

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 2

READT 042/15

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

BETWEEN **NICHOLAS FARAC**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 406)**

First respondent

AND **JERMAINE ROMERO**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson

Mr J Gaukrodger - Member

Ms C Sandelin - Member

HEARD at AUCKLAND on 24 November 2015

DATE OF THIS DECISION 14 January 2016

REPRESENTATION

The appellant on his own behalf

Mr M J Hodge, counsel for the Authority

Ms J Romero on her own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] This appeal concerns a pre-auction offer to purchase a residence and its appropriate consequences.

[2] Nicholas Farac (“the complainant”) appeals the 18 June 2015 decision of Complaints Assessment Committee 406 to take no further action in respect of his complaint (outlined below) against Jermaine Romero (“the licensee”).

[3] The licensee is a licensed salesperson under the Real Estate Agents Act 2008. At the time of the relevant conduct she was employed by Pure Realty Ltd, trading as Ray White Kelston.

[4] The complaint also concerned the conduct of Susan Woods-Markwick, the licensed branch manager for the Agency; but Committee took no further action

against Ms Woods-Markwick and this aspect of the complaint has not been pursued on appeal to us.

Background

[5] The complaint concerns the sale of 47 Newington Road, Henderson (a cross-lease property). The licensee was the listing agent acting on behalf of the vendors, Michael and Tonia Brown.

[6] Between 13 and 17 January 2015 the complainant and his partner inspected the property. On 20 January 2015, the complainant made a pre-auction offer of \$501,500. There is a divergence in the accounts of how this offer was reacted to. The complainant states he was told that, if his offer was accepted by the vendors, the auction would be brought forward from 1 February 2015 to Friday 23 January 2015 at 3.00 pm. However, the licensee states that she then explained to the complainant that the change of date was not guaranteed and that the vendors would likely bring the auction forward, but that the vendors would have the final decision on time and place.

[7] At about 8.30 pm on 21 January 2015, Ms Woods-Markwick advised the complainant by telephone that the vendors would accept the offer if the auction was brought forward to Monday 26 January, but not to Friday 23 January. The complainant objected and alleges that a variety of false reasons was given about why the auction could not be brought forward to 23 January. The licensee was apparently involved in the latter part of this conversation. The licensee and the complainant had a further telephone conversation at around 9.00 pm regarding the auction date.

[8] On 22 January 2015, the vendors reconsidered their position. They advised the complainant, through the licensee, that they would be willing to bring the auction forward to Friday 23 January, but at the time of 6.30 pm. This was after the licensee and Ms Woods-Markwick had contacted prospective purchasers to gauge availability for a Friday evening auction.

[9] The complainant objected the change in time but, reluctantly, agreed when he was told the vendors would not agree to run the auction at 3.00 pm. He signed a clause agreeing to the auction time and date.

[10] Accordingly, on 23 January 2015 the auction proceeded at 6.30 pm. As the complainant could not attend, he was represented as a telephone bidder by Lyn Beere, another Ray White licensee. Mr Beere had earlier contacted the complainant to explain the conduct of the auction.

[11] The bidding opened at the complainant's pre-auction offer. The complainant remained on the line to Mr Beere throughout the auction but made no further offers. The property was sold to another bidder. The complainant alleges that he had difficulty hearing the auctioneer.

[12] The complainant subsequently laid a complaint to the Authority making two main allegations, namely:

- [a] The licensee and Ms Woods-Markwick gave false reasons why the auction had to run at 6.30pm; and
- [b] The complainant was disadvantaged by having to bid by telephone.

[13] Although the complainant raised issues concerning the conduct of Mr Beere, he did not include Mr Beere in the original complaint form.

The Committee's Decision of 18 June 2015

[14] The Committee preferred the evidence of the licensee. It accepted that, when the first pre-auction offer was submitted, the licensee explained to the complainant that the vendors might be willing to bring the auction forward but she gave no guarantees. She also explained that the vendors had already committed marketing fees to the February date. The Committee rejected the complainant's account that the offer was "*conditional*" on the auction date being changed.

[15] The Committee found no evidence supporting the allegation that the licensee or Ms Woods-Markwick had lied to the complainant about the reasons the vendors would not change the auction date. The Committee noted that one of the reasons given, being that the vendors were going away for the weekend, was corroborated by text messages from the vendors to the licensee.

[16] The Committee found no evidence that the complainant was disadvantaged by telephone bidding. It noted that the process was explained to him, he signed a telephone bidding authority confirming that he understood the terms and conditions of the auction, and each bid was relayed to him by Mr Beere as the auction progressed. The CAC found that was not an uncommon practice.

