

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 55

READT 005/16

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

BETWEEN HANOK SHIN AND THOMAS TEH
Appellants

AND THE REAL ESTATE AGENTS
AUTHORITY (CAC 302)
First respondent

AND NATASHA CRAWFORD
Second respondent

Hearing: At Auckland on 27 July 2016

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

Appearances: Mr T Rea for the appellants
Mr J Simpson for the Real Estate Agents Authority
The second respondent on the telephone

Decision: 22 August 2016

DECISION OF THE TRIBUNAL

[1] Mr Shin is a real estate agent who works for Barfoot & Thompson in Albany. Mr Teh is his branch manager. Ms Crawford made a complaint about Mr Shin's conduct when she was trying to purchase a property at 9B/23 Emily Place, Auckland. The Tribunal had the benefit of hearing from both Mr Shin and Ms Crawford on the telephone. The summary of facts set out below comes from the evidence given to the Tribunal by both and from other written material.

[2] In 2013 Ms Crawford was looking to buy a property in Auckland. She was trying to buy a property at 23 Emily Place, Auckland. She had previously attempted to buy two other units in this development. Ms Crawford first saw Unit 9B advertised on Trade Me and immediately rang Mr Shin. He told her that he was presenting two offers to the vendor that evening but agreed to show her the property at 3.00 pm that day. When Mr Shin arrived for the viewing he was too anxious about getting a parking ticket to actually show her the property, so he remained in his vehicle while his son Leo showed her around the apartment. Mr Shin's other son is a property manager at the Emily Place building.

[3] Ms Crawford was unhappy that Mr Shin did not show her the property himself as there was no one to answer her questions. She returned to the street and told Mr Shin that she wanted to make an offer on the property. Mr Shin appeared to be very anxious about having time to draft an offer, telling the Tribunal that he had another appointment at 5.00 pm and said it was too far to go back to his office in Albany. Ms Crawford suggested that they go to her home in Mount Eden but Mr Shin was also unwilling to do that, therefore in an unsatisfactory way they sat on one of the park benches in the park at the top of Emily Place and worked on the Agreement for Sale and Purchase. Ms Crawford complained (and Mr Shin acknowledges) that he was rather distracted by the fear of receiving a parking ticket at the time that the Agreement was being drafted.

[4] There were two particular areas that were subsequently to be of concern to Ms Crawford. The first was the settlement date. Ms Crawford's evidence was that she was able to settle almost immediately and wanted some guidance from Mr Shin about whether the vendor was interested in early settlement or not. She said in her evidence that she wanted to put an open statement as settlement date such as "at the vendor's instruction" but Mr Shin said that she needed to have a date. Ms Crawford says that Mr Shin suggested the date of 20 January 2014, Mr Shin denies this and says the suggestion came from Ms Crawford. The agreement shows a settlement date of 20 January 2014 and Ms Crawford insisted that Mr Shin write the words "or earlier by agreement". She told Mr Shin that she could settle by the end of the week if the vendor wanted to and assumed that the vendor would be told this. It appears that this message may not have been conveyed to the vendor.

[5] The other area of confusion was in the pre-contract disclosure statement that Ms Crawford was given a copy of. The vendor had not deleted (or completed) Clause 10.2 by striking out which one of the clauses was inaccurate. These clauses required the vendor to specify whether the apartment or apartment building had ever been or was currently the subject of a weathertightness claim or any proceedings relating to water penetration. Ms Crawford believed that there were no weathertightness issues with the complex and she wanted to cross out that part of the clause which did not apply, but Mr Shin said it had to be completed by the vendor. He suggested that she put in a condition that the vendor would need to complete Clause 10.2. The clause that was actually inserted said "This offer is subject to confirmation that this unit is not currently and never been the subject of a weathertightness claim as per Clause 10.2 of the pre-contract disclosure statement". Ms Crawford signed the multi-offer acknowledgement but did not sign the Agreement as Mr Shin said that she did not need to sign it. Ms Crawford also asked whether or not any of the other purchasers whose offers would be presented by Mr Shin were Chinese or Korean and was told by Mr Shin they were not. Mr Shin would not tell Ms Crawford about any of the other details on the Agreement for Sale and Purchase of the other offers. This was appropriate behaviour by Mr Shin.

[6] Mr Shin then took the Agreement and the two other Agreements to the vendor. Despite having initially arranged to meet at 6.30 pm he managed to present the offer at an earlier time, at 6.00 pm. Mr Shin says that the vendor decided he was not 100% confident of the weathertightness issue and he decided to accept the offer from another lady who made an unconditional offer at the same price, with an earlier settlement date and no mention of the weathertightness issues. Accordingly Ms Crawford's offer was not accepted. Ms Crawford was very distressed about this and did not consider that Mr Shin had discharged his obligations to her. In particular she felt that he had not followed her instructions about the date on which she was able to settle. Ms Crawford was also concerned that Mr Shin would not allow her to amend the Vendor Disclosure Agreement to reflect what she understood to be the weathertightness provision.

