

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 34

READT 72/15

UNDER THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF AN APPEAL UNDER SECTION 111 OF THE ACT
BETWEEN MARTIN BEST
Appellant
AND THE REAL ESTATE AGENTS AUTHORITY
(CAC 406)
First Respondent
AND PAUL ELLIS
Second Respondent

Hearing: 6 April 2016

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

Appearances: The appellant in person
Mr J Simpson for the first respondent
Ms S Mackie and Mr T Wood for the second respondent

Date of recalled decision: 16 May 2016

Date of amended decision: 27 July 2016

AMENDED DECISION OF THE TRIBUNAL FOLLOWING RECALL

[1] Mr Best and his wife owned a large property in Ohariu Valley Road, Johnsonville, Wellington. They decided they wished to sell the property and to list the property with Mr Rodney Leitch who was a licensed agent employed by Harcourts Johnsonville. Mr Leitch came to see the Best's at their property and took instructions to list the property for sale. Mr Leitch had some difficulty in deciding what an appropriate listing price for the property ought to be, or how to do his appraisal as the property was unique and in an area with low sales. He therefore made a second visit to the property with Mr Ellis, the business owner. Because of the unique nature of the property the agents did not provide a written appraisal of the

property, instead they decided to list the property for auction. The listing agreement was based on a sale price of \$2,000,000 which gave a commission of \$46,000. Mr Ellis was not particularly involved with the appraisal but he recalls discussing the methods of sale with Mr Leitch and Mr Best and deciding that because of the unique nature of the property a sale by auction would be the best method of sale. He recalls that it was difficult to obtain comparative sales. He did not have any supervisory role with Mr Leitch and does not appear to have had a hand in completing the listing agreement; or the (non) completion of the appraisal.

[2] However once the property was listed Mr Ellis decided to pay a visit to the second open home that Mr Leitch was running. Mr Leitch was assisted by another agent from Harcourts.

[3] Mr Ellis told the Tribunal that he frequently (every second Sunday) visits the properties which Harcourts Johnsonville are selling, to make sure that the open homes are being properly and professionally run. Therefore on Sunday 9 November he arrived at the open home and met a Mr John Mackie who attended the open home with his partner and children. Mr Mackie and Mr Ellis were friends and were also business associates in that they were both directors of an entity called Somoh Commercial Limited which owned a commercial building in Johnsonville, and also the "Johnsonville Bar" which apparently operated out of premises in the commercial building. Mr Mackie was also a Police Officer. His partner and children were very keen on the property, but Mr Mackie appears to have been less keen and Mr Ellis was left with the impression that the property was too expensive for Mr Mackie. He told the Tribunal that he had no further discussion with Mr Mackie after 9 November until 19 November when he telephoned Mr Mackie the day before the auction to check if he was attending the auction. Mr Mackie said he would like to attend but he had no intention of bidding. Mr Ellis said he did not accompany John Mackie to the auction but he stood near him in the auction room. The auction was passed in with no bids. Mr Ellis said that he subsequently had an informal chat with Mr Mackie about the property. Mr Mackie said that he thought the property was worth between \$1.3 and \$1.5 million but that he would only consider paying \$1,000,000 if he were actually to make an offer. He never made any offer. Mr Mackie concurs with this evidence.

[4] Mr Ellis said that a week later Mr Best came into the office visibly agitated saying that "*Harcourts were useless*" because they had not been able to sell his property. He also wanted a large-print advertisement advertising the property to be placed in the Dominion Post for the weekend. Mr Leitch and Mr Ellis discussed this with him and Mr Best signed an authority to

spend another \$2,000 for this advertisement. During this meeting Mr Best said that he was very unhappy with the agency as they had not even achieved one offer for the house. Mr Ellis offered to see whether he could get an offer for it at \$1,000,000. Mr Best said “yes” but later said that he would not accept the offer at that price and that Mr Ellis should “*not bother*”. Mr Ellis did however telephone Mr Mackie and asked him if he was interested in making an offer. Mr Mackie said that his best offer now would be about \$850,000. Mr Ellis thought he was joking and told Mr Leitch about the conversation. Subsequently Mr Best refused to pay the invoice for the advertisement placed in the Dominion Post. Mr Ellis’ co-owner of the business Glenys, wrote a letter to Mr Best dated 19 December 2014 seeking payment of the \$2,000 advertisement and said in the last paragraph of the first page “*I remind you that we did find you a buyer in the market. However that buyer was not prepared to pay anywhere near what you had instructed us around price*”. Mr Best questioned this letter saying, rightly, that no offer had been received.

