BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 55

READT 033/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	NIGEL BROWN Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1903) First Respondent
AND	SHELLEY CARPPE Second Respondent
Hearing:	25 November 2019, at Nelson
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Appearances:	Mr Brown, Appellant Ms L Lim, on behalf of the Authority Ms Carppe, Second Respondent
Date of Decision:	10 December 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Nigel Brown ("the appellant") has appealed under s 111 of the Real Estate Agents Act 2008 ("the Act") against the decision of Complaints Assessment Committee 1903 ("the Committee"), dated 19 August 2019, in which the Committee decided to take no further action on his complaint against Ms Carppe.

Background

[2] The appellant and his brother, Evan, owned a half share of a property at Nelson, which was their former family home, as executors of the estate of their late mother. The other half share was owned by their father, Mr Gerald Brown. Evan Brown held an enduring power of attorney for his father.

[3] Ms Carppe is a licensed salesperson engaged at Mike Pero Real Estate, in Nelson ("the Agency"). In September 2016, she appraised the property at the request of the appellant and Evan Brown. At that time, the appellant expressed interest in buying it.

[4] Ms Carppe was advised in August 2018 by Mr Moore, a solicitor instructed to act in relation to the sale of the property for the appellant and Evan Brown (in his capacity as part owner and as attorney for his father), that agreement had been reached that she was to list the property for sale by auction. She completed a new appraisal of the property on 20 August 2018, in which she assessed the market value of the property as being in the range $470,000 to $490,000, with a "likely mid-range" of $475,000 to $485,000.

[5] The appellant advised Ms Carppe that there were defects in the property, and he would send her a list of them. The appellant provided Ms Carppe with the following list, and asked that it be handed out to prospective purchasers attending open homes:

1. Electrical wiring.
2. Water tank in ceiling has leak.
3. Water tank drain tray requires repair or replace.
4. May-be roof leak. It wasn't raining when checked, but signs of leak present.
5. Kitchen range-hood vents into ceiling space.

6. Log fire not up to new standard.
7. Fire place in centre bedroom requires blanking off.
8. Bath room requires major work.
9. Toilet cistern requires repair or replace.
10. Stairs into ceiling require sealing off.
11. Exterior. Rotten weather boards to replace and compete exterior paint.
12. Exterior of windows require putty replaced.
13. Sewer pipe work under house.
14. Laundry water leak under house. Unsure from where. (Inside wall lining).
15. Laundry wall lining is asbestos.
16. Dark room water pipes and drain pipe to be removed.
17. No insulation in ceiling or under floor.

[6] Ms Carppe read the list and discussed it with Mr Moore. She did not consider it appropriate to provide copies of the list to prospective purchasers, given the conflict of interest arising from the appellant being a prospective purchaser. She recommended that a vendors' building inspection report be commissioned, but the vendors did not agree as to who should be instructed, or the price to be paid. Following her discussions with Mr Moore, Ms Carppe was told that vendor warranties would be removed from the agreement for sale and purchase, that the property would be sold "as is, where is", and that she would strongly recommend to all prospective purchasers to have a building inspection carried out, as there could be faults with the property due to its age and condition.

[7] The agency agreement was signed on 23 November 2018. It specified a number of defects in the property, as follows:

> (Potentially) spa bath jets & security system – these will be sold as is
>
> Engineer has inspected beams in garage – approved by engineer but not consented
>
> Fire non-compliant
>
> Laundry lining contains asbestos
>
> Non-compliant fire place x 2
>
> Spa jets on bath may not work
>
> Security system not active
>
> Beams replaced in garage – engineer inspected, report on file

[8] Ms Carppe provided the appellant and Evan Brown with a fresh appraisal. She assessed the "likely mid-range" as $471,000 to $489,000. In the "commission" section, she indicated a sale price of $480,000 as the basis of the expected commission. When Evan Brown signed the agreement, he crossed that out and inserted "$500,000" as the indicated sale price.