[17] The Committee noted that the licensee and Ms Woods-Marwick had felt the complainant's behaviour was at times "*abusive, aggressive and bullying*". The CAC considered that to be so in the complainant demanding the auction take place at 3.00 pm on Friday 23 January 2015 to suit his own requirements. It also noted that the vendors are entitled to set the date for an auction which suits them and that when they consider a pre-auction offer, they are entitled to accept it or not.

Issues in This Appeal

[18] The Authority addressed the following three broad issues:

- [a] The allegation that the complainant was given false information when discussing the reasons the auction date could not be brought forward to 23 January at 3.00 pm.
- [b] The allegation that the licensee did not act in the complainant's interest as a "*major interest party*" when setting the auction time.
- [c] The allegation that the complainant was disadvantaged by the telephone bidding process.

Further Evidence Adduced to Us

Evidence of the Appellant/Complainant

[19] The appellant generally confirmed the salient facts covered above and added a little more evidence-in-chief which we summarise below. In particular, he presented

himself for detailed cross-examination by Mr Hodge on behalf of the Authority. Ms Romero did not seek to cross-examine the appellant.

[20] Inter alia, the complainant said that after he presented his offer to the licensee on the Wednesday she mentioned that the vendors were considering it but a concern was that the auctioneer was not available on the Friday, and the complainant queried that. He said that the licensee then said the vendors were going away for the long weekend and he queried that also. He said she then said the auction could be on the Monday which the complainant thought odd as that was Anniversary Day in Auckland and he felt the vendors wished to allow another week of advertising and open homes before the property went to auction.

[21] In any case the complainant said all this caused him to lose confidence in dealing with the licensee and her colleagues. He seemed to think he was being blackmailed by being told eventually that the auction could be at 6.30 pm on the Friday and he could take that or leave it.

[22] The complainant was carefully and thoroughly cross-examined by Mr Hodge. The complainant maintained that the licensee kept giving inconsistent statements as to why the auction could not take place on the Friday. He understood that she thought it would be good for the vendors not to bring the auction forward and so allow more open homes before the property was auctioned and that might get further bidders out of the woodwork, but he was seeking and pressing to have the auction brought forward.

[23] The complainant accepted from Mr Hodge that it was the complete prerogative of the vendors as to when the auction took place.

[24] The complainant stressed to Mr Hodge that, because he felt he had been told "*different things*" by the licensee, he experienced a loss of trust in her and her colleagues. His concerns seem to be that he felt he had been blackmailed into accepting an auction at 6.30 pm on the Friday and he seemed to think that the role of licensees was to be reasonable to prospective bidders and prefer their views to those of the vendors. The complainant seemed to state that because the licensee would not allow him a say about the time of holding the auction in the light of his pre-auction offer to purchase, he lost "*trust and faith*" in her. He insisted that he had been disadvantaged by not being able to attend the auction in person but he again accepted that the auction arrangements were the prerogative of the vendors. He insisted that if he had not lost trust in the licensee he would have bid at the auction beyond the starting bid which represented his pre-auction offer.

The Cross-Examination of the Licensee

[25] The licensee did not wish to add to the facts as set out above but made herself available for cross-examination by Mr Hodge for the Authority and by the complainant.

[26] Under cross-examination from Mr Hodge, the licensee made it clear that the arrangements about the auction were set by the vendors and not by her.

[27] She denied that she had given various explanations to the complainant as to why the auction arrangements would be changed and that she made it clear to the complainant that the directions about the auction were being made by the vendors. She said he would not accept that and seemed to be blaming her. Indeed she

became so tired of his accusative stance to her that she asked the vendors to explain their requirements to the complainant direct. They did that explaining that, due to the interests of their children, the auction could not be held at 3.00 pm on the Friday but only at 6.30 pm in terms of the convenience of the family of the vendors.

[28] The licensee made it clear that, when she ascertained that the complainant could or would not attend the auction at 6.30 pm on the Friday, she advised him that it was important he be present but, otherwise, her manager (Mr Beere) would bid for him, and that was arranged.

[29] A new issue was raised in that the complainant maintains (correctly) that, at one stage in the negotiations, the licensee sent him a lease document related to the property which was not the appropriate lease document but that for the neighbouring property. The licensee readily admitted having said at the time that it was simply an honest mistake which she had immediately corrected.

