BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 7
READT 034/15

IN THE MATTER OF	**An appeal under s 111 of the Real Estate Agents Act 2008**
BETWEEN	**MURRAY RODGERS** Appellant / Licensee
AND	**REAL ESTATE AGENTS AUTHORITY** First respondent
AND	**JAFAR DAVARI** Second respondent / Complainant

MEMBERS OF THE TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

HEARD at WELLINGTON on 28 October 2015

DATE OF THIS DECISION 2 February 2016

REPRESENTATION

The Appellant Licensee on his own behalf
Ms N Copeland, counsel for the Authority
No appearance or participation by or for the complainant second respondent

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DECISION OF THE TRIBUNAL

Introduction

[1] This is another case where a vendor of realty may have incurred double real estate commission. We understand that issue is being litigated in the Civil Courts. The vendor blames in this case, Mr M Rodgers ("the licensee) for putting him in the position of there being a dispute about double commission and he has complained to the Authority about that so as to lead to these appeal proceedings from a decision of Complaints Assessment Committee 306 referred to below. However that complainant has taken no active part in this appeal to us.

[2] The licensee appeals against a decision of finding that he engaged in unsatisfactory conduct and against the orders imposed against him, namely censure and a fine of $5,000. The licensee works for Leaders Real Estate (1987) Ltd at Wellington.

Background facts

[3] Mr Davari's industrial property at 10 Gough Street, Seaview, Wellington had been listed with at least two real estate agencies on a general listing agreement for a number of years.

[4] On 10 March 2014, Mr Ahmadi (the ultimate purchaser) contacted the licensee about the property. He attended the Leader's office to discuss terms and conditions in respect of a purchase of the property on 13 March 2014, and his mortgage broker later contacted Leader's requesting information about the property.

[5] The licensee met with Mr Ahmadi and his associates at the property on 17 March 2014. On the same day, the licensee phoned Mr Davari to discuss an agency or listing agreement. The licensee had previously been employed with Remax Commercial which had a general listing agreement for the property.

[6] At the time the licensee approached Mr Davari, no agency agreement had been signed by him with Leaders but one was ultimately signed on 17 March 2014 to expire on 30 April 2014.

[7] Mr Ahmadi met with the licensee at the Leaders office and signed a sale and purchase agreement for the property on 18 March 2014 at $680,000 plus GST.

[8] On 24 March 2014, Mr Davari contacted the licensee and advised him that he had received a higher offer. It transpired that was for $710,000 plus GST. The licensee emailed Mr Davari several days later to advise him that his agency was sole agency and, therefore, Mr Davari could be liable for two commissions. Mr Davari disputes that Leader's had a sole agency.

[9] On 8 April 2014, the licensee became aware that the purchaser he had been dealing with (Mr Ahmadi) was the same purchaser that had recently purchased the Property through Kevin Dee of Kevin Dee Realty Ltd. The Licensee then emailed Mr Davari informing him that the purchaser was the same purchaser whom he (the licensee) had introduced to the property.

[10] It seems that Kevin Dee Realty Ltd obtained the commission by taking it from the deposit in the usual way and has refused to share it with the licensee who is suing for it in a Disputes Tribunal.

The Committee's findings

[11] In a fully reasoned decision of 9 January 2014 the Committee found that the licensee had engaged in unsatisfactory conduct in failing to:

(a) explain the listing agreement to Mr Davari;

(b) instruct Mr Davari to seek legal advice;

(c) cancel the other general agencies, exposing Mr Davari to a claim for double commission; and

(d) provide a written appraisal.

[12] By a penalty decision of 29 May 2015 the licensee was censured and fined $5,000 by that Committee.

Issues on appeal

[13] The licensee appeals on the basis that the Committee erred in finding that the licensee had engaged in unsatisfactory conduct; and, in any case, in imposing the penalty orders it did.

The evidence adduced to us

[14] We received extensive evidence from the licensee and a witness for him, a Mr Churton, and in his submissions the licensee covered more facts and, effectively, gave further evidence. We refer to that below.

[15] The licensee’s case has been put to us in a rather scattered way but, for present purposes, it is best covered by our summarising his oral evidence to us, with cross-examination, and from his oral summing up to us.

[16] The licensee said that the purchaser contacted him and his colleague Mr Churton on 10 March 2014 and met with them at the offices of Leaders Commercial that day. Inter alia, he sent his form of agency agreement to the

vendor who rang him and they discussed the content of that document for at least 15 minutes by phone with the licensee explaining those contents to that vendor. The licensee stressed that a colleague at his agency, the said Mr Churton, overheard that conversation. The licensee said that he negotiated (and had signed) an agency with the vendor on 17 March 2014 as he (the licensee) required a sole agency period so he could work through any issues with the prospective purchaser and the vendor. They settled on a sole agency until 30 April 2014 and he noted that a general agency does not normally have a finite term.

