

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2016] NZREADT 57**

**READT 085/15**

IN THE MATTER OF charges laid under s 91 of the Real Estate Agents Act 2008

BETWEEN COMPLAINTS ASSESSMENT COMMITTEE 401

AND AARON HUGHES AND KIM HAPE  
Defendants

AND **READT 086/15**

BETWEEN COMPLAINTS ASSESSMENT COMMITTEE 401

AND AARON HUGHES AND AVIND LAL  
Defendants

Hearing: 22 July 2016

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

Appearances: Ms C Paterson and Ms K Lawson Bradshaw for the Real Estate Agents Authority  
Mr S Stokes for Mr Hughes  
Mr T Rea and Mrs C Eric for Mr Hape  
Mr R Butler for Mr Lal

Decision: 24 August 2016

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**DECISION OF THE TRIBUNAL**

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[1] Messrs Hughes and Hape are real estate agents who worked for Barfoot & Thompson in Papatoetoe, Auckland. Mr Avind Lal was the branch manager. All three have pleaded guilty to charges arising out of two properties that were sold by

the branch in 2014. The first is a property at 14 Carlie Street, Papatoetoe and the second a property at 71 Fitzroy Street, Papatoetoe.

[2] Because of the guilty pleas the hearing in Auckland on 22 July was a penalty hearing only and the facts set out in this decision are taken from the uncontested statements of evidence of Paul Davies, (the new branch manager at Papatoetoe branch), Mr Hape, Ms Olga Bogdanovic (the acting branch manager), David Burcovsky (a regional manager for Barfoot & Thompson, Auckland), Wayne Radovich, (a senior investigator with the Real Estate Agents Authority), Anthony Bidesi, who was involved with the sale and purchase of 14 Carlie Street, Papatoetoe and David Hedge, (another party involved with the sale of 14 Carlie Street), and Karlene Mager who was the vendor of a property at 71 Fitzroy Street, Papatoetoe. Mr Lal gave oral evidence.

[3] Mr Hughes and Mr Lal face charges in respect of their involvement in the sale and on-sale of 71 Fitzroy Street, Papatoetoe and Mr Hughes and Mr Hape face charges in respect of the on-sale of 14 Carlie Street, Papatoetoe. The charges generally arise out of a practice that appear to have developed in the Papatoetoe branch of Barfoot & Thompson of “list and sells” (where a property is listed and sold simultaneously) and the practice of on-selling the property shortly after its initial sale with a corresponding increase in price.

[4] Despite the guilty pleas the Tribunal must satisfy itself that the charges have been proved and to the level of misconduct or unsatisfactory conduct as set out in the charge. Having read and heard the evidence, the Tribunal are satisfied that the charges have been established. The conduct was serious as set out below and the guilty pleas are appropriate.

[5] The evidence of Ms Bogdanovic and Mr Davies satisfy the Tribunal that Mr Lal’s level of supervision of certain members of the Papatoetoe sales team was not at the standard that Barfoot & Thompson require from the branch managers. Further, a number of practices that were deemed unacceptable in other offices had been allowed to continue. As a result, Barfoot & Thompson have compensated the vendors who were the subject of these two sales for any loss that they have suffered.

*71 Fitzroy Street*

[6] On 24 June 2014 Mr Hughes met Karlene Mager to discuss listing her property at 71 Fitzroy Street, Papatoetoe. The property was owned by Mrs Mager and her husband Mark. They were separating and wished to sell the property. An incomplete Comparative Market Assessment (CMA) was prepared by Mr Hughes which did not include an appraisal of the valued property. Mr Hughes suggested sale by auction.

