BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 69

READT 032/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	SIMON MARTIN Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 416) First Respondent

Hearing:	9 October 2018, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Mr N O'Connor, Member
Appearances:	Mr C Child, on behalf of Mr Martin Ms E Mok, on behalf of the Authority
Date of Decision:	1 November 2018

DECISION OF THE TRIBUNAL

Introduction

[1] In a decision dated 1 March 2018, Complaints Assessment Committee 416 ("the Committee") made a finding of unsatisfactory conduct against Mr Martin ("the substantive decision"). In a decision dated 24 May 2018, the Committee censured him, and ordered him to pay a fine of $3,000 ("the penalty decision"). Mr Martin has appealed against the Committee's substantive decision. Although Mr Martin has not expressly appealed against the penalty decision, he submits that both the substantive decision and the penalty decision should be overturned.

[2] The Committee's decisions followed a complaint lodged with the Authority on 29 June 2017 by prospective purchasers of a property near Tauranga ("the property") as to the conduct of Mr Ryan Mulligan, the listing salesperson for the property. The Committee decided to inquire into the complaint then, as it considered that the complaint also raised issues concerning the conduct of Mr Martin, decided to inquire into him, pursuant to s 78(b) of the Real Estate Agents Act 2008 ("the Act").

Factual background

[3] Mr Martin is a licensed agent and is the managing director of Advantage Realty Limited, trading as Harcourts Advantage Realty Tauranga Central ("the Agency"). Mr Mulligan is a licensed salesperson engaged at the Agency. At the time of the relevant events, Mr Mulligan had approximately one years' experience as a salesperson. Mr Martin was Mr Mulligan's manager.

[4] All relevant events occurred in May and June 2017. The property was to be sold at auction on 4 May 2017. The complainants, Mr Power and Ms Wallsgrove inspected the property in early May. Mr Power made a pre-auction offer to buy the property, which was to be presented to the vendor[1] after the auction. The property failed to sell at auction and, despite negotiations, the vendor then rejected Mr Power's pre-auction offer.

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[1] The property was owned by the vendors in equal shares. All relevant dealings were with the female vendor. We will, therefore, refer to her as "the vendor", except where it is necessary to refer to both vendors.

[5] Mr Power then signed a second agreement for sale and purchase on 1 June 2017 ("Mr Power's offer"). Mr Mulligan presented Mr Power's offer to the vendor on 2 June 2017. At her request, Mr Mulligan met the vendor in a carpark. He gave her Mr Power's signed offer, expecting her to sign it. However, the vendor insisted on taking the offer to her solicitor. Mr Mulligan had not made a copy of Mr Power's offer, and the vendor took the only copy of it.

[6] At some point after Mr Power had signed his offer, an issue arose as to farm chattels included in the sale. Mr Martin assisted Mr Mulligan with drafting an appropriate clause to be included in the offer. On 7 or 8 June, Mr Mulligan orally informed Mr Power that his offer had been "accepted" by the vendor, that he was expecting to receive Mr Power's offer back from the vendor's solicitor within about one week, and that he would bring it to him for final signing (that is, countersigning the condition as to farm chattels).

[7] We note that there was a dispute as to the context in which the word "accepted" was used. Mr Mulligan's evidence to the Committee was that he may have told Mr Power that the female vendor "accepted" the condition as to the farm chattels, and the offer was then to be sent to the male vendor for signature. However, Mr Mulligan also said he told Mr Power that the female vendor had signed the offer, and the solicitor was sending it to the male vendor.

[8] On 14 June, Mr Mulligan met another prospective purchaser at the property. The vendor was present. The prospective purchaser decided to put in another offer ("the second offer"), and negotiations occurred at the property. The vendor preferred the second offer. Mr Mulligan prepared an agreement for purchase at the property, and the vendor again took it to her solicitor herself.

[9] On 15 June, Mr Mulligan told Mr Power that he had not received his offer back from the vendor's solicitor, and that another party was interested in buying the property. He told Mr Power that there was now a multi-offer situation. In fact, the vendor had not at this stage said that she wanted to commence a formal multi-offer process.

[10] On 16 June, Mr Mulligan was advised by the vendor's solicitor that the second offer had been accepted. Mr Mulligan informed Mr Martin. He did not inform Mr Power.