[9] The auction of the property was scheduled for 12 December 2018. Ms Carppe reported to the appellant and Evan Brown as to marketing the property on 2, 4 and 11 December 2018. On 10 December 2018, she wrote to the appellant and Evan Brown regarding the reserve figure to be inserted on the Auction Reserve Authority. She emailed this document to the appellant and to Evan Brown. She later collected it from Evan Brown's letterbox, finding that he had inserted $500,000 as the reserve when he signed the authority. Ms Carppe then took the authority to the appellant. In a statement provided to the Committee, she said that the appellant was very frustrated, as he believed that the reserve should be $450,000. However, he signed the authority.

[10] The appellant was the highest bidder at the auction, at $475,000. The property was passed in. On 13 December 2018 the underbidder offered $485,000, but this offer expired on 14 December without being accepted by either the appellant or Evan Brown.

[11] Ms Carppe attempted to organise a meeting with the appellant, Evan Brown, Mr Moore, and Mr Ducray, the solicitor acting for Mr Gerald Brown, without success. She continued to market the property over the Christmas/New Year period. She reported to the appellant and Evan Brown on 19 December 2018, and 8 and 15 January 2019.

[12] On 15 January 2019, Ms Carppe wrote to the appellant and Evan Brown, recording that as at that date, the highest offer received was the appellant's auction offer of $475,000, Evan Brown had indicated he would not accept an offer below $485,000, and the appellant would not agree to advertising the property at that price, as he did not consider the property was worth that much and a buyer would not be found at that level. Ms Carppe offered to discount her commission charge if the appellants' offer were to be accepted. When responding to this letter, the appellant

advised her that he had set up a meeting with Evan Brown and their father, but this had been cancelled by Evan Brown.

[13] On 20 January 2019, Ms Carppe forwarded an offer on the property to the appellant, Evan Brown, Mr Moore, and Mr Ducray. The offer was at $490,000 and was conditional on finance. The agreement for sale and purchase included clause 23, which provided:

> 23.0 The purchasers are aware and acknowledge that no vendor warranties are given for the chattels or the building works. The property will be sold as is.

[14] The purchasers also signed an acknowledgement that they had been made aware of known defects, as follows:

> Piles removed in garage without consent, replaced with beams, engineer has stated "more than adequate" for what's been removed. Asbestos may be present in some of the building materials used. Pipe out of laundry tub is broken and needs repair. There is some old wiring in the property that needs replacing.

[15] The purchasers were made aware of the appellant's offer, and signed a multi-offer form. Ms Carppe took the offer to Evan Brown, and then the appellant, for signing. The offer went unconditional on 29 January 2019, and was settled on 26 February 2019.

The appellant's complaint

[16] The appellant complained to the Authority on 11 March 2019. He set out two issues, as follows:

> It is [my] belief the list of issues I delivered to Shelley Carppe should have been passed onto all persons that viewed property, even when being sold as is.
>
> It is also my belief there should have been a meeting between all parties to discuss property sale. There had been a meeting planned, but this was cancelled.

[17] The complaint was initially handled by the Authority's Early Resolution Facilitator. The Facilitator spoke with the appellant and confirmed two aspects of the complaint: first, that he had instructed Ms Carppe to disclose a list of "concerns" as to the property to prospective purchasers, and he was unsure whether she had disclosed this information to the eventual purchasers, and secondly, that Ms Carppe had told him (about six or seven times) that the purchasers' offer was subject to finance, and they

were unlikely to get finance. This led him to accept the purchasers' offer under the impression that it would likely fall through.

[18] On 17 April 2019, the Early Resolution Facilitator sent Ms Carppe a compliance advice letter, concerning disclosure of the defects recorded in the appellant's list. The advice was as to the practice to follow for managing the relationship when acting for multiple vendors who were likely to have opposing interests. The Facilitator did not consider that the appellant's complaint that Ms Carppe had misled him concerning the purchasers' finance condition was supported on the evidence.

