BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 42

READT 057/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	YING HE Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 403) First respondent
AND	MATT EARLY & JING DU Second Respondents
Hearing:	17 April 2019
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Mr N O'Connor, Member
Appearances:	Mr Y He, self represented Ms J Bull, for the Authority Second respondents not participating
Date of Decision:	9 October 2019

DECISION OF THE TRIBUNAL

Background

[1] On 17 April 2019 the Tribunal heard an appeal brought by Mr He against findings of a Complaints Assessment Committee ("CAC") which determined that he had engaged in unsatisfactory conduct in contravention of s 72 of the Real Estate Agents Act 2008 ("the Act").

[2] The statement of background which follows is not in dispute between the parties and is taken from the submissions of Ms Bull, counsel for the Real Estate Agents Authority.

[3] Mr He is a licensed salesperson. The complaint relates to the purchase of a particular lot within a property development that was in its early stages (Property). Titles had not been issued at the time the Sale and Purchase Agreement (ASP) was signed in June 2016. The property advertising said titles were expected in late 2017, which meant settlement would occur shortly afterwards. However, the development was subject to lengthy delays.

[4] The conduct of Mr He which is subject to adverse findings included his dealings with the complainants at the time the agreement was signed. This included not insisting they obtain legal advice and inadequately drawing their attention to complex clauses within the agreement, particularly with respect to the timeframe for the development and whether and when, it was likely that titles would successfully issue. Further, the appellant did not initiate any contact with the complainant after the agreement was signed and did not keep them updated in relation to delays in the development.

[5] The Committee found the appellant's conduct was unsatisfactory and that he had breached rr 5.1, 6.2, 6.3 and 6.4 in the following respects:

[a] failing to exercise skill, care and competence by failing to recognise his professional obligations;

[b] failing to act in good faith and deal fairly with all parties, by not initiating contact with the complainant;

[c] engaging in conduct likely to bring the profession into disrepute, by stating his job finished once the agreement was signed; and

[d] misleading the complainant by failing to keep him fully informed of the change of circumstances with the development.

[6] The Committee concluded there was no evidence to establish one further ground of complaint. In a subsequent decision, the Committee censured the appellant, imposed an $8,000 fine and $1,000 order for partial restitution, and ordered the appellant to pass a course.

[7] On appeal against the Committee's decision, the appellant applied unsuccessfully to admit fresh evidence. These submissions do not further address that issue and the first respondent maintains the position adopted in its submissions dated 1 March.

[8] The appellant did not address the requirements that need to be satisfied before the additional evidence can be admitted on appeal. The standard test for admission of further evidence on appeal is that it must be cogent and material, and must not have been reasonably available at first instance.[1] In determining whether to grant leave, the following factors may be taken into account:[2]

(a) Whether the evidence could have been obtained with reasonable diligence for use at the initial hearing;

(b) Whether the evidence would have had an important influence on the outcome;

(c) Whether the evidence is apparently credible; and

(d) Whether admitting the evidence would require further evidence from other parties and cross-examination.

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1 See for example *Telecom Corp of NZ Ltd v CC* [1991] 2 NZLR 557.

2 See *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3 at [49], citing *Dragicevich v Martinovich* [1969] NZLR 306 (CA).

[9] The Authority notes the High Court's view in *Comalco NZ Ltd v TVNZ Ltd*:[3]

> It is also important the evidence should not have been available at the earlier hearing by the exercise of reasonable diligence. I accept also, however, that the test should not be put so high as to require the circumstances to be wholly exceptional. Every case must be considered in relation to its own circumstances.

[10] Mr He made no attempt to address the application of these statements of principle to the additional evidence which he hoped to adduce and that was the reason why they we gave our earlier decision declining to admit the further evidence.

Nature of appeal

[11] Appeals to the Tribunal are authorised by S 111 of the act and are by way of rehearing[4]. The procedure envisaged in that type of appeal does not provide for full de novo rehearing of evidence. While additional evidence can be adduced in cases where the Tribunal makes an order to that effect it is expected that there will be rehearing on the record. The appeal court must be persuaded that the decision is wrong.