[17] He said the document came back to him from the vendor (shown as Waterlink Properties Ltd) containing a number of changes and he accepted. It is not clear whether this is a sole agency or a general agency but that issue might be covered in some other document. There is a similar agency document from Waterlink Properties Ltd. The appraised selling price is shown as $650,000 to $800,000 plus GST (if any) and is signed by Mr Davari as “Director”.

[18] The licensee asserted that, verbally, he did clearly instruct the vendor to take legal advice. He said that by mistake the person who represented the licensee before the Committee did not make that clear. He said that, in particular, in the said private phone conversation with the vendor referred to above, he advised him to obtain legal advice. Indeed, he recalled that after he had spent about eight minutes explaining to the vendor the effect of the licensee’s sole agency agreement form, he then moved on to firmly telling him to take his own legal advice but the vendor responded he had no need to do that and forthwith sent back the agency form to the licensee.

[19] The licensee remarked that at that point the property had been on the market for about four years and had not sold because the asking price was “far too high”. Up until then it had been marketed on the basis of being fully leased to one particular tenant and to be sold with that tenant in possession. However, at material times the property was vacant.

[20] In that respect, the licensee asserted his view that, as at 17 March 2014, any prior agencies became null and void (in his view) because the property was no longer being marketed as a leased industrial property but as an industrial property with vacant possession and he felt he did not need to see that any previous agencies were cancelled because the basis on which those agencies had been given by the vendor had evaporated by the lessee vacating the property.

[21] The licensee knew that Kevin Dee Realty Ltd had an agency from 2010 but he thought that was no longer effective due to the property now being vacant. He observed to us, in particular, that meant that the value of the property had decreased through the loss of the lessee possibly by up to 40%.

[22] The licensee observed that he had approached the complainant vendor in good faith seeking an agency agreement / listing agreement, but he felt that the facts show that the vendor was deceitful to him.

[23] The licensee said that the vendor had rung him in December 2013 wanting to know what he needed to do to sell the property which had then been on the market for nearly four years and had just become vacant. The licensee answered that the issue would be over price and that he could give the vendor a valuation or appraisal but he recommended that the vendor engage the late Mr Colin Jenkins, a highly regarded Lower Hutt valuer.

[24] The vendor did that and, fairly promptly, received a valuation report at $735,000. The then Government capital value was about $800,000. The complainant vendor then instructed the licensee that the asking price be $735,000.

[25] The licensee seemed to think that he had fulfilled his obligation to provide the vendor with an appraisal by having the vendor engage Mr Jenkins and because commercial real estate was involved rather than residential. The licensee observed that the buildings on the land were derelict and rundown and had been used for the storage of dangerous goods. He opined that it was very difficult to refer to values of similar properties for comparison in an appraisal because the property was unique and that was a strong factor in him recommending that the vendor use Mr Jenkins and obtain a formal, commercial, independent valuation report. The licensee seemed to be saying that he focused on the value of the land and in the listing agreement gave a $659,000 to $800,000 range for a value and that the sale price achieved was in the middle of that.

[26] The licensee seemed to be saying that he sent the vendor a website property printout on 17 January 2014 showing the property as possibly worth the new Government valuation of $801,000 and he referred the vendor to an industrial site at Gracefield Road which was almost identical in terms of land and was valued at about $490,000. Exhibited emails confirm that. The licensee seemed to be also saying that he gave the vendor an oral appraisal after Mr Jenkins' valuation came to hand and he came up with a range of $650,000 to $830,000 but he had the advantage of knowing that the vendor would accept $735,000 although the property seems to have been sold for $720,000.

[27] In any case, the licensee avers to us that there were no other comparable properties in the North Island, although one property in Auckland had some similarities so that it was very difficult for the licensee to provide an appraisal and he was comforted by the knowledge that the vendor had a formal valuation from Mr Jenkins.

[28] It was put to the licensee that Rule 10.3 of the 2012 Rules provides "*Where no directly comparable or semi-comparable sales data exists, a*

licensee must explain this, in writing, to a client". His response was that this property was unique and the vendor knew that. However, he accepted that he had not given any explanation in writing in terms of Rule 10.3. Even now, the licensee asserts that he could never have improved on Mr Jenkins' valuation although he accepts that "technically" (as he put it), he did not comply with Rule 10.3 but he asserts that he acted prudently and wisely overall and achieved a good price for the vendor even though Kevin Dee Realty Ltd had cut across him.

