BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 30

READT 012/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	ALAN RAYNER Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First Respondent
AND	RICHARD MORROW Second Respondent
On the papers	
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms N Dangen, Member
Submissions received from:	Mr T Rea, on behalf of Mr Rayner Ms E Mok, on behalf of the Authority
Date of Decision:	31 July 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Rayner has appealed against the decision of Complaints Assessment Committee 521, dated 17 January 2019, in which it found that he had engaged in unsatisfactory conduct.[1]

[2] The Authority accepts that the Committee erred in making the finding of unsatisfactory conduct, and consents to the appeal being allowed.

[3] Mr Morrow has not participated in the appeal proceeding, and has not filed any submissions in response to the appeal.

Background

[4] Mr Rayner is a licensed salesperson and was the listing agent for a property at Manurewa, Auckland, owned by Mr Morrow.

[5] Mr Morrow complained to the Authority that Mr Rayner had misled him as to the value of the property. He alleged that Mr Rayner had provided him with an appraisal for the property, indicating that it would likely sell for between $524,000 and $568,000 and that he accepted Mr Rayner's recommendation that the property be marketed at $579,000. He said that Mr Rayner later told him that the property had unconsented alterations, which could not meet Council compliance requirements, and created a barrier for first home buyers seeking finance. Mr Morrow came to believe that the property was worth much less than its appraised value, and accepted an offer of $485,000.

[6] Mr Morrow further said that he was told by the purchaser that a documentation and assessment fee was all that was required to satisfy the Council on the unconsented alterations, and that the purchaser on-sold the property (to a first home buyer) for $625,000 some three months later, after replacing the carpets and painting the property. He said that the cost of these improvements did not equal the increase in the sale price.

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1 *Complaint 26435* Alan Rayner: Decision finding unsatisfactory conduct, 17 January 2019.

[7] Mr Morrow also complained that Mr Rayner had "bombarded" him with negative information about the property during the marketing period, had placed undue pressure on Mr Morrow to accept the offer of $485,000, and had undersold the property.

The Committee's decision

[8] The Committee found that Mr Rayner:

[a] failed to exercise due skill, care, competence, and diligence, in breach of r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 when completing the appraisal of the property, and by failing to take adequate steps to ensure that he was familiar with the property, in particular as to unconsented works; and

[b] by the same conduct, brought the industry into disrepute, in breach of r 6.3.

[9] In particular, the Committee said of Mr Rayner's appraisal:[2]

> 3.5 In [Mr Rayner's] appraisal he provided a list of recent sales and a list of properties for sale, that he deemed comparable. The recently sold properties listed had sold within the previous 12 months, were of relatively similar land and building sizes, and in the same general location. The appraisal also included a list of local schools and local real estate statistics. While this was a reasonable starting point, it was insufficient to satisfy [Mr Rayner's] obligations under the Rules. There was no analysis of each property and nor did it explain why each property was inferior or superior to [Mr Morrow's] property.
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> …
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> 3.7 [Mr Rayner's] appraisal indicated that the Property would likely sell for between $524,00 and $568,000. [Mr Rayner] recommended an asking price of $579,000. The Property sold for $485,000, some 16% less than the mid-point of [Mr Rayner's] appraisal. Notwithstanding that an appraisal will not always match the purchase price, for the reasons given above, it was not reasonable for [Mr Rayner] to come to the selling range conclusions he did. …

[10] With respect to the unconsented alterations, the Committee said:[3]

> 3.11 There is no evidence that at the appraisal, listing and marketing stages [Mr Rayner] turned his mind to the possibility of unconsented or council issues, it was only during open homes and viewings that areas of concern were brought

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2 Committee's decision, at paragraphs 3.5 and 3.7.

3 At paragraph 3.11 (citation not included).

> to his attention. Although there was no evidence of any potential purchaser being misled or deceived [Mr Rayner] clearly had an obligation to be familiar with the property. … an agent has an active role to play in conveying information about the property to a potential purchaser and must be cognisant of that role and carry it out to the best of his or her best ability.

The Committee considered that Mr Rayner's obligations were not met by relying on information given to him by Mr Morrow. It considered it to be a "fundamental competence on the part of a licensee when listing a property to ascertain compliance issues that might affect the sale of the property".[4]

[11] The Committee dismissed the complaints that Mr Rayner had bombarded Mr Morrow with negative information, had placed undue pressure on him to accept the offer, and had undersold the property.

[12] In a decision issued on 16 April 2019, the Committee ordered Mr Rayner to pay a fine of $2,000.00.

Appeal submissions

[13] On behalf of Mr Rayner, Mr Rea submitted that the appraisal prepared by Mr Rayner contained an appropriate level of detail. He submitted that the Committee had failed to obtain sufficient evidence of industry standards relating to the preparation of appraisals, and the only evidence before the Committee regarding appraisals was of an appraisal of the property prepared by a different agency, which was in virtually the same format as that prepared by the appellant. He further submitted that the Committee had purported to impose on Mr Rayner a standard in respect of preparation of appraisals which might reasonably be expected of a registered valuer, not a licensed real estate salesperson.