[12] In determining this appeal, we will conduct a rehearing based upon the evidence which was provided to the authority as part of the investigation. This was the evidence which was taken into account by the CAC. There was no additional evidence adduced. Mr He applied to adduce additional evidence but that application was declined in a decision which we released prior to the substantive hearing. The grounds for coming to that determination will be discussed as part of this decision.

[13] The order in which we will deal with the charges will be the same as that in which the CAC did.

Charge one: the licensee misled the complainant about what date the title would be issued

[14] The factual background to the making of this complaint is as follows.

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[3] *Comalco NZ Ltd v TVNZ Ltd* [1997] NZAR 97 at [25].
[4] *Austin, Nichols & Co Inc v Sitchting Lodestar* [2007] NZSC 103, at [13]- [16]

[15] When Mr Early and Ms Du (the Early's) had first looked at the development, they had expressed interest in one of lots 18, 19 or 20. They say that Mr He told them that those lots had offers on them. As a result, they contracted to buy Lot 31.

[16] After the Early's signed the agreement for sale and purchase they did not hear anything further from Mr He.

[17] Some nine months after they signed the agreement, that is in March 2017, the Early's drove to the site to review progress with the development. There they noticed that signage on the site indicated that the sections were being marketed by a different real estate agent firm from the one that employed Mr He. The new firm was Barfoot and Thompson. They also noticed that some of the sections which Mr he had told them were not available were now being advertised for sale. Mr He's response was that said that the offers that had been made on those properties must have "fallen through".

[18] As well, the marketing publicity, the Early's noticed, now referred to the possibility of "land banking" and a "potential subdivision". Notwithstanding that this suggested that the subdivision might not proceed at all, Mr He did not contact the Early's to update them on what had happened with the proposed subdivision. Nor did he address with them the question of the change of agency-and in particular the fact that from July 2017 Barfoot and Thompson had acquired an exclusive agency in respect of the properties. Mr He did not advise them either that in the light of the changed arrangements who they should now make contact with to obtain additional information about the subdivision.

[19] In August 2017 Mr Early sent an email to the new agents, Barfoot and Thompson, seeking an update but did not receive any reply.

[20] To summarise, there was no contact between the Early's and Mr He through much of 2017 down to October of that year. On the 31st day of that month, Mr Early contacted Mr He and asked them what was happening with the sale. He said that Mr He told him that the development was continuing and would start soon but he knew nothing further and that the Early's should speak to their lawyer to find out more

details. He also said that that he had not been paid for the sale so if they wanted to cancel the agreement he did not really care. He also said that his job finished from when the sale and purchase agreement was signed and that any further information would be from the vendor's solicitor to the solicitor for the Early's[5].

The CAC decision on issue 1

[21] The Committee concluded that the licensee had in fact misled the Early's about when titles might be expected to issue and when possession would therefore take place.

[22] It noted that the original expectation was apparently the titles would be due in 2017 but this was later pushed out to late 2018. They concluded that the licensee by not explaining in detail the special clauses relating to the issue of title, not advising the complainant of the importance to seek legal advice and not keeping the complainant informed of the change of circumstances had misled the complainants in their expectation as to when title would be issued. The CAC concluded that the licensee by withholding information that should by law or fairness be provided to the customer, breached Rule 6.2.

[23] There are multiple parts to the reasons why the CAC came to its decision. It is possible that the Tribunal could come to the view that some of the grounds are established but not others. We will now consider the grounds.

Discussion

[24] In our view, there can be no doubt that the licensee had an obligation to ensure that the Early's understood the main aspects of the agreement before they signed. That would include matters such as the price and the date when they would be required to pay on the settlement date. That last question in turn was tied up with the question of when titles were likely to issue.

[25] It was the obligation of the licensee to provide reasonably careful and honest advice on these matters at the point where the parties signed the agreement. The question is whether Mr He breached that obligation.

