BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 19

READT 053/15

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**STEPHEN MASEROW**
	Applicant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 404)**
	First respondent
AND	**RAJENDRA KUMAR AND MADHU MALA**
	Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 25 January 2016

DATE OF DECISION 24 February 2016

APPEARANCES

Mr T D Rea and Ms C Eric – for the appellant
Mr J Simpson and Ms C Paterson – for the first respondent
No appearance for the second respondent

DECISION OF THE TRIBUNAL

[1] In late 2013 Mr Kumar and Ms Mala complained to the Real Estate Agents Authority about the actions of two licensed salespersons, Jing (Raylene) Yang and Sam Zhang. Ms Yang and Mr Zhang were the agents who had shown the complainant the property at 18 Victory Road, Papatoetoe, Auckland. The complainant purchased the property. Both these agents work for Barfoot & Thompson, Howick. Mr Maserow is the branch manager.

[2] The Complaints Assessment Committee found that the agents Zhang and Yang were guilty of unsatisfactory conduct and that Mr Maserow as their branch manager had failed to adequately supervise them (a breach of s 50 of the Real Estate Agents Act) and therefore was also guilty of unsatisfactory conduct. The agents did not appeal against these findings but Mr Maserow appeals against the finding of unsatisfactory conduct.

[3] The property at 18 Victory Road, Papatoetoe was the original house on a large site. The vendors had been granted resource consent to subdivide the property and to construct a new house on the back section. The facts do not seem to be much in contention. The vendors' new house was accessible by a driveway running along the right hand side of the property. A car port had been located behind the original house on the property. However the new carport could not be accessed by any vehicle coming to the original house without travelling down the vendor's new driveway and someone removing part of a fence which the vendor owner of both the original house and the new back house had erected.

[4] The vendor entered into an agency agreement with Barfoot & Thompson in October 2013. They had not finished the subdivision at this time as they had not received the new titles. They had also not disclosed to the agents that it was a term of their resource consent that the carport be demolished.

[5] The complainants said that they were unaware that the garage was required to be demolished, despite Mr Zhang telling the Complaints Assessment Committee that he had looked at the resource consent plan annexed to the LIM and been able to see from this that the carport was to be demolished. He said that he had drawn this to the attention of Mr Kumar. Mr Kumar denied this and said that the access to the carport was very important to him. This seems to have been borne out by the agreement for sale and purchase which included a clause 19 which provided as follows:

> *"The purchaser could open the fence for entry to back carport at purchaser cost up to owner agreed distance on the existing fence."*

[6] The Tribunal is not certain that the fence was ever opened to give the complainants access to the back carport because shortly after settlement the complainants received an infringement notice from the Council, (including a fine), and were required to demolish the carport. The complainants immediately complained to Barfoot & Thompson about why this had been allowed to happen. They said this should have been drawn to their attention.

[7] The Complaints Assessment Committee agreed and found both Mr Zhang and Ms Yang in breach of Rule 6.4. The Committee were concerned also with the drafting of clause 19 concluding that it was:

> *"Poorly drafted, did not make sense, had no legal effect, would not be binding on the vendor, and would not be binding on any subsequent owner of the rear property. In short, it simply does not achieve what the complainants' wish which was in effect a right to use the vendor's driveway to gain access to the carport."*

[8] The Committee found that there was an obligation on Mr Maserow to review the sale and purchase agreement and if he had done this he would have seen the clause 19. The Committee said at [3.24]:

> *"A licensee supervising and managing salespeople under s 50 must be doing something more than simply ensuring they point out to salespeople mechanical steps that must be undertaken as required by the Agency. As an absolute minimum, to comply with s 50 the licensee should be reviewing sale and purchase agreements, preferably before they are signed."*

[9] The Committee accepted that in practical terms this may not be able to be achieved. They therefore considered that agreements should be reviewed as soon as practicable after they are signed. They said:

> *"By licensee 3's own admission this simply did not happen in this instance resulting in far reaching consequences for the complainant."*

[10] The Committee concluded that Mr Maserow had failed to check the LIM, review the agreement and to ensure that the salespeople are complying with the agency's requirements.