[7] On 15 July 2014 the Magers signed an agency agreement with Mr Hughes. Mr Hughes did not immediately list the property for sale on Barfoot & Thompson's computer system. Instead it was an undisclosed listing. This means that other agents in the branch and throughout the Barfoot & Thompson network were unaware that the property had been listed for sale. Mr Hughes asked the vendors about their price expectations for the property. They told him a range between \$650,000 and \$680,000. Mr Hughes presented the Magers with an offer for \$610,000 shortly after the agency agreement was signed. This initial offer was declined but eventually a sale price of \$660,000 was agreed between Singh Ventures Ltd and the vendors. This agreement was signed on 21 July 2014, that is six days after the listing agreement. The agreement included an "on-sale investor" clause. Mr Lal was then involved in the sale process and made enquiries with the Auckland Council to confirm the subdivisional potential of the property. He gave this information to a Mr Rajani who offered to purchase the property for \$760,000, i.e. \$100,000 more. This offer was made on the same day that Singh Ventures Ltd made an offer to purchase from Mr and Mrs Mager and signed and accepted on 21 July 2014.

[8] No CMA was prepared for the second listing. Mr Hughes was to receive commission on both the first and second sale. Both Mr Hughes and Mr Lal face misconduct charges arising out of these events. The charges that they face are set out in the appendix to this judgment (Schedule A). In summary they charge both defendants with misconduct.

[9] A summary of the charges against Mr Hughes are as follows:

- (a) The breach of fiduciary duty to the vendor.
- (b) Failed to obtain the best price.
- (c) Failed to act in the best interests of the vendors (Rule 9.1).
- (d) That he engaged in conduct that was likely to bring the industry into disrepute (Rule 6.3).

[10] Charges against Mr Lal

Mr Lal was charged that his conduct constituted seriously incompetent or seriously negligent real estate agency work as he failed to properly supervise Mr Hughes.

[11] The Tribunal accept the guilty pleas and enters findings of misconduct against both agents.

#### *14 Carlie Street*

[12] The second charge relates to a similar series of events. Mr Hughes and Mr Hape face this charge. This complaint arises out of the sale of 14 Carlie Street in Papatoetoe. Carlie Street was sold by a Mrs Hedge who was 80 years old in 2014. Mrs Hedge had given her son David Hedge Power of Attorney to sell the property. Mr David Hedge listed the house with Mr Hughes. Mr Hedge's brief of evidence says that Mr Hughes prepared a CMA which did not account for the property's subdivisional potential. Mr Hedge said he was aware of this potential and Mr Hughes later provided him with an updated CMA which took the subdividable potential into account. Mr Hedge signed a sole agency agreement with Mr Hughes on 9 September 2014. The agreed marketing plan was to market the property with photographs and advertising in the Property Press. Mr Hughes told Mr Hedge that he had a few people who were interested in the property who were property developers who would drive past it and have an initial look at the property. On 10 September Mr Hughes showed three prospective buyers through the property. Three offers were presented to Mr Hedge on 11 September. They were three unconditional offers

offering Mrs Hedge between \$590,000 to \$610,000. The offer from a Mr Singh was countersigned at \$630,000 and after some negotiation was accepted.

[13] According to the statement of Mr William Watson he subsequently purchased the Carlie Street property from Mr Singh. This link in the chain of title is missing from the documents before the Tribunal, however Mr Watson was subsequently able to resell the property. At about this time Mr Hape became involved. Mr Hape was unaware that the property had been sold earlier in September through the offices of Barfoot & Thompson, Papatoetoe (Mr Hughes) as the property had not been listed on the Barfoot & Thompson system. However on 16 September, (i.e. only a few days after Mr Singh had purchased the property), Mr William Watson, a property developer with whom Mr Hape had had previously dealings, asked him to list the property at 14 Carlie Street, Papatoetoe. Mr Hape's evidence was that he was aware that Mr Watson was not the owner and that it was an on-sale situation, but acknowledged that he did not see the Agreement for Sale and Purchase between Mr Watson and the vendor (or in this case the vendors). Mr Hape investigated whether the property would be subdividable and after some discussions with Mr Watson he produced a CMA and entered into a listing agreement with him on 22 September.