[30] The cross-examination of the licensee by the complainant focused on the complainant putting to the licensee with regard to various aspects that she had not been telling the truth, but the licensee adhered to her basic evidence to the Committee and, in particular, refuted that she had ever promised the complainant a Friday auction.

[31] Inter alia, the complainant put it to the licensee that she had apologised to him. She responded that she simply apologised to him because, for some reason in the course of the negotiations, he had become upset and angry and she was simply seeking to calm him down; but she did not admit she had at any time *“been in the wrong”*.

[32] The complainant seemed to be putting it to the licensee that she had not wanted him to bid at the auction. She made it clear that she most certainly did want him to bid but that he would not stop attacking her personally and she simply tried to agree with whatever he sought.

[33] The complainant also seemed to be putting it to the licensee that on the Thursday before the auction she had told him the deal was off. The licensee made it clear that she was busy at the time and simply put it to the complainant that the vendors would not be in town over the weekend, except for the Friday evening; they were marketing their own home; the complainant was simply a prospective bidder; the vendors could decide procedure and it was not for the complainant to be doing that; and if he could not accept that he should talk to her manager.

Evidence from Ms S Woods-Markwick

[34] As mentioned above, Ms Woods-Markwick is a colleague of the licensee and because she was present in the courtroom she agreed to give evidence on behalf of the licensee.

[35] She said that she found the complainant very aggressive to deal with at material times.

[36] She was aware that more open homes had been arranged before the original auction date but that the complainant had made an offer with the vendors regarded as borderline acceptable. Ms Woods-Markwick felt that the complainant was *“pushing, yelling and shoving”* for an early auction to suit himself. She was

conscious that the auction must be conducted by a licensed auctioneer which might complicate bringing the auction forward but the licensee put the complainant's request and attitude to the vendors who made appropriate decisions.

[37] Ms Woods-Markwick stated that, at one stage, the complainant stated that if the auction was to be held on the Monday night, as distinct from the previous Friday, he would withdraw his offer and became abusive about that to both her and the licensee as joint listing agents. When the vendors ascertained that the complainant would withdraw his pre-auction offer if he did not get his way about the auction date, they managed to arrange for it to be 6.30 pm on the Friday; but they would not make it 3.00 pm that day due to their concern about their children and the need for babysitters, their travel arrangements for the weekend, and their concern about other potential bidders. They were very pleased with the marketing services of the agency and wrote it a glowing letter to that effect.

The Submissions for the Authority

Issue One: the allegation that the complainant was given false information

[38] Counsel for the Authority (Mr M J Hodge) noted that the complainant has asserted that the following false reasons were given to him about why the auction date could not be brought forward, namely an auctioneer would not be available; the vendors were going away for the weekend; and Ms Woods-Markwick did not know about the complainant's need for a Friday afternoon auction.

[39] Mr Hodge noted that the evidence indicates that the complainant was communicating with Ms Woods-Markwick in the 8.30 pm telephone conversation on 21 January 2015, when the licensee was present on speakerphone, but the licensee does not seem to have personally given any reasons why the auction date could not be brought forward.

[40] Mr Hodge observed that there has been no identification of the specific instances in which the licensee, as opposed to Ms Woods-Markwick or Mr Beere, is alleged to have given false information.

[41] To assist us Mr Hodge produced the following table which sets out who the complainant was in contact with and at what time.

Tuesday 20 January, around midday	Contact with the licensee to write up the pre-auction offer.
Wednesday 21 January, 6.28 pm	Text message from the licensee confirming the complainant's offer would be presented to the vendors later that evening.

Wednesday 21 January, 8.30 pm	Telephone conversation with Ms Woods-Markwick discussing the pre-auction offer and date and time the vendors wished to have to auction. The licensee was present on speakerphone.
Wednesday 21 January, 9.00 pm	Telephone conversation with the licensee
Thursday 22 January, 1.29 pm	Text message from the licensee asking to meet the complainant in person.
Thursday 22 January, around 3.00 pm	In-person conversation with the licensee regarding the auction time on Friday 23 January and the complainant's participation.
Thursday 22 January, after meeting with the licensee	Conversation with Mr Beere during which the complainant laid a complaint and Mr Beere agreed to represent him at the auction.
Friday 23 January, 7.38 am	Text message from the licensee reminding the complainant of the auction time that evening.
Friday 23 January, 7.56 am	Text message from the licensee wishing the complainant the best for the auction.
Friday 23 January, 11.44 pm	Email from Mr Beere acknowledging the conversation of the previous day and asking the complainant to complete a telephone bid authority.
Friday 23 January, around 6.30 pm	Auction, telephone contact with Mr Beere.