[7] Ms Crawford's complaint against Mr Shin led to a decision of the Complaints Assessment Committee to find Mr Shin guilty of unsatisfactory conduct. The Complaints Assessment Committee found that Mr Shin:

- (i) Breached Rule 5.1 in allowing an unlicensed person to show Ms Crawford the property.
- (ii) Made an alteration to the listing form that was unknown to the vendor, to change the person authorised to show the apartment for viewing to be not just the property manager but also "listing agent as the vendor's instruction".
- (iii) Showed a lack of good faith in preparation of the Agreement.
- (iv) Mr Shin breached Rule 5.1 (Lack of Skill and Care) and Rule 6.2 (Lack of Good Faith).

[8] The Committee found that the early settlement date was important to the vendor and that Mr Shin did not properly advise the complainant on this issue and ensure that her instructions were conveyed to the vendor. The Complaints Assessment Committee found that Mr Shin had shown a lack of proper procedure in relation to the multi-offer situation. Barfoot & Thompson's policy requiring the branch manager to be involved in a multi-offer situation is to ensure fair dealings and that did not happen with licensee Shin taking all three offers to the vendor.

[9] Further the Committee found that Mr Shin was in breach of Rules 5.1, 9.1 and 9.2 because he was not 100% sure as to whether there was an issue with weathertightness and he did not check that the disclosure documentation was complete.

[10] Finally the Complaints Assessment Committee found that licensee Teh did not adequately supervise licensee Shin with respect to the multi-offer situation. The Complaints Assessment Committee found that he should have seen that Mr Shin was

in a conflict situation with the multiple agreement, and presented them himself to the vendor. Mr Teh was found guilty of unsatisfactory conduct.

[11] Mr Rea for Mr Shin submits that the Complaints Assessment Committee were wrong to find Mr Shin guilty of unsatisfactory conduct. He went through each category in which Mr Shin was said to have erred and submitted:

(i) *Allowing an unlicensed person to show the property.*

Mr Rea submitted that this was inappropriate but Mr Shin's son was not carrying out unlicensed real estate agency work by just providing access to the property. Mr Shin was available to answer any questions necessary on the property.

(ii) *Preparation of the Agreement on the park bench.*

There was no lack of bone fides in Mr Shin's conduct and there should be no finding of unsatisfactory conduct on this basis. Because of urgency the preparation of the offer it was perhaps less formal than appropriate but Mr Shin's conduct was not unreasonable.

(iii) *Disadvantaging Ms Crawford on the basis of the settlement date.*

Mr Rea submitted (and Mr Shin confirmed) that he inserted the settlement date in accordance with the instructions he received from the purchaser and not his own view.

(iv) *Lack of procedure in relation to multi-offer situation.*

Mr Shin followed the instructions of his branch manager which was a reasonable instruction in the circumstances where there was no conflict of interests as Mr Shin was the agent on all three Agreements.

(v) *Failure to obtain correctly completed disclosure documentation.*

Mr Rea submitted that this was not the responsibility of the agent but of the vendor. The vendor had warranted to Barfoot & Thompson in that he was unaware of any past or present water penetration and it was therefore

reasonable for Mr Shin to recommend inserting a condition where he confirmed the absence of any weathertightness claim.

- (vi) *The Committee were wrong in finding that Mr Teh had breached Rule 8.3 which has no application to Mr Teh.*

Mr Rea submitted that although Mr Teh was licensed as an agent he only worked as a branch manager and he did not operate a business or engage salesperson. Further Mr Rea submitted that Mr Teh did not breach Section 50 because there was no conflict of interest in the circumstances where all the offers were from purchasers with whom Mr Shin had been dealing, and where Mr Shin was the listing salesperson.

Issues

[12] The question for the Tribunal is therefore whether or not the Committee were right to find that the factors identified in the decision were sufficient to amount to unsatisfactory conduct by Mr Shin. This is a question of an analysis of the facts and an analysis of the gravity of the factors, individually and collectively.

[13] The Tribunal also have to consider whether or not Mr Teh should have been found guilty of unsatisfactory conduct for his failure (as branch manager) to present the multi-offers himself and instead to allow Mr Shin to do this.

Discussion

[14] The Tribunal agree with Mr Rea that not all the matters identified by the Complaints Assessment Committee are particularly serious. For example the complaint that Mr Leo Shin showed Ms Chambers the property is less serious than issues around the insertion of the settlement date. However the Tribunal is entitled to look at the totality of Mr Shin's actions when dealing with Ms Chambers to see whether or not Mr Shin's conduct amounts to unsatisfactory conduct or not. Having carefully considered all the facts in this case the Tribunal consider that the Complaints Assessment Committee reached the correct decision with respect to Mr Shin's behaviour. The Complaints Assessment Committee's conclusions illustrate that Mr Shin behaved in a hurried, harried and unprofessional way when

Ms Crawford asked him to assist her in viewing the apartment and preparing the Agreement for Sale and Purchase. We now address each of the issues in question:

(i) *Failure to show Ms Crawford the apartment.*

While in itself this may be trivial it in fact commences the behaviour that led to the unsatisfactory outcome for Ms Crawford. The apartment was empty and if Mr Shin had allowed his son to park his car for him, rather than letting him show the apartment he could have shown Ms Crawford the apartment, answered her questions and the Agreement for Sale and Purchase could have been completed in the unit, not outside on a park bench with Mr Shin having his eye on the parking warden.