[29] The licensee was comprehensively cross-examined by Ms Copeland as counsel for the Authority. She put it to him that he could have ensured that previous agencies were cancelled but he persists that they would be, as he put it "null and void due to there being no lessee at the property".

[30] Under cross-examination the licensee insisted that had firmly advised the vendor to obtain legal advice before the listing or agency agreement was signed. The licensee stressed that he felt the Committee had not believed a word he had given in explanation although he accepted that he had left matters before the Committee to his then advisers and said that he had been "pushed into the background".

[31] He insists that, after careful thought since the decision of the Committee, he firmly believes he advised the vendor on 17 March 2014 of the risk of there being double commission if other agencies were in force. He said that "*I can't be 100% sure that I covered the double commission possibility but I know that I always do so that I must have."* He adds that he could not have handled cancellation of any other general agencies because he did not know to whom the vendor may have given agencies to except that he knew there had been an agency given to Kevin Dee Realty Ltd in 2010. He admitted that the vendor had told him that there were other agencies involved but had not specified who they were.

[32] Ms Copeland then put it to the licensee whether he had advised the vendor to cancel any other general agencies and explain that if the vendor did not, he ran the risk of incurring double commission. To that question the licensee seemed to say he was not sure whether he told the vendor to cancel all other general agencies, but he would not do so himself and would simply have asked the vendor to cancel them. Ms Copeland then asked why he had not so advised the vendor in this case. He responded that he was just focused on obtaining a 20 working day sole agency and the vendor did not think there was any need to cancel any other agencies he may have given and the licensee felt that they were invalid because the lessee had vacated. However, the licensee seemed to be saying to Ms Copeland that he, the licensee, should have been more assertive about having the vendor cancel any other agencies he may have given regarding the property.

[33] Ms Copeland then put it to the licensee that he advised the vendor to get a formal independent valuation because he felt that he, the licensee, could not really advise with regard to the value of that particular property,

and that he was clearly in breach of Rule 10.2 (which is set out below) which requires a written appraisal. The licensee seemed to be arguing that he had orally given an approximate valuation range for the property and by putting figures in the listing or agency agreement and in emails to the vendor. However, he then seemed to admit that he had not provided such information in writing and was in breach of Rule 10.2.

[34] The licensee explained that, for some reason or other, although the buyer of the property at first dealt with him, that buyer then went to Kevin Dee Realty Ltd and made a slightly better offer to the vendor who accepted it. Apparently the vendor came back to the licensee and told him he had obtained a better offer from another purchaser so the licensee accepted that as having happened but, subsequently, discovered that the purchaser was the same person he, the licensee, had introduced to the property and to the vendor.

[35] The said Mr Churton then gave evidence in support of the licensee. Mr Churton is a colleague of the licensee and had first met the purchaser in 2013 when it seemed the purchaser had taken a lease of the property. In any case Mr Churton assisted the licensee gather information about the property. It seemed that the purchaser of the property had put its said offer to the vendor through Kevin Dee Realty Ltd while still obtaining information from the licensee and Mr Churton. The latter also asserted that in Wellington it is not common for agencies to cancel other agencies especially with regard to commercial property and that is a matter for the vendor to do.

Submissions for the Authority

Instructions regarding legal advice and explanation of the listing agreement

[36] Rule 9.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 provides:

> Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must –
>
> (a) recommend that the person seek legal advice; and
>
> (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and
>
> (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).

[37] Ms Copeland (counsel for the Authority) submits that the onus falls on licensees to ensure that vendors are made aware of their entitlement to seek legal advice prior to signing an agency agreement, sale and purchase agreement, or other contractual document. Licensees cannot simply rely on

the fact that a vendor is an experienced commercial businessperson to negate their obligations under this rule.

[38] Ms Copeland accepts that it is a matter for us having heard the facts, to determine whether the licensee clearly explained the terms of the listing agreement and recommended Mr Davari seek legal advice prior to signing it.

Risk of double commission

[39] Rule 9.10 of the Rules provides:

> A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than one agent in the event that a transaction is concluded.

[40] As Ms Copeland puts it, this places a positive obligation on a licensee to explain the risk of double commission to a prospective client before signing that client up to an agency agreement (refer *Tucker v REAA & Claydon & Richardson* [2013] NZREADT 46).

[41] Ms Copeland submits that in the present case, the licensee failed to warn Mr Davari about the risk of becoming liable for more than one commission prior to having him sign the sole agency agreement. For a time the licensee did not recall discussing the risk of double commission with Mr Davari but, before us, he was sure he had covered that risk with Mr Davari.