[5] Mr Best told the Tribunal that he and his wife were very concerned that there was no one prepared to bid at the auction and they therefore began to do some investigative work. They discovered that there was a relationship between Paul Ellis and John Mackie. They became suspicious at the auction because Mr Ellis and Mr Mackie were talking. Mr Best then searched the internet. He said that Harcourts had promoted Mr Mackie as the potential buyer prior to the auction and said that he and his wife had been extremely distressed to find that they were being deceived by the agents, which led to the perception that the licensees were “*conspiring to defraud us*”. He told the Tribunal that the impact upon him and his wife because of the stress of these concerns and the non sale of the house. He and his wife believe that the entire sales process failed as a direct result of Harcourts’ actions, which meant that they lost the opportunity to sell the property fairly. They put considerable expense and effort into presenting the property and considered that all of this was wasted. He complained to the REAA. The REAA found Mr Ellis and Mr Leitch guilty of unsatisfactory conduct.

[6] Mr Best appealed this decision stating that the decision of the Complaints Assessment Committee that Mr Ellis was in breach of Rule 10.2 and 10.3 (with regard to the appraisal) was insufficient. Mr Best’s view is that the Real Estate Agents Authority did not investigate their complaint properly and did not determine to lay a charge against Mr Ellis.

[7] Mr Ellis denies any wrongdoing and denies he needed to disclose his friendship as no sale or offer came from Mr Mackie. He has challenged the finding of misconduct.

The role of the Tribunal on appeal

[8] There have been numerous discussions about the proper role of the Tribunal on appeal. The most recent statement is the decision of the Tribunal in *Eichelbaum* [2016] NZREADT 3 in which the Tribunal held that when the Tribunal is considering an appeal from a decision of a Complaints Assessment Committee, the appellant should not have an opportunity to completely redo the case that was before the Complaints Assessment Committee. Rather the Tribunal should consider the evidence on the basis of the material that was before the Complaints Assessment Committee and further evidence may only be admitted where there are good reasons for doing so.

[9] In this case however we have not restricted Mr Ellis or Mr Best from calling further evidence and amplifying the case that was put before the Complaints Assessment Committee. We also note that Mr Ellis did not cross-appeal the finding of unsatisfactory conduct, although it is clear from the submissions of his counsel that in responding to Mr Best's appeal he wishes the Tribunal to reconsider the finding made and set aside the finding of unsatisfactory conduct against him.

[10] The Tribunal does have wide powers on appeal and their powers under s 111(4) of the Real Estate Agents Act 2008 are to either modify, reverse or uphold the decision of the Complaints Assessment Committee. In doing that the Tribunal is not limited to a consideration of only the appeal of one party but must reconsider the evidence again, including the evidence of the non-appealing party. It does however put the Tribunal in a difficult situation where the party that has not appealed nonetheless wants to take the benefit of appeal to set aside findings made against them. As a matter of good practice the Tribunal note that a party who is unhappy with a decision of the Complaints Assessment Committee should appeal, and appeal within time, because the Tribunal does not have a separate provision for cross-appeal. However as we set out below, given our findings on this case that issue makes little difference.

Issue 1

Is the decision of the Complaints Assessment Committee wrong in that the finding of unsatisfactory conduct was too light and a finding of misconduct ought to have been made against Mr Ellis?

[11] The onus is on Mr Best to establish for us that the conduct complained of was so serious a breach of the agent's obligations and duties that it should constitute misconduct.

