BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 68

READT 035/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	VANESSA ANN BROWN Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 413) First Respondent
AND	LOUIS (STEVE) SLICKER Second Respondent
Hearing	1 October 2018, at Wellington
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr Simpson, on behalf of the Authority No appearance by or on behalf of Ms Brown, or Mr Slicker
Date of Decision:	30 October 2018

DECISION OF THE TRIBUNAL

Introduction

[1] On 26 September 2017., the Real Estate Agents Authority ("the Authority") received a complaint made by Ms Brown against Mr Slicker. Ms Brown has appealed against the decision of Complaints Assessment Committee 413 ("the Committee"), dated 29 May 2018, to take no further action on the complaint.

Complaint

[2] Mr Slicker is a licensed salesperson engaged by Safari Real Estate Limited, trading as Tommy's Upper Hutt ("the Agency"). On 20 February 2017, Ms Brown's property at Upper Hutt was listed for sale on behalf of the mortgagee of the property (the Bank of New Zealand), and marketed by Mr Slicker.

[3] Ms Brown subsequently complained to the Authority that:

[a] Mr Slicker did not adequately market the property and "fobbed off" potential purchasers;

[b] the mortgagee accepted a tender before the closing date, and after becoming aware that her brother wished to purchase the property;

[c] Mr Slicker colluded with the mortgagee to ensure that friends of Mr Slicker purchased the property at well below market value; and

[d] The property was undersold at $325,000, but was sold a few months later for $421,000, in a sale where Mr Slicker was the selling agent.

Committee's decision

[4] The Committee decided to inquire into the complaint, pursuant to s 79(2)(e) of the Real Estate Agents Act 2008 ("the Act"). Following that inquiry, the Committee considered all of the information obtained, and decided not to take any further action on the complaint. That decision was made pursuant to s 89(2)(c) of the Act.

[5] The Committee found that the property was adequately marketed in a four-week marketing campaign, including a signboard, local print media, and internet marketing. The marketing campaign was approved by the mortgagee. The Committee found that the campaign was reasonably comprehensive, and in the best interests of Ms Brown and the mortgagee. The property received approximately 2147 online hits and 59 Trade Me watchers which resulted in two inquiries and two roadside viewings.

[6] The Committee recorded that Mr Slicker was acting on behalf of the mortgagee, not Ms Brown. There was no complaint by the mortgagee, and the Committee found no evidence of anything other than an executed campaign that would be regarded by agents of good standing, and reasonable members of the public, as being adequate and appropriate in the circumstances.

[7] Regarding Ms Brown's complaint that Mr Slicker had fobbed off potential purchasers, the Committee referred to the only evidence provided by Ms Brown to support this complaint, which was from a third party who had an acquaintance whose daughter was allegedly told by Mr Slicker that he could not show her the property because there was "a difficult tenant and dogs". The Committee accepted Mr Slicker's evidence that he had not been permitted to show interested parties through the property. The Committee found that, looked at objectively, there was no evidence to substantiate Ms Brown's assertion that Mr Slicker had fobbed off potential purchasers.

[8] The Committee rejected Ms Brown's complaint that the property was sold below market value. It recorded that the mortgagee had commissioned two registered valuations and two market appraisals. While all indicated a likely sale price higher than that achieved, the Committee did not consider the difference to be excessive. The Committee also noted that at least two of the report writers had been denied access to the property and were not therefore able to assess the interior.

[9] The Committee also recorded that the purchaser's tender price was "by some margin" the higher of the two tenders received, and the final sale price was achieved after further negotiation, and that Mr Slicker's obligation to achieve the best selling price was to the mortgagee, not Ms Brown. There was no evidence of the mortgagee being unhappy with the sale price, so Mr Slicker could not be held at fault.

[10] Finally, the Committee found that Ms Brown had not established her complaint that there was collusion between Mr Slicker and the purchasers. The Committee found that the higher on-sale price was explained by the purchasers having spent $60,000 on renovations, the on-sale was not a "forced sale", and access to the property was available for potential purchasers. Accordingly, the Committee rejected this aspect of Ms Brown's complaint.

Notice of Appeal

[11] Ms Brown stated in her Notice of Appeal that the Committee's decision did not "coincide with the rules in the Code of Conduct[1] and the Act". She stated:

> The facts are that the licensee sold a property for what was owed to the mortgagee with the intentions to resell it a short time later for its real value. This is unacceptable. The licensee took advantage of the situation and used it as an opportunity for the buyers. He did what he could to ensure that they successfully bought the property cheaply. The licensee breached any duty of care he owed me and did not care whatsoever.

Appeal process

[12] A timetable for filing submissions on the appeal was set by consent, as was the hearing date. The hearing date was initially set for 2 October 2018, but amended to 1 October. Ms Brown confirmed that 1 October was "OK for me" in an email to the Tribunal on 20 August.

[13] The timetable required Ms Brown to file submissions on the appeal by 4 September. This was later extended to 11 September, at Ms Brown's request. No submissions were received by 11 September. On 21 September, Ms Brown advised the Tribunal that "I have no more submissions". The Authority's submissions were filed and served on Ms Brown on 25 September.

