

**PURSUANT TO S 108(1) OF THE REAL ESTATE AGENTS ACT 2008,
PUBLICATION OF THE NAME OR PARTICULARS OF THE AFFAIRS OF
ANY PERSON REFERRED TO IN THIS DECISION, IS PROHIBITED**

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 62

READT 030/18

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| IN THE MATTER OF | An appeal under section 111 of the Real Estate Agents Act 2008 |
| BETWEEN | [Mr A] Appellant |
| AND | THE REAL ESTATE AGENTS AUTHORITY (CAC X) First Respondent |
| AND | [Ms B] Second Respondent |
| Hearing: | 25 September 2018, at [city] |
| Tribunal: | Hon P J Andrews, Chairperson Mr G Denley, Member Ms N Dangen, Member |
| Appearances: | Mr A Mr C, on behalf of the Authority Mr D, on behalf of Ms B |
| Date of Decision: | 17 October 2018 |

DECISION OF THE TRIBUNAL

Introduction

[1] Mr A has appealed against the decision of Complaints Assessment Committee 403 (“the Committee”), issued on 8 May 2018. In that decision the Committee decided not to inquire into Mr A’s complaint against Ms B. The Committee’s decision was made under s 79(1)(a) of the Real Estate Agents Act 2008 (“the Act”). That is, the Committee determined that Mr A’s complaint alleged neither unsatisfactory conduct nor misconduct.

[2] Mr A’s complaint related to the conduct of Ms B, of [firm] (“the Agency”), in relation to the purchase of a property by Mr A, in which she was the listing and selling agent. The issue to be determined is whether the Committee was in error in finding that Ms B was not required to disclose to Mr A whether she had given the vendors a discount on the commission charged on the sale, and if so, in what amount.

Background facts

[3] Mr A and his wife viewed a property near [city] (“the property”) in October 2017. They made an offer on the property, of \$850,000, on 1 December 2017. The offer was rejected by the vendors. They and the vendors then entered into negotiations as to the offer price. On 26 December 2017, Ms B told them that the vendors were not prepared to move from \$930,000, as they had already dropped their price from \$960,000. Their response was that if Ms B wanted to make the deal happen, she should consider, for example, reducing the commission fee charged to the vendors.

[4] On 31 December 2017, Mr A told Ms B, by email, that he and his wife had made a “tough decision” to offer \$920,000. They went to Ms B’s office later the same day to discuss the offer. Mr A alleged that Ms B said that the vendors were firm on their price of \$930,000, but if they were prepared to increase their offer to \$925,000, she would discount her commission fee by \$5,000, thereby making up the difference to \$930,000. Mr and Mrs A then increased their offer to \$925,000, which was accepted that evening by the vendors.

[5] Mr and Mrs A's offer was conditional on their entering into an unconditional agreement to sell their own property by 16 March 2018. They engaged Ms B to sell their property. An agreement for sale and purchase was entered into in early January 2018.

[6] Around 17 January 2018, Mr A contacted the Agency's Manager, Mr E, by text message, seeking a discount of the commission fee for the sale of their property, on the grounds that as only two offers had been received, they had been forced to lower their price expectations. Mr E declined his request, and said that the Agency had already discounted the fee charged to Mr and Mrs A to list their own property. He added "out of interest" that the vendors had not been given a discount on the A's purchase.

[7] Mr A sought, by email, clarification of Mr E's response. Mr E responded that Mr A had bought the property for the negotiated price, and the amount of commission was "not open for discussion" and did not "change the equation" for Mr A's purchase.

[8] Mr A then contacted the Agency's Regional Manager, Mr F. On 15 February 2018, Mr F advised Mr A, by email, that Ms B had given the vendors a discount of "around the sum you are talking about (and in fact more than [Ms B] was authorised to give). Most of this discount will come out of [Ms B's] pocket". Mr F noted Ms B's statement that she had said to Mr A that "if the vendor would not accept your offer then it might have to come out of our pocket".

[9] On 24 January 2018, the Authority received a complaint from Mr A, that Ms B had given them misleading information, that she would discount her commission charged to the vendors by \$5,000, which led Mr and Mrs A to increase their offer to \$925,000. He sought an apology, repayment of the \$5,000 by which they had increased their offer, and \$4,000 "compensation".

Committee decision

[10] The Committee set out its reason for deciding not to inquire into Mr A's complaint as follows:

3.2 The Committee has seen correspondence which confirms that the vendor of the Property did receive a discount on commission. [Mr A] was not misled or lied to about this.

3.3 The commission charged was a matter between [Ms B], her agency and the vendor. It was not a matter that concerns [Mr A]. Nor was it his business how any discount was made up.