[11] On 19 June, Mr Mulligan emailed a multi-offer form to Mr Power, asking him to sign and return it. Following that email Mr Power telephoned Mr Mulligan and there was then an exchange of emails between them. Mr Power asked for a copy of his offer. Mr Mulligan said he did not have a copy, but would aim to get one that day from the vendor's solicitor. Again, Mr Mulligan did not tell Mr Power that the second offer had been accepted by the vendor.

[12] Mr Power then contacted Mr Martin, and was told that the property had been sold, and that the vendor's solicitor would not release a copy of his offer.

[13] Mr Power and Ms Wallsgrove met with Mr Martin and Mr Mulligan on 21 June. The meeting did not achieve any resolution.

The Committee's decision

[14] The Committee made a finding of unsatisfactory conduct against Mr Mulligan. It described his conduct as "seriously remiss", in particular, in not telling Mr Power that the second offer had been received, then accepted, and in failing to retain a copy of Mr Power's offer. It found he had breached rr 6.4, 10.11, and 10.12 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), so as to be unsatisfactory conduct under s 72(b) of the Act.

[15] The Committee's inquiry into Mr Martin's conduct focussed on his supervision of Mr Mulligan. He was asked to respond to a number of questions as to the supervision of Mr Mulligan, his own knowledge of the transaction, and as to the process of the transaction (in particular Mr Mulligan's actions as to Mr Power's offer and the second offer). In his response, Mr Martin set out the Agency's supervision programme. He said that Mr Mulligan had been assessed as "both competent and confident with all aspects of real estate" after the initial six months of training, and did

not need to continue the intensive supervision given the salespeople in the first six months.

[16] Mr Martin described the supervision provided in respect of the listing and sales process of the property: a supervisor (Mr Guyot) visited the property with Mr Mulligan when it was listed, Mr Martin checked the title, Mr Guyot checked the LIM, Mr Guyot met with Mr Mulligan and the vendor prior to the auction, Mr Martin spoke with Mr Mulligan when an issue arose regarding the male vendor, Mr Martin assisted Mr Mulligan with drafting the additional clause as to the farm chattels, and Mr Martin liaised with Mr Power on 19 June.

[17] Mr Martin said, regarding the fact that the vendor took the sole copy of Mr Power's offer with her after her meeting with Mr Mulligan in a carpark, that Mr Mulligan had expected her to sign the offer, which he would then email to her solicitor. He said the vendor had insisted on taking the offer to her solicitor, and (because they were in a carpark) Mr Mulligan had no way of photocopying it and had to give it to the vendor.

[18] The Committee found that Mr Martin's supervision of Mr Mulligan fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee, and as such, was unsatisfactory conduct under s 72(a) of the Act. It found that Mr Martin's supervision was inadequate in two respects: regarding the "multi-offer situation", and regarding Mr Mulligan's failure to retain a copy of Mr Power's offer. As to the first, the Committee said:[2]

> 3.6 … these grave failings on the part of [Mr Mulligan] and his understanding of multi-offer situations demonstrate to the Committee a lack of adequate supervision systems, for which [Mr Martin] is responsible. The Committee finds this failing of adequate supervision to fall short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee …

[19] With regard to Mr Mulligan's failure to retain a copy of Mr Power's offer, the Committee said:[3]

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2 Substantive decision, at paragraph 3.6.
3 At paragraph 3.9.

> 3.9 … there is a clear supervision failure in this regard, … the Committee considers that it is not sufficient for [Mr Martin] to, as he does, in effect shrug the failure off as the result of the circumstances of [Mr Mulligan] meeting with the female vendor in the carpark. If stricter rules around the retention of ASP's by the Agency were in existence, then the situation [Mr Mulligan] found himself in would not have occurred. [Mr Martin] had the ability to control what offers were out in the world as presented by his salespeople, and he had no system in place to ensure he could exercise such control.

[20] The Committee said in its penalty decision:[4]

> 3.6 …
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> (c) [Mr Martin] allowed the situation with [Mr Mulligan] to spiral out of control. The Agency's supervision processes are, indeed, thorough and complete but the Committee considered there to be a systems failure in these systems such that the required processes were not followed.
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> (d) Both [Mr Mulligan and Mr Martin] demonstrated themselves to be out of their depth in managing the particular vendors (in the case of [Mr Mulligan]) and an agent dealing with a situation beyond his level of experience (in the case of [Mr Martin]).

