

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 52

READT 067/15

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

BETWEEN CLINTON HARDY
Appellant

AND THE REAL ESTATE AGENTS
AUTHORITY (CAC 302)
Respondent

Hearing: 11 April 2016

Tribunal: Ms K Davenport QC – Chairperson
Mr J Gaukrodger – Member
Ms C Sandelin - Member

Appearances: Mr T Rea for the applicant
Ms Lawson-Bradshaw for the respondent

Decision: 12 August 2016

DECISION OF THE TRIBUNAL

[1] Mr Clinton Hardy appeals the decision of the Complaints Assessment Committee dated 22 June 2015. In this decision he was found guilty of unsatisfactory conduct. The complaint which gave rise to this decision was made by a Ms Wright and a Mr Beard. They complained about the conduct of Craig Matheson (an agent), and Mr Saull Hinton (another agent) but the complainants did not know and did not complain about Mr Hardy.

[2] Ms Wright and Mr Beard were trying to purchase a property at 20 Colehill Road, Mangawhai. They complained that they were denied the opportunity to make an offer on the property because agent Matheson ignored the advice from Mike Scott, the licensee working with Ms Wright and Mr Beard that the couple

wished to make an offer on the property. Ms Wright and Mr Beard complained that they were not given the opportunity to make an offer, and that agent Matheson should have acknowledged that there was a multi-offer situation and presented both offers to the vendor. However the vendor received only Mr Matheson's client's offer and accepted it.

[3] Mr Hinton was a salesperson working at Barfoot & Thompson Mangawhai. He acted as the branch's branch manager. Mr Hinton became involved on 26 May 2014 when the complainants realised that their offer had not been presented to the vendors. Mr Hinton called the complainants, talked to them and advised them that he would phone the vendors and check whether the offer made by Mr Matheson's clients had been finalised. He told the complainants that it had after he had spoken to the vendor. The complainants allege that Mr Hinton said that he would check with his manager as to whether there was anything else which could have been done. In the end the Complaints Assessment Committee decided that neither Mr Matheson nor Mr Hinton had breached any rules but decided that Mr Hardy, [who was the regional manager responsible for the agency, and the Complaints Assessment Committee decided who had responsibility for supervision of licensee Matheson and Mr Hinton], was in breach of his obligation to supervise them.

[4] The Complaints Assessment Committee found that Mr Hinton was advertised on the agency website as a branch manager, but in fact Mr Hinton was only a salesperson and his supervising agent was Mr Hardy, the regional and business development manager for the agency on the North Shore. Mr Hardy had no involvement in the events as he was not actively involved in the day-to-day running of the agency. He visited the Mangawhai branch once or twice a month. The Committee concluded that this was insufficient supervision to meet his obligations under the Rules. The Committee referred to the decision of the READT in *Swann* [2014] READT 67 and concluded that Mr Hardy was not involved in the supervision of the agency at all.

[5] Mr Hardy was accordingly found guilty of unsatisfactory conduct. He has appealed this decision. During the hearing the issue arose as to whether or not the supervisory obligations implied by s 50 could be carried out by Barfoot & Thompson

Limited (the agency), or whether in fact they needed to be undertaken by a natural person.

[6] Counsel were invited to submit supplementary submissions on this point.

The Issues

[7] The issues are:

- (i) As Mr Hardy was neither branch manager nor an agent in the Mangawhai and Warkworth branches could he have any obligations under s 50?
- (ii) Can the supervisory responsibilities under s 50 be discharged by Barfoot & Thompson Limited which holds an agent's licence under the Act?

[8] The information that Mr Hardy was the branch manager was provided to the Committee by Barfoot & Thompson at paragraph 17 of a letter dated 19 August 2014. Mr Hardy told the Committee that he had responsibility for business growth and development for 36 offices and that he provided training and advice to Mr Hinton in intensive two to three hour sessions every month. He said that he had on occasion attended in-branch sales meetings with salespersons to present information about the agency. Further he was available to all managers at all times if they had issues or needed advice. The question for the Tribunal is whether these facts make him the agent responsible for the supervision of the Mangawhai branch, or whether Barfoot & Thompson has failed to discharge their obligation under s 50.

[9] Barfoot & Thompson submitted that:

- (i) The agency discharges its obligations under s 50 through the company manual, policies manual and policy directives.
- (ii) A corporate agent can exercise the statutory functions of supervision under s 50. They submit that there is no need for that person to be an individual licensee, nor does the Act require that there must be a branch

manager designated for any and every branch office of a real estate agency.