3.4 [Ms B] was upfront with [Mr A] that her vendors would not accept an offer which was below a certain level. It was her job to obtain the best price for her vendor client.

3.5 The Committee sees nothing wrong in a Licensee reaching an arrangement with a vendor reducing the commission payable to allow a vendor to accept a lower offer. [Ms B] was open to [Mr A] about the position and her conduct was not in breach of any of the [Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012]. [Mr A] is aggrieved that he did not receive a similar discount on his own property sale however [Ms B] and the Agency were under no obligation to offer him one.

Appeal submissions

[11] Mr A submitted that while he and his wife wanted to buy the property, their top line was \$925,000, and the vendors' bottom line was \$930,000. He said that he and his wife got the property by increasing their offer to \$925,000, and Ms B's discounting her commission by \$5,000. He submitted that if Ms B did not discount her commission, then she had broken a promise to him that she would do so.

[12] Further, Mr A is of the view that if in fact Ms B did not discount her commission, and the vendors accepted \$925,000 in the absence of any discount, he may have been able to negotiate with the vendors to buy the property for \$920,000. He submitted that the evidence as to whether the vendors received a discount was inconsistent: Mr E said they did not, Mr F said that they did, and counsel for Ms B in her submissions said she did not. In the circumstances, he submitted, he was entitled to know the true position.

[13] Mr D submitted for Ms B that the Committee was entitled to reach its decision not to inquire into the complaint. He submitted that whether or not Ms B told Mr A that she would reduce her commission could have no bearing on the price he paid for the property. He submitted that Mr A was aware of the vendors' price expectations from the marketing material for the property, from Ms B's advice to them on 26 December 2017 and, crucially, the vendors' counter offers of \$930,000. The only issue for Mr A and his wife was whether the vendor would accept their offer of \$925,000.

Mr D further submitted that Mr A and his wife could not have been misled by anything Ms B did or said.

[14] Mr C submitted for the Authority that the Committee was correct to conclude that Mr A's complaint did not allege either unsatisfactory conduct or misconduct. He submitted that Mr A's appeal challenged a factual determination by the Committee that was open to it to make, on the evidence before it.

[15] Mr C further submitted that s 79 performs an important filtering function, enabling Complaints Assessment Committees to filter out complaints that should not be inquired into, for any of the reasons set out in s 79(1)(a)–(e) of the Act. The Committee is entitled to consider the information it has been provided by the complainant and determine if the complaint fits within one of those categories. He submitted that there is a public interest in a robust approach being taken to power given under s 79, as it allows resources to be concentrated on other complaints, and results in those complaints being determined more swiftly.

Discussion

[16] Section 79 of the Act provides, as relevant to this appeal:

79 Procedure on receipt of complaint

- (1) As soon as practicable after receiving a complaint concerning a licensee, a Committee must consider the complaint and determine whether to inquire into it.
- (2) The Committee may—
 - (a) determine that the complaint alleges neither unsatisfactory conduct nor misconduct and dismiss it accordingly:

...

[17] We accept Mr C's submission that s 79 performs a filtering function, enabling a Complaints Assessment Committee to decide whether a complaint should be investigated further. The Committee must "consider" the complaint, but it has a discretion as to whether the complaint should become the subject of an inquiry.

[18] We are not persuaded that the Committee was in error, in any way, in deciding not to inquire into Mr A's complaint. He was not entitled to be given information as

to the commission charged to the vendor of the property he was buying, whether as to the amount charged, or any discount given.

[19] Neither Ms B nor the Agency was in breach of any of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 in refusing to disclose the commission charged to the vendor. In any event, however, Mr A was told by Mr F that there had been a discount, of “around the sum” Mr A was talking about. Therefore, Mr A now knows that Ms B did “keep her promise” to him, and that the price he paid was what was required to pay to secure the property.

[20] We reject Mr A’s submission that he was in any way misled into offering \$925,000 for the property. There was no evidence that the vendors would accept any offer below \$930,000, and Mr A and his wife were well aware of the vendors’ expectation. In the end, they secured the property for a price that they were prepared to pay, and the vendors were prepared to accept.

Decision

[21] The Committee’s decision is upheld, and Mr A’s appeal is therefore dismissed.

Order for non-publication

[22] Mr D asked for an order to be made under s 108(1)(a) of the Act, prohibiting any publication of this decision. We accept that such an order is appropriate. The Tribunal has upheld the Committee’s decision not to inquire into Mr A’s complaint. As there will be no inquiry, there can be no public interest in publishing either the Committee’s, or the Tribunal’s decisions.

[23] Pursuant to s 108(1)(a) and (c) of the Act, we make an order prohibiting the publication of the name or any particulars of the affairs of any person referred to in this proceeding.

[24] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms N Dangen
Member