[14] Mr Hape told the Tribunal that he had never been involved with an on-sale transaction. He acknowledged that he did not check that Mr Watson had the right to sell the property, but said that he felt certain that he did given his previous dealings with him. Mr Hape suggested that the property be sold by auction. Mr Watson agreed to this but said if he could get \$725,000 for the property then he would be happy to sell before auction. Mr Hape spoke with a Mr Shailendra Kewal, another agent in the Barfoot & Thompson office. They agreed to a commission split. An unconditional offer was then presented to Mr Watson by Mr Kewal's purchaser, a Mr Bidesi, for \$725,000. The Agency Agreement by Mr Watson's company WBP Limited was signed on 22 September 2014. The subsequent Agreement for Sale and Purchase to Mr Bidesi is dated 23 September 2014. The property had therefore been sold for \$95,000 more than its initial sale price within 11 days. Mr Bidesi complained about the Agreement on 24 September saying that he felt that he had been misled and may have overpaid for the property. He said he became concerned after he went to 14 Carlie Street and found that the occupier was an elderly lady. He

then made subsequent enquiries and discovered it was an on-sale. He spoke to Barfoot's and discovered that the property had sold twice in a period of 11 days with the price jumping from \$630,000 to \$725,000. Barfoot's senior management became involved at this point, as did Mr Bidesi's lawyer. Mr Bidesi cancelled the agreement. Mrs Hedge was also compensated.

[15] As set out in the annexed charges Mr Hape is charged with unsatisfactory conduct and Mr Hughes faces a charge of misconduct. A summary of the charge against Mr Hughes relating to these sales are:

- (a) His failure to list the property in the Barfoot & Thompson property listing system.
- (b) His failure to properly market the property or expose it to the market to ensure that a best price was obtained for his client.
- (c) The CMA did not contain a proper written appraisal of the property.

[16] Mr Hape faces a charge of unsatisfactory conduct in that he did not properly list the property for sale.

[17] The Tribunal accept the pleas of guilty by both agents and enters a finding of misconduct against Mr Hughes and unsatisfactory conduct against Mr Hape.

[18] In summary therefore Mr Hughes faces two charges of misconduct, Mr Lal faces one charge of misconduct relating to 71 Fitzroy Street, Papatoetoe and Mr Hape faces a charge of unsatisfactory conduct relating to the sale of the property at 14 Carlie Street, Papatoetoe.

[19] The Tribunal notes that Barfoot & Thompson appear to have done everything that they could once the issues with the Papatoetoe office were discovered to:

- (i) Replace the manager and ensure proper supervision of agents.

- (ii) Enforce and/or adopt relevant policies and procedures to deal with the on-sale situation.
- (iii) To provide information to the two original vendors and take steps to address the financial consequences of these transactions for the vendors.

[20] The agents have not made any profit from the transactions. Mr Hughes, who had made three commissions, has not received any commission for either property. Mr Hape has also not received a commission.

[21] The Tribunal comment that these are appropriate practical first steps for the parties concerned to have taken.

#### *Mr Hughes*

[22] Mr Hughes has stopped working as a real estate agent. He has surrendered his licence. His conduct is the most serious of all of the agents before the Tribunal. Mr Hughes did not contest the submissions of the Real Estate Agents Authority that his licence should have been cancelled if he had not already surrendered it.

#### *Principles of Sentencing*

[22] The Tribunal must consider four matters when considering imposition of a penalty as set out in *Real Estate Agents Authority v Lum-on* [2012] NZREADT 47.

[23] A penalty must fulfil the following functions. They are:

- [a] Protecting the public

Section 3 of the Real Estate Agents Act provides that this is one of the purposes of the Act.

- [b] Maintenance of professional standards

This was emphasised in *Taylor v The General Medical Council* and *Dentice v The Valuers Registration Board*.

- [c] Punishment

While most cases stress that a penalty in a professional discipline case is about the maintenance of standards and protection of the public there is also an element of punishment – such as in the imposition of a fine or censure. See for example the discussion by *Dowsett J in Clyne v NSW Bar Association* and Lang J in *Patel v Complaints Assessment Committee*).

The Tribunal recently reaffirmed that the purpose of disciplinary proceedings is not primarily to punish. It said :

It is settled law that the purpose of disciplinary proceedings is not to punish the individual, but to ascertain whether the individual has met appropriate standards of conduct in the occupation concerned, and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public and the maintenance of proper professional standards (specific and general deterrence) are the key considerations. In the context of real estate agency work specifically, we agree that the purpose of the proceedings is to protect consumers and promote public confidence in the performance of real estate agency work, as stated in s.3 of the Act.

