

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 33

READT 068/15

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

BETWEEN **EDWARD DE HEER**

Appellant

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

First respondent

AND **MARIA BERNARD**

Second respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Mr G Denley – Member
Ms N Dangen – Member

HEARD at AUCKLAND on 31 March 2016

DATE OF DECISION 9 May 2016

APPEARANCES

The appellant in person
Ms R Savage for the first respondent
No appearance for the second respondent

DECISION OF THE TRIBUNAL

[1] Mr de Heer has had a varied career in property development and finance prior to deciding to become a real estate agent.

[2] By October 2013 he had completed the necessary study in order for him to become a salesperson. During his first six months as an agent he required supervision. Supervision is provided by his branch manager. Mr de Heer was working for Barfoot & Thompson in Devonport at the relevant time and he was supervised by Mr Dean Wotherspoon. Mr de Heer and Mr Wotherspoon have been found guilty of unsatisfactory conduct by the Complaints Assessment Committee in a decision dated 19 June 2015. In that decision Mr de Heer and Mr Wotherspoon and

Ms Lee, (a temporary branch manager at Barfoot & Thompson while Mr Wotherspoon was away), were all found guilty of unsatisfactory conduct for their conduct arising out of the sale of a property at 11 Merwood Lane, Devonport. Mr de Heer appeals against the finding of unsatisfactory conduct against him.

[3] Merwood Lane was a vacant section and it appears to have been languishing on the books of Barfoot & Thompson as a general agency for some time prior to these events. When Mr de Heer became an agent he was desirous of building his property listings and he contacted Mr Sam Liu, the vendor. Mr Liu was a director of the company that owned the land-CanTrust Investment (Auckland) Limited. The Tribunal heard that the section was difficult as it was a relatively small size and subject to a number of restrictions shown on the title, including an esplanade strip. Mr de Heer told the Tribunal that he spent some considerable time prior to these events understanding the site, the reason that it had not sold and met with Mr Liu and discussed the sale with him. He and Mr Liu discussed whether or not Mr Liu should construct a house on the property and sell the site as both a land and house package. Mr de Heer told the Tribunal that Mr Liu was keen on doing that and was making the necessary enquiries about taking these steps.

[4] At about this time a party became interested in the land, a Mr Jerry Liu. Mr Jerry Liu made a series of offers for the property between 13 September and 4 October 2013 in the name of Carol Cai, his mother, but these had not been successful. Each time Mr Sam Liu had rejected the suggested price and counter-offered at the original asking price of \$459,000. On 5 October 2013 Jerry Liu made an offer of \$430,000 in his own name. This offer was drafted by Mr de Heer, checked with Mr Wotherspoon, signed by Jerry Liu and then forwarded to Sam Liu. On 8 October Mr Sam Liu again rejected the offer and counter-signed at \$459,000, but returned only the front page of the draft agreement. On 9 October 2013 Jerry Liu told Mr de Heer that he was not interested in further increasing his price.

[5] Later on that day Mr de Heer met Ms Bernard and a Mr Ron Dykman and showed them the section. Ms Bernard is the complainant. She told the Real Estate Agents Authority that she was very interested in the section and was going to undertake some further investigations after her inspection. She told Mr de Heer this and she went away to do so. She was unaware (because Mr de Heer did not tell her) that Mr Jerry Liu had made an offer on the property and this had been unsuccessful. She asked for and was sent a copy of the title later that day. At approximately 5.00 pm on 9 October 2013 Mr de Heer heard from Jerry Liu that he was still interested in purchasing the property. This may well have been prompted by Mr de Heer advising him that Ms Bernard was interested in the property. Mr Liu then agreed to accept the counter-offer and to pay the \$459,000 that Sam Liu had asked for. Mr de Heer informed Sam Liu of this development. Mr Sam Liu accepted this offer (orally).

[6] Mr de Heer was of the opinion that after this oral confirmation the parties had a concluded agreement. Mr Jerry Liu would not counter-sign the agreement at \$459,000 as Mr Sam Liu had only signed and returned the front page of the agreement. He wanted to see the full agreement. It was arranged that on 10 October Mr de Heer would travel to Pukekohe where Sam lived, have the agreement properly executed by Sam and then return and have it executed by Jerry.

