BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 10

READT 040/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	JOHN KETTLE Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First Respondent
AND	SAMUEL PETERS Second Respondent
Hearing:	3 March 2020, at Wellington
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr D Platt, on behalf of Mr Kettle Mr M Mortimer, on behalf of the Authority Mr T Peters, on behalf of Mr Peters
Date of Decision:	10 March 2020

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Kettle is a licensed salesperson, engaged by Tommys Real Estate Ltd, Wellington ("the Agency"). He has appealed against the decision of Complaints Assessment Committee 521, dated 10 September 2019, in which the Committee found that he had engaged in unsatisfactory conduct.

Background

[2] The second respondent, Mr S Peters, owned an apartment ("5J") "in a complex in Wellington. In this decision, in order to avoid confusion with his counsel, Mr T Peters, we will refer to him as "the complainant". In May 2018, the complainant was in the process of buying another apartment in the complex ("4A"), which would require him to sell 5J.

[3] Mr Kettle was the listing salesperson for 4A. He was also the listing salesperson for a further apartment, 5F. He had previously been the listing and selling salesperson for other apartments in the complex, including 5J (which he had sold to the complainant in December 2015). After the complainant had entered into the agreement to purchase 4A, Mr Kettle asked him if he could appraise and list 5J.

[4] The complainant advised Mr Kettle that he wished to list 5J with another salesperson, Mr Cartwright, at Ray White. There was a dispute between the complainant and Mr Kettle as to whether the complainant agreed to Mr Kettle preparing an appraisal of 5J. The complainant said that he declined Mr Kettle's request. Mr Kettle understood that the complainant had agreed to his appraising 5J.

[5] As described by Mr Platt (the director of the Agency, who appeared for Mr Kettle at the appeal hearing), Mr Kettle then: "… completed the research, considered the market and the particular apartment, the best method for marketing, the costs, commission, and the value." He produced a market appraisal for 5J, which included a comparative market analysis, dated 15 May 2018, addressed to the complainant ("the appraisal"). The appraisal indicated a current market value of 5J of $685,000 –

$720,000, and recommended a list price of "BEO $695,000."[1] However, the appraisal was not presented to the complainant.

[6] Mr Cartwright had prepared an appraisal of 5J, dated 7 May 2018. It was first marketed for sale by tender then with a list price of "BEO $759,000". A prospective purchaser, Mr Weaver, viewed 5J with Mr Cartwright's colleague, Mr Walker. Mr Weaver also viewed 5F with Mr Kettle. There was a discussion between Mr Weaver and Mr Kettle as to the respective values of 5J and 5F.

[7] Mr Weaver made an offer to purchase 5J at $700,000. The complainant counter-offered at $730,000 and a purchase price of $725,000 was ultimately agreed on.

[8] In his subsequent complaint to the Authority, the complainant said that Mr Kettle had told Mr Weaver that he had appraised 5J at $695,000 and that the complainant had declined to list 5J with him as a result. He complained that Mr Kettle's statement had had an adverse effect on negotiations for the sale of 5J.

[9] There was some dispute as to what Mr Kettle said to Mr Weaver. Both Mr Platt (in statements to the Authority on behalf of Mr Kettle and the Agency), and Mr Walker (in an email to Mr Cartwright, provided to the Authority) gave varying wording. Neither Mr Platt nor Mr Walker or Mr Cartwright was party to the discussion. The Tribunal is more assisted by the statements made by the parties to the discussion: Mr Kettle and Mr Weaver.

[10] Mr Weaver said in email statements to the Authority's investigator on 19 June 2019:

> John Kettle was selling another apartment at [the complex], I told him I was also looking at [5J].
>
> The viewing of John Kettle's listing and the conversation occurred in May or June 2018.
>
> John Kettle told me what he valued [5J] at, I don't recall the amount.
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> I thought he used the word "appraised", but I can't be sure.
>
> I subsequently told [Mr Walker] what John Kettle had valued 5J at because of the big difference in asking price and John's amount.

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1 "BEO" = "Buyer Enquiry Over".

I ended up purchasing 5J.

and:

…

John Kettle didn't indicate what sort of appraisal it was.

He did not say how he had arrived at the value.

He did say he had previously sold 5J.