[11] Mr Maserow appeals this decision. In his evidence he went into some detail about the level of supervision that he carried out for the 24 salespeople he managed at Barfoot & Thompson in Howick. The Complaints Assessment Committee did not have this information. He says that he fully supervises all agents until they have had six months experience (as the Lawyers and Conveyancers Act requires) and then provides further supervision and training for those who require further supervision, and provides continued training for all of the office. He holds weekly branch meetings and educates agents on the company policies and changes. He also arranges education and training for agents. He said he directly supervised salespeople who had less than six months' experience and those who required assistance with unusual or complex transactions, and he monitored the performance of all salespeople based on their reporting and training requirements, including conducting monthly one-on-one meetings with each salesperson and agent. As well as that he proofed the office's ads, dealt with queries, managed the property management division, attended management meetings, arranged training, managed all employment and staffing matters, all licensing matters and was responsible for the financial transactions and the day-to-day running of the branch.

[12] He told the Tribunal that the Howick branch prepared an average of 50 agreements for sale and purchase very month. However it had never been his usual practice to review every agreement for sale and purchase prepared by the office, or to review every LIM. He said in this particular case due to the level of experience of the two salespeople he did not consider that it was necessary to review the agreement prior to the contract being entered into.

[13] At that time Ms Yang had approximately 2½ years' experience and had managed approximately 170 listings and Mr Zhang (her husband) had about one year's experience.

[14] Mr Maserow did however review the agreement shortly after it was signed.

[15] Mr Maserow noticed that clause 19 was badly written and that the English and grammar were not perfect. He marked this down for further training for the salespeople, but otherwise took no steps to review or discuss matters with the agents. He said that he believed that Ms Yang and Mr Zhang were capable of reading the LIM and acting on any concerns.

[16] Mr Morley also gave evidence as an expert and he said that it was impossible for a branch manager to be involved in approving all agreements for sale and purchase or reading all LIM's. He said the question of what supervision a person receives would depend upon the manager's confidence in their ability which would be known because of the interaction within the office. He said had he seen clause 19 he would have gone to the salesperson and asked what the clause meant and tried to

establish what was intended. He said that he could see that English language was an issue in the drafting.

Counsel's submissions

[17] The Authority referred to the Tribunal's previous decisions on s 50, primarily *Hutt City v Real Estate Agents Authority*[1] which says:

> *"Simply put in terms of s 50 of the Act a salesperson must be properly supervised and managed by an agent or branch manager in the sense that the salesperson's work is carried out under some experienced direction. This is to ensure that the salesperson's work is performed confidently in compliance with the requirements of the Act … at least be applied in terms of sensible business practice and commonsense."*

[18] In the High Court in *Barfoot & Thompson v Real Estate Agents Authority*[2] the Court said:

> *"[13] Section 50 requires a salesperson to be supervised and managed and that such supervision and management is 'proper'. What that means is set out in s 50(2). A salesperson's work must be carried out under a branch manager or agent's direction and controlled sufficiently to ensure confidence and compliance with the Act. The approach of the Hutt City case is the correct one. That is, the enquirer must consider the supervision and management itself. The fact that the error has occurred is not conclusive evidence of a breach of s 50."*

[19] The REAA also referred to *Grindle v Real Estate Agents Authority*[3] and the High Court decision of *Wang v Real Estate Agents Authority*[4]. Mr Simpson accepted that not every agreement for sale and purchase should be reviewed in order for the branch manager to comply with s 50.

[20] The Authority submitted that the Tribunal should find the following facts established, all of which supported the Complaints Assessment Committee's decision. Mr Simpson submitted that Mr Maserow had in fact breached his obligations to supervise as:

(i) He had no knowledge or involvement in the transaction prior to its execution.

(ii) He failed to identify any of the issues with the transaction or make further enquiries after reviewing the transaction report (which referred to carport and a fourth bedroom and the need to obtain a LIM).

(iii) He did not recognise the issues with clause 19.

(iv) He overestimated the experience of licensees Yang and Zhang.

(v) He took a passive approach to supervision and management.

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1 [2013] NZREADT 109 at [42] and [46].
2 [2014] NZHC 2817 at [13].
3 [2014] NZREADT 84 at [20].
4 [2015] NZHC 1011 at [36].

[21] In reply counsel for Mr Maserow rejected these submissions. He submitted that the standard required in the Complaints Assessment Committee's decision was wrong. He submitted that the supervision requirements of the Act are a question of fact and must be applied according to sensible business practice as evidenced by Mr Morley's evidence. Mr Rea submitted that it would be contrary to sensible business practice and commonsense for branch managers to be required to review every offer. He submitted that the ability of a manager to organise to review an offer before its execution would depend upon a number of external factors. Mr Rea identified these as being: the number of people under supervision, the sales environment, the location and timing of the preparation and presentation of any offers and the other commitments and responsibilities of the branch manager or agent.