- (iii) If there is an implied requirement under s 50 the supervisory functions must be carried by a natural person (either a licensed agent or a branch manager), then there is still no basis for a finding of liability against Mr Hardy. Mr Hardy is not and has never been the branch manager for the Warkworth and Mangawhai branch office of Barfoot & Thompson. Accordingly there is no basis for the imposition of a statutory duty under s 50 on Mr Hardy. Barfoot & Thompson submit that the duty in this case rests with Barfoot & Thompson as the corporate agent responsible for the direction and control of its licensees.

[10] The Real Estate Agents Authority submits that the s 50 obligations of supervision can attach to Barfoot & Thompson as the agent, as an agent is defined in s 2 as including a corporate agent. Further they agree that the agency's policies and processes support the training and management of licensed salespersons, but submit that these policies without more are not sufficient to comply with s 50. They concluded by submitting:

Barfoot & Thompson needs human actors to draft policies and manuals but also to carry out the day-to-day active supervision of salespeople. Obviously salespeople experiencing issues with a transaction need a person that they can turn to for advice. Their work needs to be overseen by a person who can ensure on behalf of the company that the work is performed competently and complies with the requirements of the Act. This role is generally undertaken by the branch manager, an individual with sufficient experience to have obtained this class of licence. The Authority submitted that if Barfoot & Thompson's argument was carried out to the logical extent no branch manager would ever need to be appointed as the agency could provide supervision as corporate entity, for all of their branches.

[11] The Authority concluded that Mr Hardy was the only person in the region who did hold a branch manager's licence and he was the person who was identified by Barfoot & Thompson's initial letter as being responsible for the day-to-day supervision of the office. They therefore submitted that he had obligations under s 50. Mr Rea submitted that this designation was an error.

Discussion

Section 50 Real Estate Agents Act – Responsibility of a Company

[12] The parties are in agreement that the s 50 obligations of supervision can attach to Barfoot and Thompson as the agent.¹ Section 50 draws no distinction between what is required of an agent and what is required of a branch manager. Section 50 provides:

50 Salespersons must be supervised

(1) A salesperson must, in carrying out any agency work be properly supervised and managed by an agent or a branch manager.

(2) In this section properly supervised and managed means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—

(a) that the work is performed competently; and

(b) that the work complies with the requirements of this Act.

[13] Some assistance can be obtained from the decision of *Barfoot & Thompson Ltd v Real Estate Agents Authority* where Thomas J outlined that:²

[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 the control be sufficient to ensure competence and compliance with the Act. The approach of the *Hutt City* case is the correct one. That is, the enquiry must consider the supervision and management itself.

[14] Thomas J found that the supervision provided by the company in that case was sufficient but did not provide further guidance as to whether a company can satisfy the s 50 obligations of supervision.

[15] There is no case that expressly considers how a company can satisfy their s 50 responsibilities. Further the section draws no distinction between a person supervising and a company.

¹ Real Estate Agents Act 2008 – s 3.

² *Barfoot & Thompson Ltd v Real Estate Agents Authority* [2014] NZHC 2817, [2015] 2 NZLR 254 at [13].

[16] Logically, a company should exercise the same standard of supervision as would be required of a natural person. This is consistent with the words of s 50 and with the decision of Thomas J above. However to this case and the decision of Toogood J in *Wang v Real Estate Agents Authority*³ (which is examined below) we must add that the Tribunal itself has considered what amounts to adequate supervision in a number of cases. It is undeniable that a company must act through human actors.

[17] In one sense this is done by having people draw up policies, procedures and other documents. It is clear from the cases cited below that this will not be sufficient in itself to satisfy the requirements of s 50. A company needs natural persons acting on its behalf to actually supervise. This is because “active supervision” is required to satisfy s 50.⁴ Furthermore, the supervision must be “actual, it must be tailored to the circumstances of the agent and the property being sold”.⁵ It does not appear possible for a company to fulfil this requirement without a natural person doing the supervising on its behalf.

[18] Toogood J accepted in *Wang v Real Estate Agents Authority* that an agent or branch manager may give a salesperson actual responsibility for supervising the real estate work of another salesperson:

[36] The Authority argues that there is nothing in s 50 of the Real Estate Agents Act which precludes experienced salespersons from being involved in supervision of junior salespersons. That may be so, but it is clear that a salesperson who may be given actual responsibility for supervising the real estate work of another salesperson by an agent or branch manager, or who may assume such responsibility, is not under a statutory duty in carrying out that role. And it was not open to Mr Swann to delegate to Ms Wang his statutory duty under s 50 to ensure that Mr Li’s work was performed competently and that it complied with the requirements of the Act, including the relevant provisions of the LCA.

[19] Thus whether there has been sufficient action by a company and those acting on its behalf to satisfy the requirements of s 50 will be a fact specific inquiry, dependent on the circumstances of each case.

³ *Wang v Real Estate Agents Authority* [2015] NZHC 1011 at [36].