[11] Mr Kettle said in a statement to the Authority dated 22 May 2019:

> At no stage did I tell Mr Weaver not to buy the complainant's apartment. At no stage did I tell him that it was only worth $695,000. I told him that it was being marketed with no price, I did however mention that the complainant had agreed for me to do an appraisal, but obviously changed his mind, and that I had started doing the numbers already, which suggested that it should be marketed at Buyer Enquiry Over $695,000. (Which is quite a different thing than saying it was only worth $695,000.)
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> It was a discussion about the value comparisons between the two apartments. There was nothing sinister intended and no deliberate attempt on my part to run down the other apartment.
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> …
>
> As I have previously stated I am adamant that the complainant indicated that he wanted me to do an appraisal of his [5J] apartment. He was however clear that he was talking to Ray White and he would likely list with them as the agent was a good customer. I had no problem with this, but suggested it wouldn't do him any harm to get a no obligation 2nd opinion, to which he agreed. He did however say that it needed to be before Friday. So I went ahead and prepared the numbers and completed the paper work without a site visit, as I had full knowledge of the subject apartment (having already marketed it twice in the past). I had an expectation that I would present the appraisal in the apartment and if the apartment had significantly changed that I could amend my findings accordingly. During this time I tried calling the complainant numerous times to set a time to meet. He never answered. On the Thursday or Friday of that week I noticed [5J] was already listed with Ray white, so I abandoned any further attempts to contact him.

The Committee's decision

[12] The Committee recorded that it was not disputed that Mr Kettle had appraised 5J. It first considered whether the appraisal had been prepared without the complainant's consent, noting that it was presented with two competing accounts. The Committee concluded that there was insufficient evidence to enable it be satisfied on the balance of probabilities that Mr Kettle did not have the complainant's consent to appraise 5J. It found no unsatisfactory conduct by Mr Kettle in preparing the appraisal.

[13] The Committee then considered the complaint that Mr Kettle had disclosed the appraisal to Mr Weaver. Referring to Mr Kettle's statement to the Authority (set out earlier in this decision), the Committee found that it was conduct that was likely to bring the industry into disrepute, in breach of r 6.3:[2]

> 3.9 [Mr Kettle's] use of either "appraised" or "started doing the numbers" is not material. The effect on the Purchaser, even unconsciously, would have been the same. That being, the opinion of an experienced real estate agent who had appraised the Property or "started doing the numbers" on it and was a self-described specialist in that type of property would carry some weight, this is demonstrated in the Purchaser's evidence that he told another licensee how much [Mr Kettle] has "valued the Property at because of the big difference between the asking price and [Mr Kettle's] appraised amount.
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> 3.10 A layperson, as the Purchaser was, cannot be expected to distinguish between an appraisal and "started doing the numbers". Whether, as the Complainant alleged, the disclosure of the appraised amount to the Purchaser had a negative effect on the selling price of the Property is unknown but at a minimum [Mr Kettle's] actions caused the Purchaser to question the market value of the Property.
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> 3.11 Rule 6.3 states that *a licensee must not engage in any conduct likely to bring the industry into disrepute*. Rule 6.3 is not tied to any other professional obligation. It is not necessary to consider the Rule in the context of conduct that is negligent or incompetent to such a degree as to reflect on the licensee's fitness to practise. The consideration is solely whether the conduct is likely to bring the industry into disrepute. In our opinion, a vendor having obtained appraisals from perhaps several licensees and then listing with one agency should not have those other appraisals communicated to prospective purchasers of their property by those other licensees who were unsuccessful in obtaining the listing.
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> 3.12 The conduct of [Mr Kettle] in disclosing the appraised amount (or otherwise indicating a likely value) to the Purchaser of the Property, which was listed by a rival agency and that he had been unsuccessful in obtaining a listing for, was such that if known by the public generally, would [be] likely to bring the industry into disrepute. Accordingly, [Mr Kettle] breached Rule 6.3 and his conduct was unsatisfactory.

Appeal

[14] In a statement filed with his Notice of Appeal, Mr Kettle contended that the Committee's decision showed a basic lack of understanding of real estate processes and language, and was wrong to find that he had engaged in conduct that would bring the industry into disrepute. He said that the purpose of his meeting with Mr Weaver was in relation to the marketing of 5F (where he was representing the interests of another client vendor), that there had been no recognition of the fact that he had

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[2] Committee's decision, at paragraphs 3.9.–3.12.

completed appraisals for 5F and a "good number of apartments" in the complex in the six months before 5F and 5J went to market, so had an exceptional first-hand knowledge as to the value of apartments in the complex, and that it had been Mr Weaver who raised the subject of 5J, not him.

[15] Mr Kettle said further that he had "simply expressed surprise that 5J was being marketed without a price and that had he been given the opportunity he would have marketed the property with a buyer enquiry over figure of $695,000". He said his comments had been twisted out of context and misinterpreted by the complainant and his agents. He said that the Committee was wrong to refer to the "Purchaser's evidence", as the "so-called evidence never came from the purchaser at all".[3]

[16] In his submissions on behalf of Mr Kettle, Mr Platt set out the issues for determination as being whether the Committee erred in fact in concluding that the disclosure of a value of 5F caused the purchaser to question its market value, and whether it erred in law by concluding that a licensee is in law prevented from disclosing to a potential purchaser their informed view of the value of a property.