[d] Rehabilitation of the Agent

Where appropriate, rehabilitation of the agent must be considered – see *B v B*.

[24] The available penalties for the Tribunal are those orders which are set out in s.110(2) of the Act.

[25] In summary the available penalties are:

- [a] Those orders available under s.93;
- [b] Cancellation of the licence of the licensee;
- [c] Suspension of the licence of the licensee for a period not exceeding 24 months;
- [d] Order that the licensee not perform any supervisory functions;
- [e] In the case of a licensee who is an employee or independent contractor order that any current employment or engagement of that person by a licensee be terminated and that he or she no longer be employed in connection with Real Estate Agency work;
- [f] A fine not exceeding \$15,000;
- [g] A sum by way of compensation not exceeding \$100,000.



[26] The Tribunal has significant concerns about public safety and the appropriate maintenance of standards when examining Mr Hughes' conduct. His conduct evidences a serious breach of his obligations as an agent and particularly the fiduciary duty that he owed to the original vendor. He seems to have been more concerned with making a quick sale and two commissions than in discharging his fiduciary duty. Mr Stokes submitted that he believed that he was assisting Mr and Mrs Mager to prevent them from incurring the costs of marketing and to obtain a price that they were happy with. The Tribunal accept that he may have considered this but he had an obligation to obtain the best price possible for the vendors – not just the fastest. Mr Stokes also submitted that with respect to the Carlie Street sale he believed that Mr Hedge was aware that the property might be on-sold as it has an “on-sell clause” in the agreement. He submitted that the initial sale price of \$630,000 was a fair price. He submits, [and the Tribunal accept] that Mr Hughes should be given credit for the fact that he has surrendered his licence and admitted fault. However as the appropriate penalty is cancellation and as Mr Hughes has surrendered his licence it is not possible to reflect any discount in the penalty. The Tribunal confirm that pursuant to the Real Estate Agents Act had Mr Hughes not voluntarily surrendered his licence it would have ordered cancellation of his licence. The Tribunal therefore order that Mr Hughes' licence be cancelled under s 110 of the Act.

*Mr Lal*

[27] Mr Lal has voluntarily suspended his licence, initially for a year then for another two years until 31 March 2018. The Committee seeks an order suspending Mr Lal for six to 12 months. For Mr Lal, Mr Butler submits that Mr Lal has appropriately recognised the seriousness of his actions, made no profit from any of the transactions and has agreed to a voluntary suspension from March 2015 until March 2018.

[28] Mr Lal gave evidence to the Tribunal. During the course of that evidence the Tribunal were able to ascertain that he did not appear to have a clear understanding of his role as a branch manager. He said he did not read the company policy manuals and when there was a problem in the office he preferred to call a more senior agent outside of the office. The written evidence of Mr Davies and Ms Bogdanovic

showed that the Papatoetoe office required more hands-on supervision than Mr Lal provided. The practice of not listing agreements onto the computer system so that other agents were unaware that the listing was live was a practice that needed to be immediately stamped out by the manager. Mr Lal should have appreciated this. As set out above the purposes of a penalty are to protect public safety and to ensure the maintenance of the appropriate standards. Mr Lal's actions indicate a need to both maintain standards and to ensure that the public are protected from Mr Lal for a time. The maximum time that an agent can be suspended is a period of two years. The voluntary suspension undertaken by Mr Lal is commended, but there is nothing to prevent Mr Lal from applying to go back onto the register if he chose to do so, prior to the March 2018 date. The Tribunal therefore put that to one side when determining what period of suspension would be appropriate. They do however take into account the time that he has been voluntarily suspended from 31 March 2015, and his guilty plea.

[29] The Tribunal consider that an appropriate time for suspension for Mr Lal is a period of 10 months from the date of this decision. Mr Lal has been voluntarily suspended for 16 months. A period of suspension of 10 months will reflect the Tribunal's wish to ensure that he receives a significant time of suspension under s 110(2)(c).