[7] The next morning (10 October) Mr de Heer was driving to meet Mr Sam Liu when he had a phone call from Ms Bernard saying that she wanted to make an offer on the property. Mr de Heer told her that another party had made an acceptable offer, that there was an agreement already in place and that he was just tidying up the paperwork. He did not at this time stop the car and ring Mr Wotherspoon (his manager), or advise Mr Sam Liu that he had potentially another offer. Instead he met Sam who signed the remainder of the agreement. He then had Jerry Liu sign the agreement. Mr de Heer had told Ms Bernard that if anything changed with the previous offer he would let her know. She did not hear from him and so about 1.00 pm on 10 October her friend Mr Dykman phoned Mr Wotherspoon and told him that Ms Bernard was still waiting to hear. Ms Bernard heard from Mr de Heer shortly after this call who told her that everything had been completed with the prior agreement.

[8] Mr Dykman then visited the Barfoot & Thompson Devonport office and demanded that Ms Bernard's offer be put as a multi-offer to Mr Sam Liu. Mr Wotherspoon and Mr de Heer explained that Mr Jerry Liu's offer had already become unconditional before Ms Bernard decided to make an offer. However just after Mr Dykman left the office Mr Jerry Liu arrived at the office wanting to pull out of the agreement. He asked to see the signed agreement and he crossed the front page out in an attempt to cancel it. Mr de Heer then called Ms Bernard and told her there was an opportunity to make an offer. A meeting was arranged for the next morning, 11 October. However later on the 10th Mr Jerry Liu returned to the office, confirmed he would proceed with the agreement and paid the deposit. Ms Bernard was informed of this and that she could not now make an offer. Between 11 and 16 October there were several telephone calls and emails between Mr Wotherspoon and Ms Bernard regarding these events and eventually Ms Bernard made a formal complaint. The gist of her complaint was that Mr de Heer did not present her offer to Sam Liu in a multi-offer situation. She also alleged that there was a failure by Mr Wotherspoon to properly supervise Mr de Heer. During the course of the investigation of the complaint two other matters arose:

1. The reference or endorsement provided by Sam Liu for Mr de Heer.¹
2. The failure of Mr de Heer and Mr Wotherspoon to advise the potential purchasers of the existence of the esplanade strip. This arose when Mr Jerry Liu's solicitor requisitioned the title concerning a provision in the esplanade strip that vehicles, (including the owner's own vehicle), could not cross the strip. A resolution was finally reached between Mr Sam Liu and Barfoot & Thompson and Mr de Heer that Mr de Heer would pay the legal costs for the resolution of this issue.

[9] The Committee found that Mr de Heer as a salesperson with less than six months' experience should not have been drafting agreements or advising parties on their legal rights. The Committee found that Mr de Heer's statement, as well as that from Mr Wotherspoon indicate that they both thought it was acceptable for Mr de Heer to take a primary role in the negotiations and in the drafting of agreements. They found that as a salesperson Mr de Heer should have recognised

¹ Page 150 of the bundle of documents.

that the esplanade strip on the certificate of title was potentially of concern and thus he should have advised all parties to be aware of the issue and to seek legal advice prior to entering into the agreement. Further they found he should have been supervised as to these concerns. The Committee found that Mr de Heer breached Rules 5, 6.2 and 6.3 and that he did not deal in a good-faith manner with the complainant over her prospective purchase of the property and that he failed to present two offers to Mr Sam Liu when he should have done so. He was also found to have breached Rule 6.4 in that he should have disclosed the complainant's interest to the vendor. Further the Complaints Assessment Committee found that Mr de Heer was in breach of Rule 10.2 in that he did not provide a written appraisal for the sale of the land alone, rather the appraisal based on both the house and land package.

[10] The only evidence before the Tribunal was given by Mr de Heer who explained to the Tribunal his previous involvement in working in the property area and his view that he was competent in property dealings. He also told the Tribunal that the title was a complicated title and he would not have let [his words] Ms Bernard enter into an agreement without having done more research into the title and the property with the council and her lawyer.