[19] The appellant asked for his complaint to be referred to a Complaints Assessment Committee. The complaint was investigated by the Committee. The investigator obtained a statement from the purchaser, who confirmed that "nothing" had not been disclosed regarding the property. The purchaser added that they were in the market to buy a "do up", and "everything was disclosed" to them, and that the purchaser "is a licensed building practitioner and inspected the building from ceiling to floor levels."

The Committee's decision to take no further action on the complaint

[20] The Committee considered that the appellant was not empowered unilaterally to give Ms Carppe instructions, as the other two vendors needed to agree. Without such agreement, she would have been at risk of breaching rr 6.1 (to comply with her fiduciary obligations to her clients) and 9.1 (to act in the best interests of her clients) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules").[1]

[21] The Committee noted that Ms Carppe had consulted Mr Moore and Mr Ducray, and suggested getting a vendors' building report then, when this was not agreed to, in consultation with Mr Moore, removed the vendor warranties, and recommended all prospective purchasers to obtain building reports.[2] The Committee considered that Ms Carppe had carefully considered the appellant's list of defects, and had disclosed to customers those she considered she needed to disclose, noting that she needed to be

1 Committee's decision, at paragraph 3.4.
2 At paragraph 3.5.

careful not to lower the value of the property by mentioning alleged defects that might not exist. The Committee noted that no undisclosed defects appeared to have been revealed in building reports obtained by other prospective purchasers.[3] Finally, the Committee recorded that the purchasers had confirmed that everything had been disclosed to them, and they had not identified any undisclosed defects.[4] Accordingly, the Committee found that Ms Carppe had not breached the Act or Rules in relation to disclosure.[5]

[22] With respect to the appellant's complaint that Ms Carppe had misrepresented to him, six or seven times, that it was unlikely that the purchasers would be able to secure finance, the Committee recorded Ms Carppe's statement that when she took their offer to the appellant she told him that the offer was subject to finance, and that banks did not look favourably on properties without vendor warranties, so finance was not a "sure thing". The Committee also referred to Ms Carppe's statement that she may also have told the appellant that the purchasers were having to have an investment property valued in order to get finance approved, so finance was not a "sure thing".[6]

[23] The Committee accepted that Ms Carppe did not intentionally try to mislead the appellant as to the purchasers' chance of getting finance approved in order to get him to sign the agreement for sale and purchase. It considered that, at worst, there was a misunderstanding between what Ms Carppe said and what the appellant heard. The Committee considered that it was "self-evident" that Ms Carppe would not have known the full picture around the purchasers' chances of obtaining finance. It did not accept that she would have told the appellant that it was "unlikely" that the purchasers would get finance.[7] The Committee found that Ms Carppe did not breach the Act or Rules by misleading the appellant.[8]

[24] The Committee also inquired into Ms Carppe's management of the conflict of interest arising out of the appellant being both a vendor and prospective purchaser. Conflicts also arose out of the fact that the appellant and Evan Brown owed fiduciary

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3 At paragraph 3.6.
4 At paragraph 3.7.
5 At paragraph 3.8.
6 At paragraph 3.10.
7 At paragraph 3.11.
8 At paragraph 3.12.

duties as executors of their mother's estate, and Evan Brown owed fiduciary duties as attorney for his father. Accordingly, neither the appellant nor Evan Brown was acting in a personal capacity, and both owed duties to other parties.