[42] The Authority submits a finding of unsatisfactory conduct was open to the Committee under this head and should be upheld by us.

Cancellation of general agencies

[43] Ms Copeland noted the licensee having stated that it is the accepted and usual practice for vendors to advise agents if they have entered into a previous sole agency or need to cancel a previous general agency; and that commercial agencies in Wellington do not advise other agencies of a change in agency status unless they are instructed to do so by the vendor. He also says that, at the time of the sale to Mr Davari, the licensee's agency was the only agency representing the property for sale on Trade Me and there was no reason for the licensee to assume any other agency was involved with the sale of the property at the time.

[44] However, it is submitted for the Authority that the licensee was aware that there were other general agencies in existence in respect of the property, particularly given the licensee had been previously employed by REMAX Commercial which had a general listing agreement for the property

at material times. Therefore, there was an onus on the licensee to, at a minimum, draw Mr Davari's attention to the risk of double commission if the other general agencies were not cancelled; and it would also have been prudent for the licensee to cancel the other general agencies by, for example, sending a letter notifying the agencies of the existence of the sole agency and cancelling the general agency.

[45] More importantly, Ms Copeland submits that there are no exceptions to Rule 9.10, and the obligation was on the licensee to comply with that rule.

Providing a written appraisal

[46] Rule 10.2 of the Rules requires that an appraisal be provided in writing, be supported by comparable sales information, and must realistically reflect current market conditions. Rule 10.2 is as follows:

> 10.2 An appraisal of land or a business must-
>
> (a) be provided in writing to a client by a licensee; and
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> (b) realistically reflect current market conditions; and
>
> (c) be supported by comparable information on sales of similar land in similar locations or businesses.

[47] Rule 10.3 provides:

> Where no directly comparable or semi-comparable sales data exists, a licensee must explain this, in writing, to a client.

[48] Ms Copeland notes that the licensee contends he fulfilled rules 10.2 and 10.3 but, possibly, not strictly in accordance with the way the two rules are written. This is on the basis that he says that he gave Mr Davari comprehensive and professional advice including recommending Mr Davari get an independent valuation and emailing him with details of a recent sale he had achieved on a properly with similar land size and of another vacant land site that he had under contract.

[49] Neither the Act, nor the Rules, provides the precise format in which an appraisal is required to take. In *Weber v Real Estate Agents* Authority [2015] NZREADT 22, we considered the equivalent rule (r 9.5) in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 and stated:

> [43] We agree with Ms Eckford that a licensee is not a registered valuer and is not required to provide a formal written valuation. However, we consider that such an appraisal should either place an approximate dollar value on the property, or a general valuation range or, if that is not sensible in the opinion of the licensee, then provide

> reasons why that is not sensible. We think that the 2012 Rules 10.2 and 10.3 sensibly expand and express that approach.

[50] Ms Copeland submits that an appraisal needs to do more than simply show a prospective client comparable properties and sales figures and must inform the prospective client why the properties have been selected and how that information translates in to the appraised price that the licensee has arrived at for the property. We agree.

[51] Counsel for the Authority submits that the licensee's 17 December 2013 email, even if taken together with the independent valuation, fails to meet the requirements of r 10.2 and, therefore, it was open to the Committee to make a finding of unsatisfactory conduct in that respect also. Again, we agree.

Penalty

[52] Ms Copeland notes that the licensee also appeals the penalty imposed by the Committee. She puts it that in order to succeed on appeal (in respect of penalty), the licensee must demonstrate that the Committee made an error of law or principle; or failed to take into account a relevant consideration; or took into account irrelevant considerations; or was plainly wrong.

[53] It is submitted for the Authority that, on the facts, the Committee did not make any errors in concluding that the licensee had committed unsatisfactory conduct nor regarding the subsequent penalties it imposed.

Final Oral Submissions

[54] In final oral submissions Ms Copeland, helpfully, covered again her detailed written submissions which we have summarised above.

[55] She submitted that it was not clear that the appellant had told the vendor to obtain legal advice prior to the signing of the listing agreement; that is a requirement in terms of Rule 9.7; failure to do so is at least unsatisfactory conduct; and the licensee cannot rely on the fact that the purchaser was an experienced businessman.

[56] Ms Copeland submitted that the appellant does not seem able to recall whether he advised the vendor of the risk of double commission and the position now is that the vendor faces that risk.

[57] She submitted that it would have been prudent conduct from the licensee to have himself cancelled any other agencies to minimise that risk, she noted he has admitted that he knew that Kevin Dee Realty Ltd had an

agency and he had not pressed the vendor on who else held agencies from the vendor. However, Ms Copeland recorded that the Authority does not suggest that licensees should send out cancellation notices for vendors but emphasises that licensees must advise the vendor of the risk of double commission if agencies have been given to other real estate agents, and that the appellant seems to have neither facilitated the cancellation of other agencies nor advised the vendor of the risk of double commission through not doing so.