[11] Mr de Heer told the Tribunal that he believed that there had been a completed agreement entered into between Sam and Jerry Liu on 9 October 2013 that was binding and that all that was needed was a "*tidying up of the paperwork*". He did not seem to recognise that a contract for land is never completed until recorded in writing, and that at the time Ms Bernard rang to say she wanted to make an offer there was no completed agreement between Jerry and Sam Liu.

[12] The Tribunal asked Mr de Heer why he did not call Mr Wotherspoon when he received the phone call from Ms Bernard. He said that this was because as far as he was concerned the agreement between Sam and Jerry was completed and he just needed to get Sam to sign the documents. He again repeated the comment that he would not have let Ms Bernard enter into an agreement without further research.

[13] The Tribunal have considered the CAC's decision. It seems that Mr Wotherspoon and Ms Lee have not appealed to the findings that they did not adequately supervise Mr de Heer. The Tribunal agree with this decision. This sorry chapter of events indicates quite clearly why a new agent, even one who seems confident and competent, requires ongoing supervision for all of the required six months and possibly longer. A new agent simply does not know what they do not know. Mr de Heer, obviously experienced in property management, appeared competent and Mr Wotherspoon, and then Ms Lee, allowed him more freedom because of this.

[14] However this was Mr de Heer's first agreement for sale and purchase and he should have been closely supervised, monitored and supported by Barfoot & Thompson. In the Tribunal's view it would have been appropriate for Mr Wotherspoon as the supervisor to have gone with Mr de Heer from Devonport to Pukekohe to ensure that the signing of this first agreement, after many false starts, went smoothly. Mr Wotherspoon then would have been on hand when the call from Ms Bernard came in. Further the title, even to the lawyers on the Tribunal, looks complicated. Mr Wotherspoon should have assisted Mr de Heer with this. The title is

subject to a drainage easement, a sewage right (x 3), various right of ways, a pedestrian right of way and gross drainage easements, various consents under the Resource Management Act which affect the land, a land covenant (which will affect the use of the property could be put), rights to take water sewage and to convey water, gas, electricity, telecommunications, computer media across the land and finally the esplanade strip. In accordance with the Tribunal's previous decisions the duty of the agent (and when supervised, of his or her manager) is to ensure that they understand the restrictions which the title is subject to. If a vendor will not assist in explaining the title then legal advice is required. There does not appear to have been any legal advice taken over the title or even by the vendor's lawyers. Mr de Heer said that the title was too complicated and was it inappropriate to provide everybody with copies of all of the interests, and instead he would have told them to take legal advice.

[15] The Tribunal agree therefore that there was a failing in the supervision by Mr Wotherspoon, but what of Mr de Heer's own conduct? Section 36(2A) provides that a person who holds a licence as a salesperson and has had less than six months' experience cannot prepare an agreement for sale and purchase. Clearly the preparation of the agreement was in breach of s 50. We also find that Mr de Heer was in breach of s 36(2A) because he did prepare the agreements and amended the agreements without reference back to his supervisor.

[16] However the Tribunal are more concerned with two aspects of Mr de Heer's conduct. The Tribunal recognise that this was Mr de Heer's first agreement and it was complicated and difficult. However as a practising real estate agent Mr de Heer is required to know the obligations which fall upon him as an agent. The Tribunal has sympathy for Mr de Heer as a brand new salesperson but this does not reduce his professional obligations. This failure reflects an often stated concern of the Tribunal. People buying houses and land are entering into probably the most significant financial transaction of their lives. A title holds a wealth of information, but, as in this case, it can be difficult to understand the restrictions on the title unless you are a lawyer. The Tribunal have consistently said that real estate agents are not expected to understand the nuances of restrictions on titles but they **must** recognise that there are issues with the title and be sufficiently informed, either by getting the vendor to speak to their solicitor and getting it explained and then providing that information to potential purchasers, or by themselves instructing lawyers and then obtaining copies of instruments which may be relevant and detrimentally affect the land. There is no doubt in this case that one glance at the title would suggest that what was needed was to go to Mr Sam Liu and say "*we need to speak to your solicitor about the restrictions on the title. Please he/she you provide us with this information?*" Mr de Heer as a new real estate agent should have been sufficiently aware of the potential difficulties so that he was able to identify that there were concerns and speak to his manager about them. Rule 5.1 says that a licensee must exercise skill, care, competence and diligence at all times when carrying out real estate agency work. Rule 5.2 says that a licensee must have a sound knowledge of the Act, Regulations and Rules issued by the Authority and other legislation relevant to the real estate agency work. We consider that Mr de Heer's conduct in not mentioning to Mr Jerry Liu at all any concerns about the title, or finding out any further information from Mr Sam Liu did fall short of his obligations under Rules 5.1 and 5.2.