However simply allowing Mr Leo Shin to show Ms Crawford the apartment is not a breach of Rule 5.1. The evidence shows it was on a one-off occasion and Mr Leo Shin did not generally work as an unlicensed person carrying out real estate agency work. However, as we said this conduct adds to the totality of Mr Shin's unsatisfactory conduct.

(ii) *Lack of good faith in the preparation of the Agreement (including settling weathertightness issues).*

Because of the fact that a multi-offer was going to be presented at 6.30 pm Mr Shin appears to have been very rushed. He also had another appraisal to do at 5.00 pm. However he should have had sufficient time to do an appropriate job in preparing this agreement. However the fact that Mr Shin felt rushed and pressured because of the traffic warden meant that, in the Tribunals' view, he did not do an appropriate job. He let Ms Crawford down in two areas – (1) the insertion of the settlement date; and (2) in the advice he was able to give her about the weathertightness of the property.

[15] Having heard both Ms Crawford's and Mr Shin's evidence we accept Ms Crawford's evidence that she would have been happy to have settled at the earliest possible date. She told the Tribunal that she had the money available to settle. It was obviously important that Mr Shin did not share any information about

the other offers but equally he was aware and should have conveyed to Ms Crawford what the vendor had told him about his desire to settle the sale as quickly as possible. Had Mr Shin passed on this information then no doubt Ms Crawford would have changed the settlement date to an earlier date. Further if Mr Shin had taken cognisance of the fact that Ms Crawford was able to settle at the earliest possible date then this should have been recorded in the Agreement in some way, such as a clause saying that the purchaser agrees to settle within seven days, or such a later date as the vendor may require. This would have ensured that Ms Crawford's wish to offer to settle quickly would have been clear.

[16] The pre-disclosure documentation should have been completed prior to Ms Crawford seeing the property, and certainly before Mr Shin accepted two other offers on the property. Mr Shin himself should have confirmed with the vendor that there were no weathertightness issues with the property and not come to a meeting with any prospective purchaser without that information being known to him. It seems that this building had no weathertightness issues, but that the vendor was apparently unwilling to provide a statement to that effect. Mr Shin should have communicated with the vendor to say that the pre-disclosure needed to be completed before he could present any offers or called the vendor to confirm which clause was appropriate. Ms Crawford was certainly disadvantaged in making her offer because she was aware of this failure and as a consequence her offer was not a "clean" Agreement for the vendor. Mr Shin should have been in a position to have advised any purchaser of the correct position.

[17] We accept the Complaints Assessment Committee's conclusion that there was no intention by Mr Shin to prevent Ms Crawford from purchasing the property but certainly the sloppy way in which Mr Shin went about his work as an agent would have contributed to her sense that this was a 'set-up' and that she was never going to be able to purchase the property.

[18] For the reasons set out above, the Tribunal dismiss the appeal by Mr Shin and consider that the Complaints Assessment Committee were correct in finding that Mr Shin was guilty of unsatisfactory conduct. We disagree with the Complaints Assessment Committee as the Rules which Mr Shin had breached. We do not think

that his conduct showed a lack of good faith, but rather that it was sloppy and showed a lack of attention to detail and a basic misunderstanding of his obligations as the agent for the vendor with respect to conveying the vendor's wishes and understanding that the property was not leaky. We consider that these amount to breaches of Rule 5.1. The Tribunal have concluded that Mr Shin is in breach of Rule 5.1 that he showed a lack of skill and care in the preparation of his agreement and in his dealings with Ms Crawford.

[19] The Tribunal have made no finding on whether Mr Shin altered the listing form. There is no information to make a reliable finding on this point. The Tribunal also make no finding on the multi-offer situation for the reasons set out below at paragraph [21].

[20] Mr Shin also appeals against the penalty orders. A fine of \$4,000 is significant for unsatisfactory conduct, and the Tribunal consider that the fine of \$2,000 would be an appropriate fine for this moderately serious unsatisfactory conduct. The maximum fine for unsatisfactory conduct is \$10,000. This conduct is moderately serious unsatisfactory conduct and so 20% of the maximum seems appropriate. The Tribunal accordingly allow this appeal and reduce the fine to \$2,000.

Mr Teh

[21] The appeal by Mr Teh is allowed. When consulted Mr Teh reached the correct decision that given that all the offers were from clients of Mr Shin that there should therefore be no conflict between Mr Shin and any of the potential purchasers. This was a reasonable call to make and does not amount to a breach of s 50. Accordingly the Tribunal dismiss the finding of unsatisfactory conduct against Mr Teh and allow his appeal.

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

Ms K Davenport QC
Chairperson

Ms N Dangen
Member

Mr G Denley
Member