client that he was sure he had included a clause into the agreement and upon further investigation we found that this was the case. Please find attached a copy of the agreement together with copies of the further terms of sale with the clauses included over the top of the GST clause and also a copy of the further terms of sale page which I have managed to pull back from the glued clause and you can clearly see the GST clause underneath. I've also pencilled the outline of the actual clauses. We confirm that we hold the original agreement and we have since we received it from your office¹ upon signing by our client. Please note that the GST clause has not been crossed out and initialled, it has just been glued over as if it was never in the agreement."

[6] Mr Thomas does not deny that he did this but says that the new clause was glued over the top of the old GST clause in the presence of Mr Lang. He said that he thought this was okay because the offer was still in the process of being prepared and had not yet been finalised or signed by Mr Lang. Further it seemed tidier. He was adamant that he went through the terms of the agreement with Mr Lang and says that Mr Lang read it carefully and signed and initialled the contract. He says

¹ i.e. Barfoot & Thompson.

Mr Lang took a signed copy of the offer away from him. The vendor subsequently signed the contract. He says the original was then sent to Mr Lang's solicitors.

[7] The Complaints Assessment Committee found Mr Thomas guilty of unsatisfactory conduct. They said in their decision of 11 March 2015:

"Therefore the evidence in relation to the issue of whether Mr Lang knew or was told that the GST had been glued over was inconclusive. The Complaints Assessment Committee notes that Mr Lang says that he was 'pretty sure' he initialled the GST but that he did not see the agreement again until after 21 August 2013 (but settlement did not take place until March 2014)."

[8] The Complaints Assessment Committee found that Mr Lang had initialled the clause that was pasted over the GST clause. They accepted that it may not have been apparent to him that this clause was pasted over the GST clause and that Mr Thomas was remiss in not bringing it to his attention. The Complaints Assessment Committee found no evidence of deliberate wrongdoing but believe that his:

"Handling of the pasting in and out of the clause was what might be termed 'sloppy' conduct and as such fall short of the standard that a reasonable member of the public is entitled to expect from a recently (reasonably) competent licensee. We also find that licensee 1 was negligent in not specifically pointing out to the complainant that the GST clause had been pasted over. Because of these two findings we find licensee 1 guilty of unsatisfactory conduct."

[9] The issue in this case therefore is whether or not the acknowledged conduct of pasting over the initial GST clause with a new clause, which may not have been specifically drawn to the attention of the purchaser, was unsatisfactory conduct?

[10] The Tribunal asked to see a copy of the original agreement. Following the hearing Mrs Eric provided a copy to the Tribunal which was subsequently viewed by Ms Savage. On inspection of the original it is apparent that there is a clause glued into the agreement. What is not apparent is the fact that there was a clause underneath this that had been covered over.

[11] Mrs Eric submitted that this was not unsatisfactory conduct. She disagreed with the Complaints Assessment Committee's categorisation of the conduct as "sloppy". She noted that it was recognised practice for agents to glue in clauses into an agreement for sale and purchase. She submitted that the GST clause was pasted over when the offer was still in the process of being prepared. She submitted that the agreement had not been completed, approved or signed by the vendor and Mr Lang clearly initialled the clauses which were pasted over the top. She acknowledged that with hindsight it would have been preferable and perhaps best practice for the clause to have been crossed out and initialled to ensure that there could be no doubt as to the purchaser's acknowledgement of the removal of this clause. However she submitted that the fact that this was not done does not amount to unsatisfactory conduct. She submitted that it was not reasonable for Mr Lang to have claimed that he was unaware of the absence of the clause, especially as the GST status of the transaction was ascertainable from the fact that the agreement was expressed to be GST inclusive, and the vendor's registered GST status was

identified in the second schedule of the agreement. She submitted that a departure from 'best practice,' if this was one, does not equate with a departure from acceptable standard so as to lead to a finding of unsatisfactory conduct.

[12] In reply, Ms Savage submitted that the conduct of the appellant in pasting over the initial GST clause was liable to mislead and to confuse either or both of the parties because it left no record on the face of the document as to what the parties had agreed with respect to the GST clause or that it had ever been considered for inclusion. Ms Savage acknowledged that on the facts it seems that the Committee had found that the clause was pasted over in the presence of Mr Lang but submitted that this did not detract from the conclusion that it was sloppy and showed a lack of transparency.

[13] Ms Savage also submitted that if Mr Thomas had simply crossed the clause out and had it initialled then he would have properly ensured that the complainant would not have been taken by surprise (as he clearly was) as to the exclusion of the GST clause.

Discussion

[14] Because of Mr Lang's tragic death it is not possible for the Tribunal to accept Mr Lang's version of events and reject Mr Thomas's in the absence of any other evidence. What we can say, from having read the file and ourselves examined the agreement for sale and purchase, is that the GST clause was completely obscured by the additional clauses 18 and 19 which were glued over the top of it. It is more likely than not that Mr Lang would have been unaware that the GST clause was underneath clauses 18 and 19.

[15] We can also conclude that Mr Lang was taken by surprise when his solicitors (who had received the original after it was signed) discovered that there was no GST clause in the agreement. His complaint was made prior to settlement, as soon as his solicitors appeared to have discovered the error. It was a contemporaneous complaint.

[16] Mr Thomas acknowledges that he did paste the clause in because he felt that this was a tidier way of preparing the agreement and did not think that anything turned on it as the agreement had not been signed by the vendor. He reiterates that he told Mr Lang that this had been done.

Discussion of the Facts

[17] We consider that the risk of confusion in the purchaser simply failing to notice that the GST clause was no longer contained in the agreement was high. It is clearly better practice for an agent to cross out any clause that has been inserted but not accepted so that all parties can see the passage of the negotiation. There is no evidence of intentional deception of Mr Lang, but by the same token the possibility of confusion and unwitting error was high. We do not consider that the pasting in of clauses per se is wrong but to deliberately obscure something which has been specifically requested in an agreement, [even if a purchaser was orally advised of this fact] gives rise to a real potential for confusion and for a purchaser to be misled.

[18] Mr Lang and his solicitors were adamant that he had been. We cannot test this conclusion but it supports our view that there was a risk of confusion. The purpose of the Rules and the Real Estate Agents Act is to ensure that consumers are protected

from being taken by surprise. Agents are obliged to use their best endeavours not to confuse purchasers or to deceive them and are obliged to draw to purchasers' attention matters which in fairness they ought to be aware of. In our view obscuring a requested clause was a breach of these obligations. It also had the potential to mislead the solicitors for the parties as to the fact that the GST clause had not been signed by the vendor. We conclude that the Complaints Assessment Committee's conclusion was correct. We therefore dismiss the appeal.

[19] However this is not a significant breach of Mr Thomas' professional obligations and may well have been unwitting. Accordingly we do not impose any penalty upon Mr Thomas, other than the finding of unsatisfactory conduct. The Complaints Assessment Committee's findings as to penalty are modified in this way.

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

Ms K Davenport QC
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member