[12] The Tribunal has adopted the statement of what constitutes misconduct as set out in *Pillai v Messiter* in which the Court said:

“The statutory test (for misconduct in a professional respect) is not met by mere professional incompetence or deficiencies in the nature of the profession, something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and abuse of the privileges which accompany registration.”

[13] The question for the Tribunal is whether the conduct complained of falls within this definition and the wording of s 73, which requires the Tribunal to inquire whether the conduct is so bad that other agents of good standing would reasonably regard the conduct as disgraceful.

[14] On the facts of this case Mr Ellis knew Mr Mackie. Mr Mackie, while interested in the property, did not intend to, or perhaps could not afford (or both) to purchase the property. The question therefore is whether in those circumstances Mr Ellis had an obligation to disclose their relationship to Mr Best.

[15] The Complaints Assessment Committee found that Mr Ellis should have disclosed this information in the circumstances of this case.

[16] We are not satisfied on the evidence before us that Mr Ellis' failure was so serious a breach of his obligations and such misconduct that other agents would regard it as disgraceful. In the absence of an actual sale and evidence of a clear conflict this breach must be at the lower end of the disciplinary scale. Misconduct is a very serious breach of an agent's obligations and is conduct that is significantly below the standards set by this Tribunal and the Rules and the Act. We do not find that the facts reach this level of seriousness. There was no offer from Mr Mackie and thus the potential conflict of interest did not apparently occur to Mr Ellis. But should it have occurred to him as best practice always favours openness? The Tribunal consider that it would have been in the best interest of all parties for Mr Ellis to have told Mr Best that Mr Mackie was a friend. Hindsight is always a powerful torch and now all parties should see that it would have been in the best interests of both Mr Ellis and Mr Best for Mr Ellis to have disclosed this friendship to the vendors. There is no doubt that the failure to disclose had a powerful impact upon Mr Best and his family, who, in this most important

of all financial transactions believe that they were disadvantaged by the failure to disclose their friendship.

[17] On the facts of this case the Tribunal consider that Rule 6.4, (which requires a licensee to disclose information which should in fairness be provided to a customer or client), this was breached – this relationship should have been disclosed to Mr Best. This is not a general requirement to disclose in every case before a sale. But in this case given that the interest by Mr Mackie was the only interest in the property, and that Mr Mackie was apparently being touted as a potential purchaser, it would have been sensible for Mr Best to have been aware of the relationship. We consider therefore that it was unfair not to disclose the relationship. We therefore uphold the decision of the Committee to find that Mr Ellis breached Rule 6.4.

Appeal on Penalty

[18] In addition to challenging the decision of the Complaints Assessment Committee set out above. Mr Best raised other points of appeal:

- (i) The Complaints Assessment Committee did not impose the appropriate penalties on the finding of unsatisfactory conduct, and that the penalty was different to the penalty which was imposed on licensee Leitch for breach of the same rule; and
- (ii) The Complaints Assessment Committee has not considered adequately or applied its own findings by omitting references to Rules 6.1, 6.2, 6.4 and 9.2 of its decision on penalty; and
- (iii) These were significant breaches which should have resulted in a significant penalty, or the Complaints Assessment Committee should have given reasons as to why that was not the case.
- (iv) Mr Best's reimbursement of costs were not considered, or no reasons given for the decisions about the orders.

[19] Mr Best sought to have the Tribunal reconsider the impact of the offending on him. He requested that his fees be waived and his legal expenses be paid.

[20] The penalties open to the Tribunal for breach of the Client Care rules are those prescribed in s.93 Real Estate Agents Act and are in summary (and as relevant).

- (a) Censuring the licensee;
- (b) Implementing an agreed settlement;
- (c) Ordering the licensee to apologise;
- (d) Ordering the licensee undergo training or education;
- (e) Ordering the licensee to reduce, cancel or refund fees, where the work is subject of the complaint;
- (f) Ordering the licensee to rectify at his or her own expense any error or omission;
- (g) Ordering the licensee to pay a fine not exceeding \$10,000;
- (h) Ordering the licensee to make their business available for inspection;
- (i) Ordering the licensee to pay the complainant any costs or expenses incurred in respect of the enquiry, investigation or hearing.