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[5] BD 118

[26] It would have been obvious to the licensee as well that the Early's understood that the contract provided for deferred possession and that possession would not be available until at least late 2017 when titles were expected, according to the vendor.

[27] Common sense suggests that the Early's did not enter into this agreement without giving consideration to when a title for the property would be available and when they would be required to have funds to pay for the section. It is our conclusion that it must have been obvious to the purchasers that they were not going to be able to obtain immediate possession of the properties and nor would they be required to pay the full purchase price immediately. When those considerations are coupled with the fact that the advertising for the sections stated that title was expected "late next year", we consider that the Early's cannot reasonably contend that they were left in doubt about the questions of issue of title and the obligation to settle.

[28] In its decision, the CAC initially appears to have agreed that the Early's were informed that the settlement date could be late 2017 which was the date that appeared in the advertisement. The CAC then goes on to say that:

> What was discussed between the parties, regarding the requirements of the complaint, is not proven but the documentary evidence suggests the titles were initially due in 2017 and later pushed out to 2018.[6]

[29] Then in a later part of the decision, the committee said that:

> The licensee, by not explaining in detail the special clauses relating to the issue of title, not advising the complainant of the importance to seek legal advice and not keeping the complainant informed of the change of circumstances with "the development" has misled the complainant in their expectation as to when title would be issued. The licensee by withholding information that should by law or in fairness be provided to the customer, has breached rule 6.2. The committee therefore finds the licensee is guilty of unsatisfactory conduct.

[6] Paragraph 3.2 of decision

[30] The charge of misleading comes under the heading of rule 6.4 which forbids a licensee to mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

[31] We deal first with the ground that the licensee did not explain in detail the special clauses relating to the issue of title.

[32] The committee seems to have accepted that the Early's understood that titles would not be available until late 2017.

[33] There is a conflict of evidence between the licensee and the Early's on the point of whether the licensee actually explained the special conditions relating to possession. The licensee says that he did[7]. If the licensee had explained the special conditions, this would have included that possession was going to be deferred until title issued but also the important point that there was no specific date by which the vendor was bound to obtain a title. The licensee says that he specifically said there was uncertainty about the settlement date and there was "no guarantee". In the context of this case this last statement could reasonably be interpreted to mean that there was no guarantee that title was going to issue at all.

[34] The conclusion of the investigator was that "what was discussed between the parties regarding the requirements of the complainant is not proven but the documentary evidence suggests that the titles were initially due in 2017 and later pushed out to 2018". The reference to the "requirements" is apparently attributable to the assertion that the Early's make that they were expecting to build their "dream home" towards the end of 2017 to early 2018.[8]

[35] We accept that the conclusions of the investigator are not binding on the Committee. They are required to come to their own conclusions. However, it is correct that there is no documentary evidence which would entitle the Committee or the Tribunal to prefer the evidence of the Early's over that of the licensee regarding the matter of whether or not the fact that this was a situation where titles might not issue

[7] BD 74
[8] BD IV

at all was actually discussed. Certainly, if the licensee had given an explanation of the special conditions about title and settlement then it would have been clear to the Early's that not only was it uncertain that they would be building their house by late 2017 early 2018, but that might never happen at all in the event that no title ever issued for the property which the vendor was able to pass on to the Early's.

[36] The burden of proving the charge rests with the Real Estate Authority (REA). If the evidence that they have put forward is directly conflicting, then, unless there is some rational way in which the impasse can be broken, the REA will have failed to prove the charge. Unless, there was some reason in this case for coming to a reasoned preference of the evidence of the Early's over that of the agent, then it cannot be regarded as proved on the balance of probabilities that the licensee misled the Early's. In order for the charge to be proved it would have been necessary to accept that, in all the circumstances that prevailed prior to the entry into the agreement for sale and purchase, there was a risk that unless the licensee explained that there was no fixed date for provision of title and indeed there may never be an issue of title, then the Early's were likely to be misled.