[25] The Committee accepted that Ms Carppe was in constant communication with the appellant and Evan Brown, and with Mr Moore and Mr Ducray, and that she had made various suggestions throughout the sale process as to how to manage the conflict. It found that it was was made clear at the auction that one of the bidders was also an owner and would be acting on his own behalf, and that the purchasers were informed of a multi-offer situation, and that a family member was interested in buying the property.[9]

[26] The Committee accepted Ms Carppe's explanation as to how she managed the conflict, and concluded that she had managed the situation with "perseverance, diligence, and skill fulfilling her obligations under rr 5.1, 6.1, 6.2, 6.4, and 9.1."[10]

Appeal issues

[27] In his notice of appeal, the appellant said that his complaint was as to the process leading to the sale of the property. He said that Ms Carppe had not disclosed the list of defects he gave to her, to be handed to persons viewing the property, her response to the list had never been discussed with him, he had never been informed of building inspections taking place, he had not been informed of the reserve price and it was not discussed with him, a meeting should have been held after the auction to discuss the sale but was cancelled, and there had been preferential treatment of Evan Brown and Mr Ducray.

[28] At the appeal hearing, the appellant confirmed to the Tribunal that he was not pursuing the matter of his complaint that Ms Carppe had misled him into believing that the purchasers would not be able to obtain finance. We consider the remaining issues, noting that some were not raised in his complaint, so are not properly matters for consideration on appeal.

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9 At paragraphs 3.14 and 3.15.
10 At paragraphs 3.16.

Did Ms Carppe fail to comply with r 10.7, as to disclosure of defects?

Submissions

[29] Mr Brown accepted at the hearing that Ms Carppe was not required to hand out photocopies of his list of defects to everyone who went through the property, but he submitted that if she did not not provide copies, she was obliged to give oral disclosure of every matter listed by him. He further submitted that if she did not consider she should do that, she should have refused to act further on the sale, pursuant to her obligations under r 10.8.

[30] Ms Carppe submitted that she was not required to hand out copies of the list of defects, and she was conscious of the conflict of interest, given that the appellant was both a vendor and a prospective purchaser. She submitted that after she read through the list she consulted Mr Moore and acted in accordance with his advice. In addition to the specific disclosure set out below, the property sold was "as is where is", and she recommended to visitors to the property to obtain a building inspection report.

[31] By reference to the list of defects, Ms Carppe submitted that she had disclosed the fact that the electrical wiring required repair or replacement, she was advised that the water tank in the ceiling had been repaired (and had seen receipts for work done), she had seen evidence of historic roof leaks, but not current leaks (and none had been found in any building inspections), she knew from experience that the kitchen range hood was compliant at the time it was installed, and she disclosed that the fireplaces were non-compliant, there was asbestos in the property, a broken pipe in the laundry, and rotten weatherboards. She also submitted that defects such as the state of the bathroom and the exterior cladding were obvious to any viewer of the property.

[32] Ms Carppe submitted that she did not climb up into the ceiling space, and could not check an alleged water leak because the water was turned off (by the appellant). She had opened and closed all windows to check that they performed properly, but assumed that the state of the putty around window glass would not need to be expressly disclosed. If she could not herself establish that a defect listed by the appellant existed, she marked it as "unsubstantiated".

[33] Ms Lim submitted for the Authority that while it may have been good practice for Ms Carppe to have told the appellant what she was (and was not) going to disclose as defects, the Committee was correct to find that she met her disclosure obligations. In particular, she had considered each of the items, and had taken advice from Mr Moore. She submitted that where it was unclear whether a particular item listed by the appellant was in fact a defect, it was appropriately handled by the removal of the vendor warranties, the sale of the property "as is where is", and the recommendation to obtain building inspection reports.

[34] Ms Lim further submitted that there was no evidence that Ms Carppe was ever instructed not to disclose a defect. Accordingly, she submitted, no issue arose as to Ms Carppe being required pursuant to r 10.8 to decline to act on the sale.

Discussion

[35] Rule 10.7 provides:

> A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either–
>
> (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
>
> (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

[36] We are not persuaded that the Committee was wrong to decide to take no further action on the appellant's complaint. To the contrary, we have concluded that Ms Carppe followed a proper course in the circumstances. She considered the items listed by the appellant. She recommended to her vendor clients that they commission a vendors' building inspection report, but they could not agree to who should be instructed to do it, or at what cost. She then discussed the list and sought advice from the solicitor acting on the sale. She did not discuss it with Evan Brown

[37] Ms Carppe was not required under the Rules to provide a copy of the appellant's list of defects to visitors to the property, and she properly considered the issue of the conflict of interest arising out of his position as vendor and prospective purchaser. She

pointed out matters that required disclosure, referring to the non-compliant fireplaces, wiring that needed to be replaced, a downstairs leak and a leak in the ceiling, rotten weatherboards, and the presence of asbestos. She also pointed out unconsented work downstairs, and provided an engineer's report on that work.

