

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 61

READT 062/15

IN THE MATTER OF an appeal under s111 of the Real Estate
 Agents Act 2008

BETWEEN MACK WORKMAN
 Appellant

AND THE REAL ESTATE AGENTS
 AUTHORITY (CAC 402)
 First respondent

AND DEBORAH KEELY AND LESLIE KEELY
 Second Respondents

Hearing: 26 July 2016, at Auckland

Tribunal: Hon P J Andrews, Chairperson
 Ms N Dangen, Member
 Mr G Denley, Member

Appearances: Mr T Rea and Ms C Eric, on behalf of the Appellant
 Mr J Simpson, on behalf of the First Respondent
 No appearance by or on behalf of the Second
 Respondents

Date of Decision: 29 August 2016

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Workman has appealed against the decision of Complaints Assessment Committee 402 (the Committee) dated 2 June 2015, in which the Committee found that he had engaged in unsatisfactory conduct (the substantive decision). He has also appealed against the orders made by the Committee in its penalty decision, issued on 28 August 2015 (the penalty decision).

[2] The unsatisfactory conduct found by the Committee related to Mr Workman's involvement in the sale of a residential property at Massey, Auckland (the property). Mr Workman contended on appeal that the Committee erred in law in finding that he had engaged in unsatisfactory conduct.

Relevant facts

[3] All events occurred between April and October 2014.

[4] On 1 April, the complainants (Mr and Mrs Keely) (the Keelys) listed the property for sale with Barfoot & Thompson (the Agency). At the time, they had entered into an agreement to buy another property. That agreement was conditional on the sale of their property. The listing agent was Mr Paul Farry of the Agency's Te Atatu branch.

[5] On 30 June, a potential purchaser, (Ms T), viewed the property with Ms Walls, a licensed salesperson at the Agency's New Lynn branch. Ms T contacted Ms Walls on 1 July saying she wished to make an unconditional offer on the property. We interpolate that Ms T was expecting to receive funds for the purchase from her fiancé, who was overseas. As there was an existing offer on the property, Ms Walls explained the multi-offer process to Ms T, then drew up an agreement for sale and purchase.

[6] That same evening Ms Higgins, the branch manager of the Agency's Te Atatu branch, presented the two offers to the Keelys. They accepted Ms T's offer. A deposit of \$20,000 was payable on 17 July. The specified settlement date was 15 August. Mr Workman, branch manager at the Agency's New Lynn branch, was advised of the sale and, in accordance with the Agency's normal office processes, was provided with a copy of the agreement for sale and purchase and a transaction report.

[7] On 3 July 2014 the Keelys advised their solicitors that their own purchase agreement was now unconditional. They asked Ms Walls to ensure that Ms T engaged a solicitor. Ms T subsequently instructed a firm of solicitors.

[8] The Keelys made several enquiries of Ms Walls as to payment of the deposit and was told that everything was “above board”. Ms T told Ms Walls on 10 July that she had not been to see her solicitor, and was reminded by Ms Walls that the deposit was due on 17 July. Ms T told Ms Walls on 15 July that the deposit would be arriving on 17 July.

[9] During the afternoon of 17 July, Ms Walls sent several text messages and telephoned Ms T about the deposit. When Ms Walls made contact with Ms T, she was told that the funds were not going to arrive until 3.00 pm the next day. Ms Walls also learned, from Ms T’s solicitor, that she had not met a scheduled appointment. Mr Farry contacted Ms Walls about the deposit, and both he and the Keelys were updated.¹

[10] Ms Walls made several attempts to contact Ms T on 18 July. Ms T advised her that the funds had arrived in New Zealand, but could not be released for five days. Ms Walls conveyed this information to the Keelys, their solicitor, and Ms T’s solicitor. The time to pay the deposit was extended for five days, to 23 July.

[11] On 23 July Ms Walls sent a text message to Ms T asking to discuss the deposit. On 25 July Ms T told Ms Walls that the funds had been reversed. Ms Walls informed the Keelys, and both parties’ solicitor.

[12] Ms T contacted Ms Walls on 26 July, asking if the property could be held back until 24 August. She confirmed that the deposit would then be paid. Ms Walls advised the Keelys. On 27 July Ms Walls told them that she had not heard further from Ms T. On 28 July, after Ms Walls had spoken to both solicitors, the Keelys’ solicitor issued a cancellation notice, requiring payment of the deposit within three days.