[37] What the CAC appeared to have done is to approach matters on the basis that in the circumstances the licensee ought to have appreciated that the buyers were in doubt about the deferred settlement date and that he ought to have explained it. If in the circumstances it seemed reasonably clear that the purchasers understood what the correct position was, there was not necessarily an obligation on the licensee to spell out the fact that titles would be subject to the completion of subdivision formalities.

[38] Whether there was such an obligation depends upon the factual circumstances. If, for example, the purchasers spoke in terms which suggested that they were under a misunderstanding then the licensee was obliged to clarify the situation. If it was apparent in all the circumstances that the purchasers were of the belief that once they entered into an agreement, that meant that there was no doubt that they were going to get title to the property, then the licensee would have been obliged to spell out what the correct position was. In such circumstances it would have been obvious that the purchasers were labouring under a misunderstanding that the licensee was obliged to rectify.

[39] While we have some doubts about whether the Early's in truth did misunderstand the situation about the titles, we are content to decide the appeal in regard to charge one on the grounds that we have just been discussing, namely the conflict of evidence as to whether the licensee actually did provide the required explanation.

[40] In our view, it is not proved that the licensee failed to give an explanation which would dispel any such confusion if it existed. A misrepresentation in that sense which appears to be overall thrust of charge one is not proved.

Charge 2

[41] The second charge is that "The licensee failed to draw the complainant's attention to important aspects of the agreement for sale and purchase".

[42] We have already dealt with the evidential position when considering charge one. For the same reasons that charge one was not proved, we come to a similar position with regard to charge two.

Charge 3

[43] The third charge is that:

> The licensee failed to communicate and keep the complainant informed of all matters relevant to the property.

[44] This charge is different from the first two. The first two are concerned with the circumstances leading up to the Early's entering into the agreement for sale and purchase while charge three is concerned with an alleged failure on the part of the licensee to keep the Early's informed about progress with the subdivision after the agreement had been entered into.

[45] The Committee's finding was that the Licensee failed to communicate and keep the complainant informed of all matters relevant to the Property.

[46] The committee observed that in March 2017[9]:

> [Mr Early] and his wife noticed "the development" was being marketed by Barfoot and Thompson and that the Lots that had been previously sold were now on the market. He [apparently Mr Early] emailed the licensee for an update and there was no mention of any delays and they presumed they were on track for the end of 2017. He called the licensee on 23 October 2017 for an update. The licensee said he would check with the vendor and get back to him on the 25 October. He did not get back to the complainant as promised. On the 31 October 2017 the complainant phoned the licensee. The complainant has provided an email showing on every occasion after the Sale and Purchase Agreement had been signed and accepted he initiated contact with the licensee and it was only when he questioned the Licensee did he receive information regarding the delays re-the issuing of the titles.

[47] The Committee held that the complainant was guilty of unsatisfactory conduct by his own admission, by stating that his job finishes when both parties sign the agreement. The contention of the Authority was that contrary to this assertion that his job finished, the appellant had a duty of care to keep the complainant updated with all details of the contract to the completion date, or when the agreement came to an end.

The submission of the REA

[48] The submissions which the REA made analysed the basis upon which charge three was found to be proved.

> 4.4 The appellant's position does not engage with the basis for the Committee's finding. The Committee's finding was not based on advertising at the time the ASP was signed and it was not suggested that advertisement was misleading at that time. Instead, the Committee's finding was based on the following factors:
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> a) not explaining in detail the special clauses relating to the issue of title;
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> b) not advising the Complainant of the importance to seek legal advice; and

[9] BD 98

c) not keeping the Complainant informed of the change of circumstances with "The Development".

4.5 These three factors were addressed separately in more detail above in Parts **Error! Reference source not found.** to **Error! Reference source not fo und.** above.

4.6 In relation to the first two factors (detail of the special clause and the importance of legal advice), the appellant held that information himself and accordingly his default was in withholding it when in law and fairness he should have provided it.