[30] Mr Lal's licence has not been cancelled because the Tribunal consider that his conduct was not as serious as that of Mr Hughes and his failings were more failings to appreciate the fact that what was happening with the Carlie Street property was inappropriate rather than actual dishonesty. He was actively involved in steps which maximised the profit for the agency but were contrary to the vendor's best interests. However we consider that Mr Lal may be able to be rehabilitated and come back into the profession after the suspension. We have no information concerning any rehabilitation, but even though Mr Lal is qualified to be a branch manager it would be appropriate for him to come back into the profession as an agent, and be properly supervised in order to learn the skills that he has failed to acquire.

*Mr Hape*

[31] Mr Hape faces the least serious of the charges and at a level of unsatisfactory conduct. Mr Hape knew that there had been an on-sale situation when he took the listing from Mr Williams. Despite this he took no steps to find out whether or not Mr Williams had the right to sell the property. It was providential that he did have the right but Mr Hape is in need of further supervision and training to ensure that the public safety aspects of his conduct are addressed. These public safety aspects include the need to ensure the vendor is properly identified and has the right to sell the property being listed for sale.

[32] The Real Estate Agents Authority has submitted that Mr Hape should receive a \$5,000 fine. This is contested by Mr Rea who submits that a fine of about \$500 would be an appropriate level of penalty for Mr Hape. The Tribunal do not agree. This is a serious offence and given that the actual vendor was an elderly lady the potential for harm was very real. We accept however that Mr Hape was not aware of who the original vendor was, except in very general terms, but he clearly failed in the most fundamental step to ascertain who had the right to sell the property. He needs further education to ensure that he does meet the standards required of a reasonably competent agent.

[33] Mr Hape is ordered to undertake further education and training. He needs to undertake further training in the following areas:

- Drafting Agreements for Sale and Purchase.
- The law relating to property.

The Tribunal considers that appropriate courses for Mr Hape are:

- Drafting Agreements for Sale and Purchase, Unit: 23137.
- The law relating to real estate, Unit: 23141.
- Mr Hape is ordered to undertake these courses.

[34] The maximum fine that the Tribunal could impose is \$10,000 but the Tribunal consider in this case that a fine of \$3,500 is at the appropriate level, recognising the serious nature of the conduct, but also giving Mr Hape a discount for a guilty plea.

[35] Mr Hape is censured to reflect the Tribunal's disapproval of the events at issue.

### **Summary of Orders**

- (a) Mr Hughes' licence is cancelled pursuant to s 110(2)(b).
- (b) Mr Lal is suspended for 10 months from the date of this decision, pursuant to s 110(2)(c).
- (c) Mr Hape is fined \$3,500. He is censured. He is ordered to undergo training as set out above at para [33].

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

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Ms K Davenport QC  
Chairperson

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Ms N Dangen  
Member

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Mr G Denley  
Member

## **Appendix A**

Following an investigation by the Real Estate Agents Authority, Complaints Assessment Committee 401 charges the defendants Aaron Hughes and Kim Hape as follows:

### **Charge 1 – Wilful or reckless breach of the Act or Rules (HUGHES)**

The Committee charges Aaron Hughes with misconduct under s 73(c) of the Real Estate Agents Act 2008, in that he wilfully or recklessly breached rules 5.1, 9.1, 10.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (Rules).