[13] The deposit was not paid. Ms T told Ms Walls that she was totally reliant on her fiancé for funds. The agreement for sale and purchase was cancelled and the property was re-listed. The Keelys subsequently sold the property at a lower price.

¹ There was a dispute as to whether Mr and Mrs Keely were updated by Mr Farry, or by their own solicitor. That dispute does not need to be resolved, for the purposes of this decision.

They incurred costs from having to borrow additional finance, having to make mortgage repayments on two properties at once, and increased solicitors' fees. The Agency paid the Keelys' conveyancing fees.

The complaint and the Committee's decision

[14] Mr and Mrs Keely complained to the Authority as to the conduct of Ms Walls and Mr Workman. They said that Ms Walls had not advised them to seek legal advice as to the risk of accepting a sale and purchase agreement that did not come with a deposit, or where funds were coming in from overseas, they were not advised by Ms Walls that the deposit had not been received, they did not receive any communication about the extension given for paying the deposit, Mr Workman had not taken a lead role when they experienced difficulties working with Ms Walls, and they had suffered financial loss. They sought a cash settlement of 50% of the commission plus \$2000 towards legal costs.

[15] In its substantive decision, the Committee found that Ms Walls had engaged in unsatisfactory conduct, in breach of rr 9.3 and 6.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the rules) by failing to communicate regularly with the Keelys, to keep them informed of all relevant matters, and had failed to exercise her professional judgement by not informing her branch manager in a timely manner of problems with the contract. However, the Committee found that the Keelys were properly informed of the risks of accepting Ms T's offer, and that the matters that arose could not have been anticipated at that time.

[16] In its penalty decision, the Committee found that Ms Walls' unsatisfactory conduct was at the lower end. Ms Walls was ordered to complete further training.

[17] Regarding Mr Workman, the Committee found in its substantive decision that he had engaged in unsatisfactory conduct, in breach of rr 6.1 and 9.1. It found that he had breached his fiduciary duty to the Keelys by failing to support them when requested, he had failed to act in the Keely's best interests by not managing client

liaison with Ms T, as the Keelys had requested, and he had failed to properly manage and supervise Ms Walls prior to 28 July 2014.

[18] In its penalty decision, the Committee expressed concern as to the lack of effective office systems within the Agency, which led to Mr Workman's not being aware of the problems Ms Walls was experiencing, until she advised him some 12 days after the deposit was due; nor was he aware that the deposit had not been paid on the due date. While acknowledging that had Mr Workman been more involved that outcome may have been the same, the Keely's did not receive the expected skill, professionalism and communication. Mr Workman was censured, fined \$1,000, and ordered to complete further training.

Issues on appeal

[19] At the start of the appeal hearing Mr Simpson advised the Tribunal that, having had regard to evidence submitted by Mr Workman in support of his appeal, the Authority did not oppose the appeal in respect of the Committee's finding that Mr Workman failed to properly supervise Ms Walls. Mr Workman challenged all other aspects of the Committee's decision. Mr Rea made three principal submissions on his behalf:

- [a] No act or omission by Mr Workman reached the threshold of unsatisfactory conduct;
- [b] The Committee was wrong to conclude that Mr Workman had breached his fiduciary duty to the Keelys; and
- [c] The Keelys were unreasonable in thinking that they had not been supported.

[20] The Tribunal considers that this characterisation of the issues can be expressed as one overall issue: did Mr Workman respond appropriately regarding Ms T's non-payment of the deposit? As the appeal regarding supervision of Ms Walls will be allowed, the relevant period to examine Mr Workman's conduct is from 28 July,

which was the first time he was made aware of the issue of non-payment. The issue for determination can therefore be re-phrased as: did Mr Workman respond appropriately regarding the non-payment of the deposit after he was made aware of it on 28 July. The Tribunal must therefore consider whether the Committee was wrong to find that his not taking over dealings with Ms T, and his not communicating more with the Keelys, justified a finding of unsatisfactory conduct.

Submissions

[21] Mr Rea submitted that what Mr Workman did or did not do did not meet the threshold for unsatisfactory conduct. He submitted that the Keelys had entered into the agreement with Ms T in full knowledge that it did not require immediate payment of the deposit, so there was a risk that deposit might not be paid. Further, they had made their own purchase agreement unconditional after accepting Ms T's offer, notwithstanding that the deposit had not been paid. He submitted that their distress when the deposit was not paid had been brought on by themselves.