[58] Ms Copeland also submits that Rule 10.2 has been breached because the licensee did not provide the vendor with a written appraisal of the land and has admitted to that failure. She puts it that Rule 10.2 does not allow an exception for the situation such as arranging a formal valuation from Mr Jenkins as was done in this case. She submits that the Committee was correct in finding unsatisfactory conduct in that respect and in the penalty it imposed on the various failures leading to unsatisfactory conduct by the licensee.

[59] In his final oral submission the licensee put it that there was only ever one purchaser involved in this case and he had introduced that purchaser to the vendor and to the property and he obtained a sole agency from the vendor; so he feels entitled to commission and, accordingly, is suing for it in the Disputes Tribunal.

[60] The licensee observes that the vendor knew he (the licensee) had a sole agency and that the purchaser was the same person from whom the licensee had arranged the initial offer. He submits that he, the licensee, was the only agency with a valid signed agency at material times because any other agency was given in relation to a property which was fully leased whereas, at material times, the property was vacant and being marketed with vacant possession. He maintains the vendor has treated him dishonestly.

Discussion

[61] Having heard far more evidence than was available to the Committee, we accept the appellant licensee as an honest and credible witness and that he probably explained the listing agreement to the vendor in the manner he outlined to us, and that he instructed the vendor to seek legal advice from the outset.

[62] We also accept that it was not the appellant licensee's responsibility to cancel other general agencies but it would have been good practice to have pushed the vendor into doing that or into advising the licensee who else might have agencies so that the licensee could cancel them on behalf of the vendor. This failure is particularly concerning as, for a time, there seemed to be some uncertainty as to whether the licensee had complied with Rule 9.10 in that he has given conflicting evidence as to whether he explained to the vendor that if the vendor entered into or had already entered into other

agency agreements, that vendor could be liable to pay double commission, i.e. to more than one agent in the event that the sale transaction is concluded.

[63] In any case, we have no hesitation in finding, as did the Committee, that the vendor was not provided with an appraisal in writing as required by Rule 10.2 and that Rule 10.3 cannot be applied to redeem the licensee in respect of that because he did not explain in writing to the vendor that perhaps no directly comparable or semi-comparable sales data existed in this case.

[64] As covered above, the Committee found that the terms of the listing authority were not explained clearly by the licensee to the complainant; that the complainant was not advised to seek legal advice before signing the agency agreement; that the licensee exposed the complainant to a claim for double commission and that the licensee failed to provide a written appraisal as required by Rule 10.2. Accordingly, the Committee found that the appellant engaged in unsatisfactory conduct. We have no doubt that Rule 10.2 (coupled with Rule 10.3) was breached. The evidence about exposing the complainant to a claim for double commission was conflicting for a time. It is difficult to disagree with the Committee that the licensee exposed the vendor to a claim for the double commission in terms of the evidence then put before the Committee but, before us, his evidence led to our findings expressed in para [61] above.

[65] On the evidence adduced to us, we find that the licensee, on and the risk of probabilities, explained the listing agreement to the vendor; and the risk of incurring more than one commission; and advised the vendor to seek legal advice. He did not provide a written appraisal of the property but, in terms of penalty, he did have a very reputable valuer provide sound advice to the vendor and the property was not of a type to easily appraise.

[66] The licensee should have pressed the vendor to disclose and cancel competing agencies at material times so as to avoid even a dispute about exposing the vendor to possible double commission. That the property became vacant in the course of marketing did not nullify agency or listing agreements as the licensee thought; but we take that factor into account.

[67] We take the view there has been unsatisfactory conduct on the part of the licensee but to a lesser degree than covered by the Committee which did not have available to it the evidence adduced to us. Accordingly, we reduce the fine imposed by the Committee from $5,000 to $1,500.00.

[68] We express our concern that, allegedly, real estate agents in Wellington may be casual about ensuring that there is only one agency in existence so as to eliminate the possibility of a vendor incurring double or multiple commission.

[69] We also record that Rule 10.2 is crystal clear in requiring that a licensee provide the vendor with an appraisal of the property “in writing”. That means that no matter what helpful and accurate oral advice is given by the agent to a vendor, unless that is in writing there will be a breach of Rule 10.2.

[70] Pursuant to s 113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s 116 of the Act.

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Judge P F Barber
Chairperson

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Mr J Gaukrodger
Member

_____
Ms N Dangen
Member