Appeal issue

[21] The sole issue on appeal is whether the Committee was wrong to find that Mr Martin's supervision of Mr Mulligan was inadequate.

Submissions

[22] Mr Child submitted on behalf of Mr Martin that the Committee was wrong to reason that an incorrect decision by a licensee (in this case, Mr Mulligan's error) indicates a failure in supervision and management practices. He submitted that the Agency had recently updated supervision policies and processes in place at the time:

[a] The supervision system is tailored to each licensee in the Agency, based on specific competencies and learning needs. He noted that the Committee found that the system was thorough and complete.

[b] The Agency's policies required Mr Mulligan to advise Mr Martin and/or the branch manager as soon as a multi-offer scenario was identified. The Agency relies on licensees' responsible for a property to trigger the

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4 Penalty decision, at paragraph 3.6 (c) and (d).

procedure for dealing with multi-offers. He submitted that in this case Mr Mulligan had overlooked it, and never triggered the procedure.

[c] Mr Mulligan had had training on policies re agreements for sale and purchase, including a "strictly enforced" policy of stamping all incomplete purchase offers, placing them in an "out" tray for processing by the Agency administration staff. In this case, Mr Mulligan had overlooked the Agency policy, because he was away from the office, and was pressured by the vendor to hand over the only copy of the offer. He submitted that Mr Mulligan had made a poor decision, which undermined the policy.

[23] Mr Child noted that the Authority acknowledged that the Committee had erred in finding that Mr Martin had advised Mr Mulligan to send a multi-offer form to Mr Power. He submitted that the Committee wrongly gave weight to its finding that Mr Martin had given such advice. He further submitted that Mr Martin had never been alerted to any need to supervise a multi-offer process, because Mr Mulligan never told him it was necessary to do so.

[24] Mr Child referred the Tribunal to its decision in *Hutt City Ltd v the Real Estate Agents Authority (CAC 20002)*,[5] and to the judgment of her Honour Justice Thomas in the High Court in *Barfoot & Thompson Ltd v Real Estate Agents Authority*.[6] He submitted that *Hutt City* and *Barfoot & Thompson* are authority for the proposition that an incorrect decision by a licensee does not automatically indicate a failure in the supervision and management practices applied to the licensee.

[25] In the present case, he submitted, Mr Mulligan's decisions were made under pressure, in unique circumstances. He submitted that the Committee should have assessed the Agency's supervision practices "in isolation and in light of sensible business practice and common sense". He submitted that despite finding that the Agency had a sufficient supervision structure in place, the Committee had taken exception to Mr Martin's inability to supervise every aspect of Mr Mulligan's dealings with the vendor, in order to prevent breaches from occurring. He submitted that if the

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5 *Hutt City Ltd v the Real Estate Agents Authority (CAC 20002)* [2013] NZREADT 109.
6 *Barfoot & Thompson Ltd v Real Estate Agents Authority* [2014] NZHC 2817, [2015] 2 NZLR 254.

Committee had properly considered the Agency's supervision policies and practices in isolation, it would have concluded that they met the requirements of the Act and Rules, and that any wrongdoing as a result of not following them lay at the feet of Mr Mulligan, alone.

[26] Ms Mok submitted for the Authority that the submission advanced for Mr Martin was unduly narrow, and inconsistent with the consumer protection purposes of the Act, which include raising industry standards. She further submitted that the reference to *Hutt City* and *Barfoot & Thompson* was misconceived, and that while the occurrence of an error by a licensee may not necessarily equate to a failure of supervision, the error is the starting point for considering the adequacy of the supervision of the licensee.

[27] She submitted that neither *Hutt City* nor *Barfoot & Thompson* is authority for a proposition that the inquiry is confined to an agency's supervision policies and practices in isolation, as it is necessary to consider both the supervision structure, and how it was applied. Ms Mok further referred to her Honour Justice Thomas's statement in *Barfoot & Thompson*, that "the fact that an error has occurred is not conclusive evidence of a breach of s 50".[7] She also referred to the Tribunal's statement in *Donkin v Real Estate Agents Authority (10057)*,[8] that more than a simple assertion that staff have been told to act in a certain way, but have not, is required in order to discharge the obligation to supervise under s 50 of the Act.