[14] Regarding the unconsented alterations, Mr Rea submitted that Mr Rayner had inspected the property, and specifically asked Mr Morrow whether there was any unconsented work. He submitted that nothing more was reasonably required, and there was insufficient evidence on which the Committee could have concluded that the risk of unconsented work ought reasonably to have been apparent to Mr Rayner, or any

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4 At paragraph 3.13.

reasonably competent licensee. He submitted that the Committee had failed to identify any physical attribute of the property that ought to have put Mr Rayner on inquiry as to a risk of unconsented work, and the evidence before the Committee was that no (or no substantial) work was in fact required to be undertaken in order for a certificate of acceptance to be obtained.

[15] Accordingly, Mr Rea submitted, the evidence before the Committee did not support its findings that Mr Rayner was in breach of his obligations regarding either his appraisal, or the matter of the unconsented alterations, and the Committee failed to consider adequately the evidence that was before it.

[16] On behalf of the Authority, Ms Mok submitted that the Rules relating to appraisals (in particular, rr 10.2 and 10.3) do not oblige the licensee to go so far as to explain why each comparable property included in the appraisal is inferior or superior to the subject property in every case. She submitted that the Rules require that the appraisal reflects current market conditions and that comparable sales information is provided.

[17] Ms Mok submitted that while a licensee may be expected to provide an explanation for the inclusion of certain properties if requested to do so, the Rules do not extend the obligation beyond this, as long as the licensee has provided sufficient details in the appraisal about the comparable features of the properties (such as designated land use, age, nature size, and condition of the property) so as to inform the prospective client about why the properties have been selected and so as to support the appraised price.

[18] Ms Mok noted that the Tribunal has emphasised in a number of cases that an appraisal is not intended to be a registered valuation. She submitted that deficiencies in appraisals where other licensees were found to be in breach of their obligations were not present in this case. She noted that the appraisal prepared for Mr Morrow by another agency was done after renovations costing more than $100,000 had been carried out, and she referred to the Committee's finding that Mr Rayner had not undersold the property.

[19] Ms Mok submitted that the Committee's finding that Mr Rayner should have considered compliance issues with unconsented alterations incorrectly conflated the obligation on licensees to provide a comprehensive appraisal, with the obligation on licensees to have sufficient knowledge of a property which they are marketing and selling. She submitted that in some circumstances, an appraisal is provided before the agency agreement is signed, and is a tool that might assist a potential vendor to decide whether the vendor wants to list the property. She further submitted that a licensee is required to have viewed the property before giving an appraisal.[5]

[20] Ms Mok submitted that the evidence before the Committee was that Mr Rayner had visited the property before giving the appraisal, and had been told by Mr Morrow that there was no issue with unconsented work. She submitted that there was no evidence to suggest that it was reasonably apparent that there were unconsented alterations to the property, such as to put Mr Rayner on notice of those issues and thus oblige him to take further steps to verify Mr Morrow's representations.

[21] Further, while submitting that it may be appropriate for a licensee to raise the possibility of a revised appraisal (for example, if issues come to light which materially affect the appraised price range), Ms Mok noted that there is no express requirement in the Rules imposing such an obligation.

[22] Accordingly, Ms Mok submitted that the Authority accepts that the Committee erred in finding that Mr Rayner engaged in unsatisfactory conduct, and consents to the appeal being allowed.

Did the Committee err in finding Mr Rayner guilty of unsatisfactory conduct in respect of his appraisal of the property?

[23] The Committee had before it the appraisal prepared by Mr Rayner, dated 3 January 2018, and an appraisal prepared by another agency, dated 13 April 2018. Having reviewed the two appraisals, we agree with Mr Rea that they follow the same format. The second appraisal does not contain any analysis or explanation as to the properties listed as being comparable which goes beyond that provided in Mr Rayner's

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5 Referring to *Martick v Real Estate Agents Authority (CAC 303)* [2015] NZREADT 56, at [17].

appraisal. However, that does not in itself establish that the Committee erred in its finding regarding Mr Rayner's appraisal.

[24] The Committee did not refer to any evidence or authority as to the content of appraisals. Ms Mok referred to the Tribunal's decisions in *McCay-Woods v Real Estate Agents Authority (CAC 20008),*[6] and *Martick v Real Estate Agents Authority (CAC 303).*[7]

[25] The first case, *McCay-Woods*, concerned an estate property in Dunedin. Two independent valuations had been obtained, one was at $227,000, the second at $200,000.

[26] A licensee then provided two market appraisals for the co-executors of the estate. His first appraisal was between $255,000 and $265,000. About one month later he provided a revised appraisal, having been asked to take into account the recent sales of two nearby properties, at $245,000 and $230,000, respectively. His revised appraisal was between $250,000 and $260,000. He distinguished the two additional properties on the grounds that the first had a restrictive covenant on the title, and the second was inferior in several identified respects. He also provided an explanation for the difference between his appraisal and the first independent valuation.