[22] Mr Rea further submitted that Mr Workman had acted appropriately, and had done all that he could have been expected to do, in the circumstances. In particular, he submitted that:

- [a] The Keelys had no shortage of advice as to the progress (or lack thereof) in collecting the deposit;
- [b] Mr Workman appreciated there was a high likelihood of the agreement not proceeding, and recommended re-marketing the property. However, the Keelys had disregarded his advice;
- [c] Mr Workman appropriately realised that if he were to get involved in dealings with Ms T, communication with her was likely to cease totally: Ms Walls was best placed to deal with her;

[d] Mr Workman appropriately limited any direct contact with the Keelys because they did not want to deal with him. Further, the Te Atatu branch was in communication with them; and

[e] Finally, the Keelys were difficult clients, they were unreasonable, demanded compensation, and referred to possible media publicity. The Tribunal has recorded this submission, but does not consider it to be relevant to consideration of this appeal.

[23] On behalf of the Authority, Mr Simpson accepted that the Keelys had entered into the agreement knowing that there was a risk that the deposit would not be paid, and had made their own purchase unconditional. However, he submitted, it was natural that they would be extremely distressed when the deposit was not paid, as this meant that they were left owning two properties, and paying two mortgages.

[24] Mr Simpson submitted that in those circumstances it was reasonable for them to seek assistance from Mr Workman; and greater assistance, communication, and support should have been offered. The Keelys had specifically contacted Mr Workman, asking for help. He accepted that Mr Workman had contact with the licensees at Te Atatu, they were in contact with the Keelys (as to re-marketing the property), and Ms Walls was reporting to the Keelys on progress regarding payment of the deposit. However, he submitted that:

[a] Mr Workman allowed the position to continue where the only contact the Keelys had regarding the deposit was Ms Walls, in whom they had no confidence;

[b] Mr Workman communicated with the Keelys only twice: on 28 July and 14 August;

[c] There were clear signs to Mr Workman, in Ms Walls' failure to advise him that the deposit had not been paid, and the Keelys lack of confidence in Ms Walls, that should have led him to involve himself more.

[25] Mr Simpson submitted that Mr Workman should have explained to the Keelys why Ms Walls was best placed to deal with Ms T, or arranged for another senior salesperson to take over dealings with her. He submitted that there was nothing unreasonable in the Keelys request for another licensee to take over. He further submitted that even though this was unlikely to produce the deposit, it would at least have given the Keelys more support.

[26] In summary, Mr Simpson submitted that Mr Workman should have been more active during the period after 28 July. He submitted that the Committee was not wrong to find that Mr Workman's conduct fell short of the standard a reasonable member of the public is entitled to expect from a licensee, and find he had engaged in unsatisfactory conduct. He acknowledged that Mr Workman's unsatisfactory conduct was at a low level.

Our assessment

[27] We accept there were steps that Mr Workman could perhaps have taken during the period after 28 July. He could have set out in writing for the Keelys the steps Ms Walls had taken to collect the deposit from Ms T, and what Ms Walls was then going to do about the situation. Mr Workman could also set out the steps being taken by the Te Atatu branch. Further, he could have confirmed in writing his advice as to what the Keelys could do regarding the non-payment of deposit, so that they could consider it in their own time.

[28] However, as from 4 August (when the Keelys' solicitor sent the "three days" notice), the matter was being dealt with by solicitors for the Keelys and Ms T. It would have been inappropriate for Mr Workman to offer anything that might be construed as legal advice. Further, the matter was by then entirely in the hands of the Te Atatu branch.

[29] The reservations set out above as to steps Mr Workman might have taken after 28 July do not persuade us that a finding of unsatisfactory conduct was justified. We have concluded that the Committee was wrong to find that Mr Workman had

engaged in unsatisfactory conduct by not taking over dealings with Ms T, and in respect of his communication with the Keelys.

Outcome

[30] As recorded earlier, the Authority did not oppose Mr Workman's appeal against the finding that he failed to properly supervise Ms Walls. As the Tribunal has found that the Committee was wrong to find that Mr Workman engaged in unsatisfactory conduct regarding the dealings with Ms T, and communication with the Keelys, the result is that Mr Workman's appeal succeeds in its entirety.

[31] The Committee's decision is reversed, and the Committee's penalty orders are quashed.

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

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Mr G Denley
Member