[14] A formal Notice of Hearing was sent to Ms Brown on 21 September. This advised her that she was "required to attend a hearing before the Real Estate Agents Disciplinary Tribunal", and set out the address of the venue (a hearing room at the Tribunals Unit), the date and starting time of the hearing. The Notice also advised Ms

---

1 The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

Brown that hearing duration was estimated to be half a day, and she was asked to ensure that she arrives at least 15 minutes prior to the hearing.

[15] The Notice also provided general advice: that Ms Brown needed to attend the hearing to have the case heard, she could appoint a lawyer or representative to act on her behalf, and could bring a support person. The Notice then advised Ms Brown:

> If you do not attend the hearing, the hearing may still proceed in your absence.

[16] Ms Brown was advised that she could find out more about the Tribunal on the Ministry of Justice Website (the address was provided), and invited to contact the Case Manager if she had any questions. Ms Brown did not contact the Case Manager with any questions.

Appeal hearing

[17] Ms Brown did not appear at the hearing on 1 October. The appeal was called outside the hearing room, without any response. The Case Manager attempted without success to contact her by telephone. An email was sent to her at 10.05 asking her to advise urgently if she was attending the hearing, and that it was supposed to have started at 10.00 am.

[18] The hearing was cancelled at 10.45 am. Counsel for the Authority was advised that the Tribunal intended to issue a decision on the appeal "on the papers", that is, the material before the Committee, the Committee's decision, Ms Brown's Notice of Appeal, and the Authority's submissions.

Application for re-scheduled hearing

[19] The Tribunal received an email from Ms Brown at 6.52 pm on 1 October, in which she said "I thought the hearing took place without me, like the CAC hearing". At 11.52 am on 2 October, the Tribunal received a further email, in which Ms Brown stated:

> Can we please re-schedule the hearing? Reasons for my request is that I've been going through personal issues with my health and also homelessness

> recently. I apologise for not attending. I am engaging a solicitor and respectfully ask that the Tribunal allow for a hearing.

[20] Submissions were sought from counsel for the Authority. In a memorandum on behalf of the Authority dated 2 October (copied to Ms Brown), Mr Simpson opposed Ms Brown's application for the hearing of her appeal to be re-scheduled. He submitted that although the oral hearing should not be re-scheduled, Ms Brown would still have the benefit of having her appeal substantively determined on the papers, as she could be given the opportunity to file written submissions in support of her appeal.

[21] Mr Simpson further submitted that the Authority would be unfairly prejudiced if put to the expense of a re-scheduled hearing, which would involve the cost of counsel travelling from Auckland, a second time.

[22] Mr Simpson did not object to Ms Brown being given further time to file written submissions.

Timetable for written submissions

[23] On 8 October, the Tribunal's Case Manager advised Ms Brown that the Tribunal would allow her until 15 October to file written submissions.

[24] On 11 October, Ms Brown sought, and was given, a further week to file submissions. Her submissions were, therefore, to be filed by 23 October. Ms Brown did not file submissions by 23 October, and has not done so subsequently.

Discussion

[25] As recorded at paragraph [13], above, Ms Brown advised the Tribunal on 21 September, that she had "no more submissions" on her appeal. Despite that advice, she later advised the Tribunal that she wished to file submissions. The Tribunal is satisfied that Ms Brown has been given ample opportunity to file written submissions, and she has not done so.

[26] It is appropriate for Ms Brown's appeal to be determined in her absence.

[27] The Tribunal has no doubt that the Committee's decision was correct, for the reasons set out in its decision. In brief:

[a] There was evidence before the Committee that the property was comprehensively and adequately marketed in a four-week marketing campaign, including a signboard, local print media, and internet marketing, approved by the mortgagee.

[b] Mr Slicker was acting on behalf of the mortgagee, not Ms Brown. There was no complaint by the mortgagee, and there was no evidence before the Committee of anything other than an executed campaign that would be regarded by agents of good standing, and reasonable members of the public, as being adequate and appropriate in the circumstances.

[c] The only evidence offered by Ms Brown that Mr Slicker had fobbed off potential purchasers, was at least triple hearsay, which the Committee was right to reject. The Committee correctly found that, looked at objectively, there was no evidence to substantiate Ms Brown's assertion.

[d] On the evidence before it, the Committee was right to reject Ms Brown's complaint that the property was sold below market value. The evidence before the Committee was that the purchaser's tender price was "by some margin" the higher of the two tenders received, and the final sale price was achieved after further negotiation.

[e] The Committee was right to find that Mr Slicker's obligation to achieve the best selling price was to the mortgagee, not Ms Brown.

[f] The Committee's finding that Ms Brown had not established her complaint that there was collusion between Mr Slicker and the purchasers was supported by the evidence before it. This was the evidence of expenditure by the purchasers on renovations, that the on-sale was not a "forced sale", and that potential purchasers were able to view the property.

Result

[28] The Tribunal is not persuaded that the Committee erred in deciding to take no further action on Ms Brown's complaint. Her appeal against the Committee's decision is therefore dismissed.

[29] 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 C Sandelin
Member