[38] Ms Carppe recommended that persons viewing the property obtained building reports, and it is evident from her reports to the appellant and Evan Brown that many of them did so. We also note her statement to the Committee (and the Tribunal), supported by photographs of the property, that some of the defects listed by the appellant were self-evident. We note that the eventual purchaser confirmed that Ms Carppe had identified defects in the property.

[39] That Ms Carppe gave appropriate disclosure of defects is evident from her reports to the appellant and Evan Brown. To set out one example, in her report of 19 December 2018, she said:

> Buyer feedback is centering around the amount of work that needs to be done at the property – removing potential asbestos-containing lino from the kitchen, laundry, bathroom and toilet, (asbestos also likely present in the soffits and the cladding below the weatherboard), replacing old wiring, repairing broken drain pipe in the laundry and replacing old galvanised pipes with new plastic or copper pipes, treating borer present in the ceiling space and the internal staircase, replacing rotten weatherboards on the northern side of the property, and the cost involved with repainting, especially these days when scaffolding is required to paint at height.
>
> Understandably, buyers need to take into account the cost of these issues, as well as the cosmetic changes most would undoubtedly make. The costs add up and they are wary of over-capitalising in that area.

[40] The appellant referred in his submissions to the Tribunal to r 10.8. Rule 10.8 provides:

> A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.

[41] There was no evidence that Ms Carppe was told not to disclose any defect. Accordingly, r 10.8 has no application.

[42] At the hearing, the appellant contended that he had not been told about inspections obtained by prospective purchasers. There is no substance to this complaint. Ms Carppe's communications to the appellant and Evan Brown on 4, 10,

11 and 19 December 2018 and 8 January 2019 all refer to inspections. The appellant submitted that he should have received copies of the inspection reports. We accept Ms Carppe's statement that in accordance with normal practice, she did not see those reports herself, as they are commissioned by prospective purchasers for their own benefit, only.

[43] We are not persuaded that Ms Carppe failed to comply with her obligations under r 10.7. The appellant's appeal on this point is dismissed.

Was Ms Carppe in breach of any obligation in respect of setting the reserve price?

[44] Although it was not part of his original complaint, the appellant contended during the Committee's investigation of the complaint that he was never contacted regarding setting the reserve price for the auction. The Committee did not refer to any issue as to the reserve price in its decision. In his notice of appeal, the appellant contended that he "was not informed of the reserve price and this was never discussed with me". He said that he "still [didn't] know" how the reserve figure of $500,000 was reached. He submitted that Ms Carppe should have had a "sit-down meeting", with himself, Evan Brown, and Mr Moore to discuss it.

[45] The appellant said in a communication to Ms Carppe and Mr Moore on 3 December 2018:

> Why have I NEVER been contacted regarding setting the reserve price for the sale of this property?

[46] His question was answered by Mr Moore the same day:

> As to the issue of reserve price, this was discussed between us in a series of emails exchanged during August.

[47] Ms Carppe provided an explanation to the Tribunal. As noted in the factual background set out earlier, she appraised the property in the range $470,000 to $490,000. When she prepared the agency agreement, she provided a commission figure, based on a sale price of $480,000. Before signing the agency agreement, Evan Brown crossed out $480,000 and wrote in $500,000. Ms Carppe later emailed the auction reserve document to the appellant and Evan Brown, with no reserve figure in

it. Evan Brown inserted $500,000 as the reserve figure then signed it. Ms Carppe then took the document signed by Evan Brown to the appellant. The appellant signed it. Ms Carppe said she knew that the appellant was not happy with the reserve figure, but she was comfortable that when he signed it he knew and understood that he was agreeing to the reserve.