#### Particulars:

- 1.1 On 9 September 2014, David Hedge signed an agency agreement with Barfoot and Thompson, listing 14 Carlie Street, Papatoetoe (property) for sale with Mr Hughes as licensee.
- 1.2 From discussions with Mr Hughes, Mr Hedge understood that the property would be marketed with photographs and an advertising campaign to commence on 23 September 2014.
- 1.3 Mr Hedge also understood that Mr Hughes would send out the property listing to other Barfoot and Thompson agents.
- 1.4 Mr Hughes did not enter the property listing in the Barfoot and Thompson Papatoetoe property listing system or inform any other Barfoot and Thompson agents about the listing.
- 1.5 Mr Hughes took two property developers only to view the property.
- 1.6 On 11 September 2014, Mr Hughes presented a purchase offer to Mr Hedge from one of those property developers, Gulab Singh Padam Singh Bisht, for \$610,000.
- 1.7 Further negotiations followed and the same day, 11 September 2014, Mr Hedge signed an unconditional sale and purchase agreement agreeing to sell the property to Mr Singh for \$630,000. Settlement was due to occur on 28 November 2014.
- 1.8 Prior to the sale, Mr Hughes did not inform Mr Hedge:
  - (a) that the property had not been entered into the Barfoot and Thompson property listing system;
  - (b) that the Papatoetoe office had not been informed about the property listing and nor had other Barfoot and Thompson agents;
  - (c) about the disadvantages of not fully exposing a property to the market before accepting an offer.

- 1.9 On 15 or 16 September 2014, Mr Singh on-sold the property to WBP Limited for approximately \$655,000.
- 1.10 On 16 September 2014, Mr Watson of WBP Limited contacted Mr Hape, another licensee at the same Barfoot and Thompson Papatoetoe office as Mr Hughes. Mr Watson informed Mr Hape that he wished to list the property and on sell it.
- 1.11 On 17 September 2014, Mr Hape produced a written Comparative Market Analysis (CMA), appraising the property as being valued between \$710,000 and \$725,000.
- 1.12 On 22 September 2014, Mr Watson signed an agency agreement listing the property with Mr Hape.
- 1.13 On 22 September 2014, Anthony Bidesi signed a sale and purchase agreement for the property to purchase it from WBP Limited for \$725,000.
- 1.14 Mr Hughes did not properly market the property and expose it to the market to ensure that the best price was obtained for his client or, failing that, properly advise his client about the approach he was taking to the sale of the property and obtain his client's informed consent to that approach. Mr Hughes' conduct was a wilful or reckless breach of rules 5.1, 6.1 and 9.1 of the Rules.
- 1.15 On 3 September 2014, Mr Hughes created a CMA for the property for Mr Hedge.
- 1.16 On 27 September 2014, Mr Hedge edited that CMA which he had created for Mr Hedge. This was after:
  - (a) Mr Hedge had signed the agency agreement on 9 September 2014;
  - (b) Mr Hedge had signed the sale and purchase agreement with Mr Singh on 11 September 2014, agreeing to sell the property for \$630,000;
  - (c) Mr Singh had on-sold the property to WBP Limited on or about 16 September 2014;
  - (d) Mr Hape produced a CMA for Mr Watson of WBP Limited for the property for \$710,000 - \$725,000 on 17 September 2014;
  - (e) WBP Limited signed a sale and purchase agreement with Mr Bidesi for \$725,000 on 22 September 2014.
- 1.17 The CMA provided to the Authority by Mr Hughes was that which was edited on 27 September 2014. The CMA does not contain a written appraisal of the value of the property. Mr Hughes did not set out in writing to Mr Hedge how the property would be marketed or advertised. Mr Hughes' conduct was a wilful or reckless breach of rule 10.2 and 10.6 of the Rules.

**Charge 2 – Serious negligence (alternative to charge one) (HUGHES)**

In the alternative, and on the same particulars as described in charge one, the Committee charges the Aaron Hughes with misconduct under s 73(b) of the Act, in that his actions constituted seriously incompetent or seriously negligent real estate work.

**Charge 3 – Unsatisfactory conduct (HAPE)**

The Committee charges Kim Hape with unsatisfactory conduct under s 72(a) and/or (d) of the Act.

Particulars:

The Committee repeats particulars 1.1 to 1.13 above and says further:

- 1.18 Mr Hape should have, but failed to obtain a copy of the on-sale contract from Mr Watson to confirm his authority to sell (even though he did, in fact, have such authority).
- 1.19 Given his inexperience with on-sale transactions, Mr Hape should have sought guidance from his branch manager (even though the practice within the office was not to do so).
- 1.20 He should have made sure that Mr Kewal was aware that this was an on-sale transaction.