[28] Ms Mok accepted that in this case, the Agency's supervision policies and practices were generally adequate, but submitted that the issue here is whether, notwithstanding those policies and processes, there was adequate supervision of Mr Mulligan in this specific transaction. She submitted that inadequate supervision of Mr Mulligan materially contributed to his unsatisfactory conduct.

[29] Ms Mok referred to the supervision provided to Mr Mulligan, as set out by Mr Martin (and recorded at paragraph [16], above). She pointed out that with the exception of Mr Martin's assistance with drafting the condition as to farm chattels,

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7 *Barfoot & Thompson*, above n 7, at paragraph [13].
8 *Donkin v Real Estate Agents Authority (10057)* [2012] NZREADT 44, at paragraph [12].

that supervision occurred before Mr Power made his offer on 1 June. She submitted that this demonstrated a lack of supervisory oversight when Mr Power's offer was under consideration.

[30] She submitted that this transaction had a number of "red flag" features: it was a farm property not a typical residential property; the vendor was difficult to deal with (compounded by issues surrounding the male vendor); the vendor's solicitor refused to release a copy of Mr Power's offer; and a competing offer was made which potentially triggered a multi-offer process. She submitted that these features required experienced oversight to ensure that all parties were dealt with fairly, and the issues could have been better managed if Mr Martin had exercised a greater degree of direction and control.

[31] Ms Mok submitted that Mr Martin's involvement was limited to assisting with drafting the farm chattels condition (at some point after Mr Power had signed his offer), being informed that second offer had been accepted (on 16 June), and liaising with Mr Power on 19 and 20 June. This resulted in there having been no direction of Mr Mulligan, or involvement in the transaction, during the period between 2 and 16 June.

[32] Thus, she submitted, Mr Martin did not know that the vendor had the only copy of Mr Power's offer after the carpark meeting. She submitted that if there had been adequate supervision by Mr Martin on a day to day basis, this issue could have been addressed by Mr Martin, such as by his insisting that Mr Mulligan follow the matter up with the vendor so as to get a copy of the offer, or by preparing a fresh offer for Mr Power, and by communicating with Mr Power.

[33] Ms Mok further submitted that Mr Martin had only a limited involvement in the period between 14 June (when the second offer was made) and 16 June (when the second offer was accepted). The extent of Mr Martin's direction of Mr Mulligan was to say, when Mr Mulligan informed him that the second offer had been made, that it was the vendor's decision as to what to do. She submitted that Mr Martin's failure to direct Mr Mulligan to communicate with Mr Power resulted in a breach of r 6.2 of the Rules (which requires a licensee to deal fairly with all parties).

[34] Ms Mok submitted that Mr Mulligan's communication with Mr Power throughout the 20 day period after his offer was made was deficient. She submitted that the most serious deficiency was not telling Mr Power that a second offer had been made, and then that it had been accepted. She submitted that the span of events between 14 and 16 June shows that Mr Martin was not sufficiently involved so as to provide proper direction and control.

[35] Ms Mok submitted that this is not a case of a single, unexpected, unilateral action at the end of a transaction (such as occurred in *Hutt City*), as Mr Mulligan had largely been left to his own devices, and Mr Martin was not sufficiently involved so as to be in a position to identify Mr Mulligan's mistakes and to ensure they were rectified. She submitted that Mr Martin did not exercise sufficient direction and control to ensure that Mr Mulligan acted competently, and complied with the Act and Rules. She submitted that Mr Martin had to be proactive, and not wait until Mr Mulligan raised issues.

[36] Accordingly, she submitted, the Committee was correct to find that in this case, Mr Martin's supervision of Mr Mulligan was insufficient to meet the requirements of s 50 of the Act.

Discussion

Preliminary matters

[37] We note, first, that in his oral submissions, Mr Child referred to information given to him by Mr Martin, shortly before the appeal hearing, as to his involvement in the transaction. This was information that Mr Martin could (and should) have provided to the Committee, in response to the questions asked of him. He did not do so. Mr Child applied for leave to adduce the information as fresh evidence. In an oral Ruling given at the hearing, the Tribunal declined leave to do so.[9] Following that Ruling, Mr Child advised the Tribunal that Mr Martin wished to continue his appeal submissions, in the absence of that evidence.