[21] Pursuant to s.111 the Tribunal may exercise any of the powers of the Committee on appeal.

[22] It is unlikely that, despite the Complaints Assessment Committee finding that Mr Ellis was in breach of multiple rules, that this would have had the effect of significantly increasing the appropriate penalty for Mr Ellis. It is the facts of a case and the severity of the conduct which determine the appropriate level of penalty not the number of Rules breached. By way of example, very serious conduct can be as a result of a breach of one Rule or many. The Tribunal have found that there was no actual conflict of interest, just an obligation for Mr Ellis in the circumstances of this case to have disclosed his close friendship with the only potential purchaser. Thus a penalty is likely to be at the lower end of the available penalties as the conduct was not egregious.

[23] The Complaints Assessment Committee imposed an order of censure on Mr Ellis. They noted Mr Best's submission that his marketing fees be cancelled and that he be reimbursed for the legal fees (\$1,050 plus GST), but they declined to make such orders.

[24] Licensee Leitch, who was found to have been in breach of his obligation to provide a written market appraisal was fined the sum of \$1,500.00.

[25] There is no connection between the conduct of Mr Leitch and the conduct of Mr Best. The facts on which the breach of the Rules were founded are different and make comparisons inappropriate.

[26] A penalty is imposed upon a licensee for three purposes:

- (a) To maintain standards of the real estate profession;
- (b) To protect public safety to ensure that licensees who are not complying with the Act are suitably regulated; and
- (c) In some circumstances to punish the agent.

[27] The Tribunal have considered these purposes and do not consider that there is a need for any penalty to punish the respondent or protect the public. An order which reflects the need to maintain standards is appropriate in this case. However as there was no actual conflict of interest, rather just the need to be open with Mr Best, the appropriate penalty is a modest penalty. The finding that we have made against Mr Ellis is more in the nature of a lesson to the profession (and to Mr Ellis).

[28] We consider that a censure, which is a mark of disapproval by the Tribunal and the profession to Mr Ellis, and which is a significant penalty for any professional, is sufficient to mark the Tribunal's concerns. Mr Best has not been able to point to any further evidence of culpability which would suggest to us that a more harsh penalty would be appropriate or should be imposed. A modest fine might have been added to the penalty by the Complaints Assessment Committee but the Tribunal does not consider that it should impose its own views on the exercise of the discretion of the Complaints Assessment Committee on penalty. The Tribunal has more limited powers to overturn a decision where it is made in exercise of a discretion unless manifestly inappropriate. It is not so in this case.

[29] We have considered Mr Best's requests that his marketing fees and legal fees be reimbursed. The Real Estate Agents Act enables such fees to be reimbursed if there is a link between the costs and expenses incurred by the complainant as a result of the enquiry, investigation or hearing by the Committee. The Committee also has the power to reduce, cancel or refund fees charged for work where that work is the subject of the complaint. We do not consider that there is a sufficient causal nexus shown between the actions of Mr Ellis in relation to his failure to disclose his relationship with Mr Mackie and the marketing and other expenses incurred by Mr Best. These were incurred in promoting his house for sale and

were not wasted because of Mr Best's breach of R 6.2. These were a necessary part of the costs of sale. In addition, we do not see that any legal fees that were incurred by Mr Best in relation to this case were linked or necessarily linked to the actions of Mr Ellis.

[30] We acknowledge the real impact this case has had upon Mr Best and his wife, but for the reasons which we have set out above, we do not consider that the unsatisfactory conduct by the agent, which has to be the basis for our imposition of penalty, has been so significant to warrant any increase in the orders which were made by the Complaints Assessment Committee.

[31] The Tribunal therefore dismiss all Mr Best's appeals against the Complaints Assessment Committee's penalty decisions.

[32] 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 N Dangen
Member