[48] We are not persuaded that there is any substance to the appellant's contention that he was never contacted regarding the auction reserve figure. Mr Moore's email indicates earlier discussion on the point. Further, the appellant signed the auction reserve, knowing the figure that his brother had written in.

Did Ms Carppe breach any obligation in relation to holding a post-auction meeting?

[49] Again, this is not a matter that was part of the appellant's original complaint, and it was not referred to in the Committee's decision. However, the appellant said in his notice of appeal that:

> There was a meeting scheduled with all persons to discuss sale. This was cancelled and no reason given, I have since discovered this is a standard practice and would like to know why this never happened.

[50] It is evident from the material before the Committee that on 13 December 2018, Ms Carppe suggested a meeting between the appellant, Evan Brown, Mr Moore, Mr Ducray, and herself, to discuss an offer received from the under-bidder at the auction. She noted that the meeting had been agreed by the appellant and Evan Brown. Ms Carppe advised the Tribunal that the meeting did not take place, because of anticipated acrimony between the appellant and his brother.

[51] Ms Carppe cannot be found to be in breach of any of her obligations as a licensee for the reason that the meeting never took place. She attempted to arrange a meeting, and the fact that it never took place was not as a result of any action of hers. She could not force anyone to attend a meeting.

Did Ms Carppe give preferential treatment to Mr Ducray and Evan Brown?

[52] As noted earlier, the Committee was satisfied that Ms Carppe was in constant communication with the appellant and his brother, and Mr Moore and Mr Ducray, and concluded that she "managed the situation with perseverance, diligence and skill fulfilling her obligations" under the Rules.

[53] In his notice of appeal, the appellant referred to a request made by Mr Ducray that Ms Carppe not give any preferential treatment to any bidder at the auction by agreeing to reduce or waive commission. Mr Ducray said that this request was made because the appellant had advised Evan Brown that Ms Carppe had said that if he was successful at the auction, no commission would be charged. Mr Ducray also said that his letter was not to be disclosed to the appellant.

[54] After that reference, the appellant said in his notice of appeal:

> With no meeting after auction and my defect list not passed onto persons viewing property, maybe there is preferential treatment to [Mr Ducray] and Evan Brown.

[55] At the appeal hearing, the appellant referred to the fact that the meeting that was to have taken place after the auction did not take place was an example of "preferential treatment" given to his brother and Mr Ducray.

[56] As with the matters discussed under the previous two headings, "preferential treatment" of Evan Brown and Mr Ducray was not part of the appellant's complaint, so not specifically discussed in the Committee's decision. However, the Committee inquired into, and made findings as to, Ms Carppe's handling of the various conflicts of interest she was presented with.

[57] With respect to Mr Ducray's letter of December 2016, the material before the Committee included Ms Carppe's response, of 17 January 2017. She responded that if the vendors did not want to take advantage of the offer to waive commission if the appellant were to purchase the property, that was entirely their decision. She went on to say:

> Please note, however, that this cannot be kept confidential from Mr Nigel Brown as his signature will be required on the Real Estate Agency Agreement. I prefer to work on the basis of complete transparency in fairness to all parties, and therefore this needs to be agreed upon by all parties prior to the property being listed.

[58] Ms Carppe's response was entirely appropriate. There is no evidence that her subsequent dealings in respect of marketing the property were carried out with anything other than compete transparency. There is no evidence of any preferential treatment being given to anyone. We are not persuaded that that the Committee was wrong to find that Ms Carppe appropriately handled the conflicts of interest involved, fulfilling her obligations under the Rules.

Outcome

[59] The appellant has not established that the Committee was wrong to decide to take no further action on his complaint. His appeal is dismissed.

[60] 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 C Sandelin
Member

_____
Mr N O'Connor
Member