[42] Mr Hodge submitted that the allegations concerning the reasons the auction date could not be brought forward do not involve the licensee so that it is open for us to take no further action in respect of this issue. He also puts it that if we find that the licensee had greater involvement in that telephone conversation, there is no evidence to suggest that any of the reasons given were false. He puts it that the text message evidence supports the reasons given by Ms Woods-Markwick, namely, that the vendors indicated they would be away for the weekend in a text message sent to the licensee at 11.16 on 19 January 2015, two days prior; and a further text message from the vendors sent at 10.16 pm on 21 January 2015, after the telephone conversation with the complainant, confirms they did not want to bring the auction forward *“for all the reasons we thrashed around with you”*. Mr Hodge also puts it that this indicates that reasons were discussed with the licensees.

[43] Mr Hodge further submitted that it is open to us to find, as the Committee did, that any slight confusion or inconsistency is due to the licensee's and Ms Woods-Markwick's efforts to placate the complainant's demands.

Issue Two: Did the licensee act in the complainant's interest as a "major interest party" when setting the auction time and date?

[44] Mr Hodge noted that the complainant says that he was not consulted when the auction time of 6.30 pm on Friday 23 January 2015 was set; and that he felt blackmailed into accepting that time and was forced to become a telephone bidder.

[45] Mr Hodge also noted the evidence of the licensee that, when the offer was first made, the complainant was told that the auction would "*probably*" be brought forward, but gave no guarantees.

[46] Mr Hodge refers to the licensee having said that during the telephone conversations on the night of 21 January 2015 that she explained that the vendors would make the decision about the auction time, and this was reiterated by Mr Beere in an email prior to the auction. It was emphasised that the licensee says that the auction time of Friday 23 January 2015 at 6.30 pm was set after she had contacted prospective purchasers to check their availability, and the final decision was left to the vendors after a number of prospective purchasers indicated they would be available.

[47] Mr Hodge submits that licensee has fiduciary and contractual obligations to act in the best interests of their clients under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, regs 6.1 and 9.1. The term "*client*" is defined as "*the person on whose behalf an agent carries out real estate agency work*" (Real Estate Agents Act 2008, s 4), and the clients in this situation where the vendors with whom the licensee had a contractual agency agreement.

[48] Mr Hodge also submits that the complainant is not a client but a "*customer*" which is defined in the Act as "*a person who is a party or potential party to a transaction*". Under reg 4.1 of the Rules, licensees are obliged to act in good faith and deal fairly with customers, but do not act on behalf of customers Rule 6.2. At all times licensees continue to have stronger duties to their clients than to their customers.

[49] It is also submitted for the Authority that, when setting the auction date and time, the licensee was obliged to engage the complainant in good faith and deal with him fairly, but that the licensee also had a duty to follow her clients' instructions and act in their best interests. The auction date and time was set in accordance with the vendors' instructions after the licensee confirmed that prospective purchasers were available to take part.

[50] Mr Hodge submits that, on the evidence available, it is open to us to find the licensee engaged with the complainant fairly and in good faith. It is put that the licensee referred all of the complainant's requests for a particular date and time to the vendors for consideration. She kept the complainant updated of the vendors' decisions in a timely manner. When the selected auction time did not suit the complainant, she suggested the option of participating as a telephone bidder. It is submitted that the evidence does not suggest that the licensee was other than professional when communicating with the complainant.

[51] Mr Hodge noted that the complainant seems to suggest the licensee acted without proper authority from the vendors when setting the auction date and time, but no evidence has been produced to support this contention.

[52] It is submitted for the Authority that it is open to us to take no further action in respect of the licensee's conduct in this issue.

Issue Three: Was the complainant disadvantaged by the telephone bidding process?

[53] The complainant was represented at the auction by Mr Beere. The complainant says that he struggled to hear the auctioneer and what was going on. He says that, as a result, he could not fairly compete with other parties.

[54] The evidence indicates that the licensee was standing next to Mr Beere at the auction but had no involvement in the telephone bidding process.

[55] It is submitted for the Authority that any allegations related to the telephone bidding process do not involve the licensee and it is open to us to take no further action in respect of this issue.

The Stance of the Complainant Mr N Farac

[56] Essentially, the complainant's stance seemed to be that he considers that all customers needed to be treated fairly by the licensee even to the extent that the vendor could not be favoured ahead of such potential bidders. We do not accept that as law.