[17] The Committee also found that the agent breached Rule 6.2: "*duty to act in good faith and fairly*", Rule 6.3: "*not engage in conduct likely to bring the industry into disrepute*" and Rule 6.4: "*not misleading a customer or client or providing false*

information or withhold information that should by law and fairness be provided to a customer or client”.

[18] What were Mr de Heer’s obligations when Ms Bernard rang him? Was he obliged to put both agreements to Mr Sam Liu or was he entitled to assume (as he did) that he had a concluded sale which simply required documentation? This potentially could be seen to be a difficult situation for Mr de Heer as he had received a verbal confirmation from Mr Jerry Liu, but Mr Liu refused to sign the agreement until Mr Sam Liu had signed it which meant that the agreement was not signed until the next morning. One could imagine that if he had not proceeded to have Mr Sam Liu sign the agreement that Mr Jerry Liu could have also felt aggrieved that he was not acting fairly towards him. However as a matter of law there was no concluded contract. The Tribunal consider that at the very least Mr de Heer should have recognised the legal position and sought advice from his manager. We recognise that in this particular case it may have been difficult to navigate the way through the tricky situation but the best way would have been honesty and clearly explaining the situation to the vendor and letting the vendor determine the way forward either by way of multi-offer, (in the hope of getting more money for the section), or by proceeding to execute the signed agreement with Mr Sam Liu. In any event what Mr de Heer should have done, and what as a new agent he failed to appreciate, was to seek advice and to advise the vendor. He did neither and the consequences were a confused muddle which led to an expensive outcome for all. Mr de Heer too should have recognised that when Mr Jerry Liu defaced the agreement that he was unable to cancel the agreement and that there was still a binding agreement.

[19] We conclude that Mr de Heer did breach Rule 6.2 and 6.4 by failing to advise Mr Sam Liu fully and fairly of all these events and by not immediately seeking advice from his supervisor.

[20] We have considered whether there is any concern about the letter of endorsement written by Mr Sam Liu. We do not find that Mr de Heer is in breach of any obligations. He acknowledges that this was a letter he prepared but Mr Sam Liu agreed to sign it and he did. There was no coercion by Mr de Heer. We dismiss any finding on this point.

Written appraisal

[21] Again we do not consider that Mr de Heer was at fault here. He was preparing to sell the property as a land and house property. The offer to purchase the section did not remove this. There was no breach of Rule 10.

[22] Accordingly we uphold the Complaints Assessment Committee’s decision to find that Mr de Heer was in breach of his obligations under Rule 5.1 and 5.2 with respect to the title and Rule 6.2 and 6.4 with respect to his failure to communicate with Mr Sam Liu. We dismiss all other findings.

[23] Having said this we are aware that this was Mr de Heer’s first agreement and understand that this experience caused him to decide that real estate agency work was not for him and to leave the profession.

[24] With respect to penalty the Tribunal find that the appropriate penalty for Mr de Heer in all the circumstances of this case is to censure him and impose a modest fine of \$1,000 to recognise the costs of the complaint upon the real estate agency

profession as a whole. No other orders are needed given Mr de Heer does not work as a real estate agent any more.

[25] Accordingly the Tribunal modify the decisions of the Complaints Assessment Committee as set out above.

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

Ms K Davenport QC
Chairperson

Mr G Denley
Member

Ms N Dangen
Member