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9 *Martin v Real Estate Agents Authority (CAC 416)* [2018] NZREADT 56.

[38] Secondly, we note that although there was some discussion in submissions as to whether there was a "multi-offer situation" here, and as to the steps a licensee should take in such a situation, we are not required to make a determination on the point.

Supervision

[39] Section 50 of the Act provides:

> **50 Salespersons must be supervised**
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> (1) A salesperson must, in carrying out any real estate agency work, be properly supervised and managed by an agent or branch manager.
>
> (2) In this section **properly supervised and managed** means that the agency work is carried under such direction and control of either a branch manager or an agent as is sufficient to ensure–
>
> (a) that the work is performed competently; and
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> (b) that the work complies with the requirements of this Act.

[40] Rule 8.3 also refers to supervision:

> *Supervision and management of salespersons*
>
> 8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.

[41] There is no dispute that, as the Committee found, the Agency's policies and procedures set up a suitable supervision structure. Further, we agree, as found by the Tribunal in *Hutt City*, and approved by the High Court in *Barfoot & Thompson*, that an error by a licensee does not necessarily demonstrate that there has been a failure to have an adequate supervision structure.

[42] However, neither s 50 nor r 8.3 refers to a supervision structure, or having policies and practices in place. Both provisions use the phrase "properly supervised and managed". Accordingly, the question whether there has been adequate supervision in any particular instance does not rest on the presence of a supervision structure and there being policies and practices in place. As the Tribunal said in *Donkin*, there must be "something more".

[43] While it can be accepted that a pragmatic approach and "commercial realities" should be taken into account when assessing the adequacy of supervision in any one case, that is not a "one size fits all" standard. We reject Mr Child's submission that in

this case, the Committee should have assessed Mr Martin's compliance with his supervision obligations solely by reference to the supervision policies and practices in place in the Agency, and then absolve him on the grounds that Mr Mulligan's mistakes resulted from his failure to follow those policies and practices.

[44] Adequate supervision is not provided by relying on an agency's policies and practices, and waiting for licensees to approach their manager with particular questions or issues. Supervision should be proactive, and ongoing. In the case of a more complex listing such as that in the present case, where a number of "red flags" were present, it is clear that proactive supervision was required.

[45] We are not persuaded that the Committee reached the wrong conclusion in this case, and to describe Mr Martin as having "allowed the situation with [Mr Mulligan] to spiral out of control".

[46] We reject Mr Child's submission that this case was analogous to that in *Hutt City*. In that case, a licensee released the keys to a property late on the day of settlement (contrary to the provisions of the agency's Policy and Procedure Manual), but settlement did not in fact occur. The licensee's manager was unavoidably away from the office at the time so not available for the licensee to consult. The Tribunal overturned a Complaints Assessment Committee's finding that the manager was in breach of s 50 of the Act. The present case was not one of a one-off, single issue error. Rather, it involved an entire transaction, of some complexity, where more than one issue arose.

[47] There was no evidence put before the Committee, by either Mr Mulligan or Mr Martin, which would have supported a conclusion that the supervision of Mr Mulligan in this case was adequate. We accept Ms Mok's submission that Mr Martin had only a limited involvement in the crucial period from 14 June (when the second offer was made) and 16 June (when the second offer was accepted). During that time, the extent of his direction of Mr Mulligan was, when Mr Mulligan informed him that the second offer had been made, to say it was the vendor's decision as to what to do. In particular, Mr Martin did not direct Mr Mulligan to tell Mr Power that a second offer had been

made, and then that it had been accepted, and he did not provide Mr Mulligan with proper supervision by way of direction and control.

Outcome

[48] We are not persuaded that the Committee was wrong to make the finding of unsatisfactory conduct against Mr Martin, and his appeal is dismissed. In the light of that finding, we have considered the penalty orders made against Mr Martin. While no submissions were made as to those orders, we are satisfied that the order for censure, and a fine of $3000 was appropriate, and a fair reflection of Mr Martin's conduct.

[49] 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.

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Hon P J Andrews
Chairperson

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Ms N Dangen
Member

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Mr N O'Connor
Member