[27] One of the co-executors (Ms McCay-Woods) wished to buy the property. Her highest offer of $240,000 was not accepted. She later complained to the Authority that the licensee's appraisals were misleading, because he had not used comparable properties in similar locations, with the result that his valuations did not reflect the market. A Complaints Assessment Committee found that that he had not breached the relevant rule as to appraisals, and determined to take no further action on the complaint.[8] Ms McCay-Woods appealed to the Tribunal.

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6 *McCay-Woods v Real Estate Agents Authority (CAC 20008)* [2014] NZREADT 103.

7 *Martick*, fn 5, above.

8 Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, which is in substantially similar terms to r 102 of the current Rules, the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

[28] The Tribunal said that the purpose of the rule:[9]

> [57] … is to ensure transparency and that any appraisal provided by a licensee is realistic so as to avoid the risk of an overinflated (and therefore misleading) appraisal used simply to obtain a property listing; or an unrealistic low appraisal to ensure a quick sale and commission for the licensee, but which may lead to vendors achieving significantly lower than market value for their property.
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> [58] It does not follow that an appraisal will always match the purchase price. A different purchase price may, of course, be realised, whether that be under or over the appraised value. What is important is that the licensee has exercised the required care and skill in reaching his or her market appraisal and that it is supported with comparable sales data. This enables a vendor client to make an educated decision when they are presented with purchase offers.

[29] The Tribunal upheld the Committee's decision. It noted that the licensee's appraisals were "not dissimilar" to appraisals of $240,000-$260,000 and $230,000-$250,000 provided by two other agencies.

[30] The Tribunal also accepted (in relation to a submission that the licensee had not provided sufficient detail as to why particular properties were referred to) that the Rules do not necessarily require a licensee to give specific reasons for the inclusion of each property, and an explanation as to why each property is inferior or superior to the property being appraised.

[31] In *Martick* the licensee provided a current market appraisal for a property on Waiheke Island. This was after the property had been listed with three other agencies as general agencies, but had not sold. Those agencies had provided appraisals of $480,000-560,000, $480,000-$490,000, and $450,000-$475,000. It had been listed for sale at $525,000, reduced to under $475,000 after one month on the market.

[32] The licensee recorded in the appraisal that she "had not been inside but had a good look through the windows". She gave a market value of low to mid-$500,000 and recommended sale by auction. She referred to 15 comparable properties. The vendors then listed the property with her on a sole agency. They rejected an offer of $460,000, presented by one of the previous agencies. The property was passed in at auction, and eventually sold for $427,000.

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9 *McCay-Woods*, at [57]–[58].

[33] The vendors complained to the Authority that the licensee's appraisal was over-inflated. A Complaints Assessment Committee found that she was guilty of unsatisfactory conduct, in that her appraisal was overly optimistic, and she appeared to have taken into account the most favourable sales of properties and ignored the less favourable comparisons. The Committee commented that it appeared that the licensee had not factored into her calculations that the property had been exposed to the market with other agencies at $525,000 for 30 days, without an offer. The Committee also recorded the licensee's admission that she had not carried out a full inspection of the property before completing the appraisal.

[34] The licensee was found to have failed to exercise due skill, care, competence, and diligence, in breach of r 5.1, and to have misled the vendors as to the potential sale price for the property, in order to win an exclusive agency, in breach of r 6.4.

[35] The Tribunal dismissed an appeal by the licensee.

[36] There are obvious differences between both *McCay-Woods* and *Martick* and the present case. In *McCay-Woods* the licensee had provided reasons for distinguishing the two properties specifically referred to him, and for the difference between his appraisal and an independent valuation. Further, the licensee's valuation was similar to that of three other agencies' appraisals. In the present case, the Committee had only one other appraisal, which was completed after the property was renovated at a cost of some $100,000.

[37] In *Martick*, the licensee's appraisal was higher than those in three other appraisals, and higher than the sale figure that had not attracted any offers while the property was on the market. Further, the licensee stated to the Committee that she had not inspected the property before providing the appraisal.

[38] We have carefully considered the submissions by Mr Rea and Ms Mok. We accept their submissions that the Committee erred in finding that Mr Rayner failed to exercise due skill, care, competence, and diligence in preparing his appraisal of the property.

Did the Committee err in finding Mr Rayner guilty of unsatisfactory conduct in relation to the unconsented alterations?

[39] We also accept Mr Rea's and Ms Mok's submissions that the Committee erred in finding that Mr Rayner failed to exercise due skill, care, competence, and diligence in failing to identify unconsented work on the property.

[40] In particular, we accept that there was no evidence before the Committee that it was, or should have been, apparent to Mr Rayner that there was a risk that work on the property was not properly consented, such that he should not have relied on advice or assurances from the vendor that there was no issue with unconsented work.

Outcome

[41] Mr Rayner's appeal is allowed. The Committee's finding of unsatisfactory conduct against him is quashed, as is the Committee's order that he pay a fine.

[42] 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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Mr G Denley
Member

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Ms N Dangen
Member