4.7 However in relation to the third category – not keeping the complainant informed – his default was primarily a lack of a due diligence to make proactive inquires and then obtain information that ought to have been disclosed. The documents do not clearly establish an instance after the Agreement was signed where the appellant held relevant information that he failed to disclose. For instance, his May 2017 advertisement of the property, which noted title was now expected in 2018, came after a call between the complainant and appellant. However their accounts of the call differ as to whether the delay was discussed.

4.8 Instead, and by his own admission, the appellant's conduct displays a lack of proactive engagement. The appellant said of the complainant's statement that the project was on the market for sale by another agency that "the Licensee was also very surprised when the Complainant told the Licensee this. He said he never received any information from the vendor or vendor's solicitor about that". This displays a lack of due diligence on his behalf. The Committee treated this as withholding information, though it may also be treated as failing to exercise skill, care, competence by failing to recognise his professional obligations. [footnotes omitted]

Discussion

[49] The first point is that we do not accept that the evidence which was put forward establishes that the information which the licensee provided to the Early's was deficient when it came to describing the conditions of the agreement which linked settlement to the grant of subdivision consent. We cannot agree either that on the balance of probabilities it has been established that the licensee failed to advise failed to advise the Early's that they ought to obtain legal advice. Amongst other things, he provided them with the standard memorandum to purchasers which contains exactly that advice.

[50] Where there is doubt, however, is in the area of providing adequate advice after the time when the agreement was signed and right on through 2017.

[51] There is no dispute about the timeline which shows the very intermittent contact between Mr He and the purchasers. The evidence establishes that there was no communication between Mr He and the Early's from June 2016 to March 2017. However what is an appropriate amount of contact is nowhere prescribed and what is required is a judgement whether in the overall context in which the charges are brought, the extent of contact between the licensee and the Early's was sufficient to meet the standard in rule 6.4 requiring the provision of information that should by law or in fairness be provided to a customer or client.

[52] In the case where there is a long-term settlement arrangement such as that which the parties agreed to in this case, we consider that it is reasonable for periodic reports to be made by the licensee to the purchaser. As between the three parties who have an interest in the transaction, it is the licensee that the purchaser will look to for information about progress towards settlement of the contract. Purchasers in this situation have a reasonable expectation that they will be kept informed so that they will know when they are likely to be required to settle the agreement and when they will, accordingly, obtain possession of the property.

[53] In a resulting information vacuum which can result from a failure to maintain communication, buyers who have a close interest in the ultimate fate of their contract may begin to contemplate the worst-case situation and generally anxious about their purchase.

[54] In some cases an energetic and proactive solicitor who is acting for the purchaser would make enquiries him/herself from the solicitor acting for the vendor or developer. But the licensee in the position of Mr He does not appear to have relied upon that happening. In any case it would not excuse him.

[55] Apart from that general obligation to provide advice, there were in this case, particular occurrences which the licensee ought to have taken the initiative to get some more information about and thereafter to report to the Early's. Specifically, in January 2017 or thereabouts another real estate agency acquired a general listing of the property. In March 2017 the Early's emailed the licensee at which point he, the

licensee, contacted the vendor. The licensee says[10] that the vendor told him that there was still no guarantee when the titles would be issued. The vendors said it was hopeful the title would be issued at the end of 2018 but there were some uncertainties.

[56] Given that the property agreement had been signed in June 2016, the time lag until the first communication from the agent was some eight or nine months. We consider that that was excessive to meet the reasonable requirements of the purchasers for information updating them on progress with obtaining title.

[57] What had particularly sparked the enquiry which the Early's made was that on visiting the site they had seen that a different real estate company, Barfoot and Thompson, had put signage on the site which indicated that they were instructed as agents of the vendor. As well, Mr Early noted that some of the lots that the Early's were told had been sold, were now apparently unsold.

[58] Later that year, in May or July 2017- the evidence is not clear on the point - Barfoot and Thompson obtained an exclusive listing of the properties. Barfoot and Thompson had placed publicity stating that the property was now for sale as a "land bank" which conveyed that the property was to be sold in an un-subdivided state. The licensee did not take any steps to advise the Early's of this change in circumstances. It was, of course, an important occurrence because it indicated that no subdivision had been approved and that the vendor was apparently abandoning attempts to obtain a subdivision.