⁴ *Maserow v Real Estate Agents Authority* [2016] NZREADT 19 at [24].

⁵ At [25].

[20] In *Hutt City Ltd v Real Estate Agents Authority*⁶ the Tribunal held:

[37] Counsel for the appellants accepted that it is not a satisfactory excuse or discharge of an obligation under s 50 of the Act that Donna Tschurtschenthaler was advised not to act in this way. It is not enough that the agency policies contain references to not releasing the keys. Section 50 clearly requires more.

[42] Simply put, in terms of s 50 of the Act a salesperson must be properly supervised and managed by an agent or a 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 competently and complies with the requirements of the Act.

[46] We think that strict compliance with the requirements of s 50 of the Act is fundamental to the real estate industry functioning properly. However, it needs to be applied in terms of sensible business practice and common sense. It cannot be that supervisors and managers need to have reserve backups in their own office when that is available 5 to 15 minutes away by car. In any case, the necessary and proper systems, with training systems, were in place but, perversely, a normally sensible real estate agent succumbed to human pressure from purchasers and prematurely handed over keys to the property on good faith.

[21] In *Donkin v Real Estate Agents Authority*⁷ the Tribunal held that:

[12] We need to make it clear that we do not consider that a simple assertion that staff have been told to act in a certain way and have not is a proper discharge of the obligation to supervise under s 50. More is required. Section 50 makes this perfectly clear. However we consider that Ms Donkin appears to have carried her supervisory role appropriately. She gave clear instructions to the staff about what was required and while she did not make a further enquiry of the salesperson we do not consider that this failure in this case is sufficient to amount to unsatisfactory conduct.

[22] In *Maserow v Real Estate Agents Authority*⁸ the Tribunal held that:

[24] 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

⁶ *Hutt City Ltd v Real Estate Agents Authority* [2013] NZREADT 109 at [37], [42] and [46].

⁷ *Donkin v Real Estate Agents Authority* [2012] NZREADT 44 at [12].

⁸ *Maserow v Real Estate Agents Authority*, above n 3 at [24]-[25].

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 matter 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.

Conclusion

[23] As set out above the cases of the High Court and the Tribunal place emphasis on supervision being carried out properly and thoroughly to ensure that issues that less experienced agents might have with real estate problems are addressed and ideally averted. It is trite but true to say that every case must be determined on its own facts. Thus the question of whether there has been proper supervision must be determined by looking at the facts of this case. The Act is rather unhelpful in that it does allow, on the face of it, a s 50 supervisory role to be carried out by a corporate entity. However the Tribunal agrees with the Real Estate Agents Authority that in practice there must be some person whose task it is to make sure that not only are the proper seminars given, manuals prepared and forms and precedents kept up-to-date but there is a person who is responsible for dealing with the salespeople on a day-to-day basis and providing practical, sensible and timely advice. This interpretation is in accordance with the objects of the Real Estate Agents Act.

[24] Section 3 provides:

The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work. The Act achieves its purpose by (a) regulating agents, branch managers and salespersons; (b) raising industry standards; (c) providing accountability through a disciplinary process that is independent, transparent and effective.

[25] The Tribunal therefore conclude that in order to satisfy the purpose of the Act and the activities required in active supervision the supervisor must be an actual person. Thus the question for determination is now:

- (i) Was Mr Hardy the person who was responsible for carrying out this supervision; and
- (ii) If so did he adequately carry out this supervision?

[26] As a matter of fact we find that Mr Hardy was not in breach of his supervisory role because while he held a branch manager's licence he was not the branch manager for Warkworth or Mangawhai nor does it appear that he carried out that role, despite the letter from Barfoot & Thompson dated 19 August 2014. The Tribunal cannot find him responsible in a disciplinary context of failing to carry out a role that Mr Hardy did not recognise he was required to fulfil. Further the facts do not illustrate that there was an actual failure of supervision. The agents at Mangawhai reached the correct outcome for the vendor, although it is clear that the agents were not good at communicating with the complainants.

[27] In this case Barfoot & Thompson (the agency) is not a party to this appeal but it appears that it has failed in its obligation to ensure that there was an actual person who was responsible for supervising the Mangawhai and Warkworth branches. Mr Hinton was identified as the branch manager but did not hold the qualifications to do so and therefore was not the person who could be the supervisor under s 50. There was a lacuna therefore in who was responsible for supervising this branch. That fault rests with Barfoot & Thompson and were they party to this appeal we would have found that they were in breach of s 50 in not providing an actual person who can carry out that role for every one of Barfoot & Thompson's offices.

[28] Accordingly the Tribunal uphold the appeal by Mr Hardy and dismiss the finding of unsatisfactory conduct by the Complaints Assessment Committee.

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

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member