[57] The complainant maintains that he was lied to by the licensee and that she was incompetent. Frankly, we find that type of allegation to be unfounded in this case. He also seemed to be submitting that his complaints were not heeded by the agency, but we find no evidence of that.

[58] The complainant asserted that his loss of faith and trust in the licensee was a detrimental factor for the vendors and so must be unsatisfactory conduct by the licensee. He did not seem to accept that it was for the vendors to give directions about the marketing of their property and that they did not seem to regard his offer price as particularly compelling or attractive to them.

[59] The complainant put it that it has been proven to us that the evidence of the licensee is untrue and that, at the time he made his pre-auction offer, she promised him that the auction would be brought forward to the Friday afternoon. He emphasised that we had not heard evidence from the vendors of their instructions at material times to the licensee but, of course, it was up to him to have called them as witnesses before us, by subpoena if necessary. In any case, we find the evidence of the licensee and Ms Woods-Markwick to be credible.

Discussion

[60] We record that the licensee wished to add nothing further to the evidence which we have referred above.

[61] Simply put we agree with the submissions presented to us by Mr M J Hodge as counsel for the Authority. We also agree with the reasoning of the Committee to which we have referred above.

[62] In his final oral submissions Mr Hodge noted that the complainant seemed to feel that the licensee was “*his*” agent whereas her fiduciary duty and loyalties were to her vendor clients rather than to the complainant. Mr Hodge also put it that the evidence shows that the complainant wished to be directive about the sale procedure whereas that was a prerogative of the vendors. We agree.

[63] Mr Hodge pointed out that, in any case, much of the dealing at material times between the agency and the vendors was handled by Ms Woods-Markwick who found that the vendors would have preferred another week’s marketing of the property and sought to be out of town for the weekend after the pre-auction offer was submitted by the complainant. Also, it was not easy to arrange an auctioneer when auction times were changed nor to fit the convenience of other prospective bidders. Mr Hodge submits that there had been no misleading conduct by the licensee.

[64] Mr Hodge again put it that real estate agents need to be firm in applying the lawful instructions of the vendor.

[65] Mr Hodge submitted that the inability of the complainant to attend the auction simply followed from the directions of the vendors about auction arrangements and they were perfectly entitled to give those directions and require them to be implemented and that the licensee could not be regarded as responsible for that. He put it that, in any case, the complainant was hardly disadvantaged because he had every chance to bid through Mr Beere but seemed to have got himself so upset that he would not bid and therefore it mattered not whether he had attended the auction in person or by telephone.

[66] Finally Mr Hodge observed that to initially provide the complainant with the wrong lease for the property was a freely admitted mistake by the licensee which she immediately corrected and could hardly be regarded in itself as “*unsatisfactory conduct*” as defined in s 72 of the Act, and is a fairly minor lapse in the circumstances.

[67] The complainant simply misunderstands that control of the selling of the property was, at all times, in the hands of the owner/vendors and it was the licensee’s duty, in general terms, to obey their lawful instructions. That meant that the licensee was perfectly entitled to tell the complainant what the auction arrangements would be including, for instance, that the auction was to be at 6.30 pm on the Friday and they could accept that and come and bid, or not.

[68] There seemed to us to be a slight personality problem between the complainant and the licensee which could be no fault of the licensee. She is youngish, and English did not seem to be her first language, but she was dedicated to the interests of the vendors, although she seemed to us to have been perfectly fair to interested bidders. There is no doubt that the vendors are very content with the licensee’s efforts, marketing, and the outcome.

[69] The complainant seems a somewhat demanding person, probably, because he appears to be a very effective business person, but did not seem to understand that the vendors were calling the tune in terms of the marketing arrangements of their own property and, as we have indicated above, it was the licensee’s duty to comply

with the directions of the vendors so long as they were lawful, which was certainly the case in this matter.

[70] It seems to us that the complainant was rather over-pressing to the licensee at material times and did not understand that the overall prerogative in terms of marketing this property rested with the vendors and that, if the complainant was a genuine, serious bidder, he needed to fit in with the marketing process adopted by the vendors and implemented by the agency, the licensee, and Ms Woods-Markwick.

[71] Simply put, we find no merit whatsoever in the appellant's appeal case to us and, as already indicated, we consider that the Committee was absolutely correct in its reasoning and decision.

[72] Accordingly, this appeal is dismissed. We observe that, had we the power to do so, we would have ordered costs against the complainant.

[73] Pursuant to s 113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s 116 of the Act.

Judge P F Barber
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member