[22] Mr Rea also advanced the argument that s 36(A) of the Lawyers and Conveyancers Act 2006 created a *de facto* limit on the amount of supervision required for a branch manager to check agreements for sale and purchase. Mr Rea submitted that the level and nature of supervision should be assessed on a case-by-case basis. He submitted in conclusion that Mr Maserow had discharged his obligations to properly supervise Mr Zhang and Ms Yang.

Discussion

[23] The Tribunal concur with both counsel's submissions that the standard set by the Committee in their decision that every agreement should be reviewed by the branch manager, (either before or as soon as practicable after execution) and that LIMs should be reviewed by a branch manager is a counsel of perfection and not realistically commercially sensible.

[24] However s 50 does require active supervision by a branch manager. We reject the submission that s 36(2A) of the Lawyers and Conveyancers Act 2006 creates a limit on the amount of time that an agent needs to be supervised. This section prescribes the minimum supervision for the most competent agent. A branch manager must determine what level of supervision is actually required for each agent. This may change with each property.

[25] Supervision must be actual, it must be tailored to the circumstances of the agent and the property being sold, it must involve active involvement by the branch manager with the agent(s), including a knowledge and understanding of the issues with each of the properties being sold by the agency, if any. It should include an assessment of the competence of an agent to draft an agreement in English. As New Zealand's population becomes more ethnically diverse the number of agents for whom English is not a first language will grow. While this offers a better service to vendors and purchasers who speak the same language it may also mean that the branch manager needs to be more actively involved in the drafting of agreements. Agencies must demonstrate that agreements which are drafted by all agents are well written and the clauses on their face sensible and understandable. The branch manager should be alert to identifying potential problems rather than waiting for a possibly inexperienced agent to identify them. At regular meetings of staff branch managers should ask questions to elicit matters which might be of concern such as issues with the boundary, lack of code compliance, and disclosure of known defects and issues with the LIM. All of these matters should be considered by the branch

manager and agent when a property is listed for sale and in regular reviews relating to the sale process.

[26] In an ideal world every agreement for sale and purchase could be reviewed by the experienced branch manager but the Tribunal acknowledge that this is practically impossible. However an adoption of the standards set out above by branch managers will ensure that issues which might require more detailed supervision can be readily identified and the subject of more hands-on supervision by the branch manager.

Application of the law to the facts

[27] The Tribunal have determined to dismiss the finding of unsatisfactory conduct made by the Complaints Assessment Committee. We consider that Mr Maserow appears to have understood and complied with his obligations as branch manager. He spoke of randomly deciding to accompany agents when properties were being listed, of ensuring that he reviewed most if not all of the agreements for sale and purchase that were entered into by the office (after the offer was signed) and providing continued support to those agents who he felt were not capable of practicing alone. These are all positive signs of ongoing supervision in this case. He identified that there was a problem with clause 19 but he did not make further enquiries of the agents to ascertain the true nature of the clause and its intentions. Mr Maserow did not choose to take any steps to explore what this clause meant and this was regrettable. Even though the agreement was signed had Mr Maserow intervened, the problems that were later experienced, (with the purchaser discovering that the carport needed to be torn down), could have perhaps been dealt with at an earlier time and prior to settlement to allow for the involvement of the lawyers for the parties. However despite this failing the Tribunal do not consider that Mr Maserow's level of supervision was so far below the required standard to justify a disciplinary finding.

[28] Mr Maserow impressed the Tribunal as being a thorough and careful branch manager and the fault in this case was that he did not appreciate that there were issues with this property which had not been disclosed to him by the agents (if in fact the agents appreciated them, which given their finding of unsatisfactory conduct maybe unlikely). We do not consider that every error an agent makes is a direct result of inadequate supervision. Every case must be judged on its merits and the particular facts. Mr Maserow's supervision relied on his previous knowledge of the two agents' skills. He considered that they were experienced and therefore accepted that the agreement was appropriate. His error was in not to recognise that he should have re-examined that view when he read clause 19. This mistake in all the circumstances is not sufficient for a finding of unsatisfactory conduct – it shows an error in his reasoning but not in his supervision.

[29] Therefore while Mr Maserow's conduct was not perfect we consider that the conduct is not sufficiently short of that to be expected of a branch manager so as to lead to the need to impose a disciplinary sanction on Mr Maserow.

[30] Accordingly the Tribunal set aside the decision of the Complaints Assessment Committee as it applies to Mr Maserow.

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

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Ms K Davenport QC
Chairperson

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Ms N Dangen
Member

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Ms C Sandelin
Member