[59] The licensee admits telling the complainant his job finished once the agreement was signed. The licensee asserted in conversation with Mr Early that he had no responsibility to provide information and that his responsibilities in the matter ended at the point where the agreement was signed. The licensee sought to explain away this comment by saying that he had made it in circumstances where he had a phone call with Mr early which irritated him. Whether that was in fact how it came about, that does not excuse the licensee.

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[10] BD 75

[60] It is clear in the view of the Tribunal that this charge is made out and in particular there was a failure to comply with Rule 6.4 which prohibits withholding information that should by law or fairness be provided to a customer or client.

Charge 4

[61] The Committee dismissed particular four of the charges. There is no cross-appeal against that decision. Accordingly, there is no need for further comment about that particular in this decision on appeal.

Penalty

[62] Mr He told us at the hearing that he wished to appeal against the penalty and Ms Bull, understandably, did not dispute his entitlement to raise an appeal against penalty without giving prior notice of his intention to do so.

[63] The maximum fine which was available to the Tribunal to impose upon Mr He was $10,000. The fine it actually imposed was $8000. Additionally, Mr He was required to contribute a sum of $1000 to the legal costs of the Early's.

[64] In this part of the decision we will consider whether the penalty was excessive.

[65] We adopt as the starting point the consideration that the maximum penalties or penalties approaching the maximum which are available under the Act should be reserved for the worst cases.

[66] A penalty of $8000 against a maximum of $10,000 would generally indicate that there was a high level of culpability and little by way of mitigation in the offending on the part of the licensee. We do not view the present case as falling into such a band.

[67] A further matter that needs to be taken into account is that the penalty that the Committee imposed presumably reflected the finding of the Committee that the licensee had infringed against the Act and Regulations in additional ways that we have now concluded were not justified. The Tribunal is required to impose a penalty that

reflects the lesser number of charges which the Tribunal has found proved. The Tribunal is not required to take into account a failure to advise the Early's about the deferred title arrangements and neither does the penalty need to reflect a finding that the licensee failed to advise the Early's that they should obtain legal advice before entering into the agreement.

[68] As a result of our assessment of this case, our decision is that findings have been made that Mr He breached his obligations as a licensee only in regard to one of the four particulars of unsatisfactory conduct which were alleged against Mr He.

[69] In regard to that remaining infringement, the failure to provide information and maintain communication with the Early's, our assessment is that while this constituted unsatisfactory conduct, it was not conduct which would justify the imposition of a near-maximum penalty.

[70] The only issue which could possibly lead to augmentation of the penalties is the fact that Mr He has previously appeared before the Tribunal. One of the findings against him was that he took part in the marketing of the property when he had no proper authority from the vendor and the other was that he did not provide a comparative market analysis to the vendor. He said that he was ordered to undertake training which he did. However, those charges occurred some years ago.

[71] On the other hand, the present offending seems to have come about because of a failure on the part of Mr He to appreciate that the protection of interests of consumers is one of the key objectives of the Act: S 3.

[72] We consider that the disapproval of the Tribunal of this type of conduct would be sufficiently marked by a financial penalty on Mr He totalling no more than $2500. That is before any additional factors such as aggravating matters are taken into account.

[73] In these overall circumstances, we consider that a modest augmentation of the penalty is required to deter Mr He from acting in a way that is insensitive to the interests of customers and clients. The logic of applying such an approach is that it

would appear that previous penalties have not had the desired effect and that some increase in the quantum of financial penalty should now be imposed to underline to Mr He that he must change his ways.

[74] Taking all these matters into account it is our view that the correct decision is to set aside the fine which the committee imposed, to leave in place the direction that he pay $1000 to the Early's for their legal costs and in addition to pay $2000 by way of penalty.

[75] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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Mr J Doogue
Deputy Chairperson

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Mr G Denley
Member

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Mr N O'Connor
Member