[17] In the course of the appeal hearing, it was clarified that the sole issue for determination is whether the Committee was wrong to find that Mr Kettle's statements to Mr Weaver, as expressed by him in his statement to the Authority (set out at paragraph [11], above) constituted conduct that would bring the industry into disrepute.

Submissions

[18] Mr Platt submitted that the Committee was wrong to find that Mr Kettle had engaged in unsatisfactory conduct. He accepted that a licensee could be in breach of r 6.3 if, for example, the licensee had prepared and presented an appraisal to a prospective client, then disclosed his appraisal and recommendations to a third party. He submitted that this was not what occurred in the present case. He submitted that in

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[3] It is clear that Mr Kettle was mistaken in asserting that there was no evidence from the purchaser, Mr Weaver, whose evidence is set out in this decision at paragraph [10].

the present case, r 6.3 has no application, because the appraisal prepared by Mr Kettle was never completed and presented to the complainant.

[19] He submitted that licensees must be free to express their opinions, based on their knowledge and experience in the industry, as to any property, regardless of whether they have a listing for the property in question. He referred to a statement by an experienced property developer (annexed to his submissions), to the effect that advice from a range of licensees is frequently sought, as to what a particular property might be worth. The developer expressed the view that it would be "naïve and dangerous to try to stop or regulate against the public obtaining such market price opinions from whatever source they choose".

[20] Mr Peters submitted that the Committee was not wrong to find unsatisfactory conduct. He submitted that the Committee correctly considered the words used by Mr Kettle (as set out in his statement to the Authority), as that is the critical issue. He submitted that the Committee correctly concluded that in giving Mr Weaver advice as to 5J, and providing information to him, on the basis of the work that he had done on the understanding that the complainant had agreed to his preparing an appraisal, Mr Kettle was in breach of r 6.3.

[21] Mr Peters accepted that if Mr Kettle had said to Mr Weaver something to the effect that from his personal experience, and his knowledge of the apartments in the complex, 5J might sell for somewhere in the region of $695,000, it was possible that there would have been no breach of r 6.3. However, that was not how Mr Kettle had set out what he said to Mr Weaver.

[22] Mr Mortimer submitted that while r 6.3 refers to "conduct", the inquiry as to whether there has been a breach of the rule must be fact-specific. He submitted that the Committee properly considered a number of facts before concluding that Mr Kettle had crossed the line and was in breach of r 6.3.

[23] First, in relation to the manner in which the information provided to Mr Weaver was generated, Mr Mortimer noted that Mr Kettle had taken steps towards obtaining a

listing of 5J. This in itself took the present case out of the category of general comments based on Mr Kettle's knowledge and experience as a licensee.

[24] Mr Mortimer further submitted that the information Mr Kettle gave Mr Weaver was generated in the course of preparing an appraisal, as part of the process of obtaining a listing. He submitted that the later conduct in disclosing the appraisal would have been more egregious if he had presented the appraisal to the complainant. However, the appraisal was all but complete, and Mr Kettle had taken steps to try to present it to the complainant.

[25] Secondly, as to the circumstances in which the appraisal was disclosed, Mr Mortimer submitted that Mr Kettle was at the time working for his client, the vendor of 5F, and acting in that client's interests. He had an interest in securing the sale of 5F. Further, his disclosure of the appraisal was in the context of Mr Weaver being in effect choosing between 5F (which Mr Kettle was marketing) and 5J (which was being marketed by another agency).

[26] Finally, Mr Mortimer referred to the words Mr Kettle said he used, which were specifically related to 5J: he submitted that what Mr Kettle said to Mr Weaver was informed by his appraisal of 5J.

[27] Mr Mortimer accepted that general statements as to possible selling price of a property, made on the basis of a licensee's knowledge and experience, would be unlikely to be found to be in breach of r 6.3. However, he submitted that on the basis of the facts set out above, the Committee was correct to find that Mr Kettle had breached r 6.3.

Discussion

[28] Rule 6.3 was discussed briefly by the Tribunal in its decision in *Jackman v CAC 10100*,[4] where the Tribunal approved of a Complaints Assessment Committee's

[4] *Jackman v CAC 10100* [2011] NZREADT 31, at [65].

discussion of r 6.3 in *Re Raos*.[5] In that case the Committee described conduct that would justify a finding of a breach of r 6.3 as conduct that:

> … if known by the public generally, would lead them to think that licensees should not condone it or find it to be acceptable. Acceptance that such conduct is acceptable would … tend to lower the standing and reputation of the industry.

[29] Rule 6.3 is not tied to any other professional obligation. As Mr Mortimer submitted, it is a general provision, that may cover a wide variety of behaviour. It is not necessary to consider the Rule in the context of conduct that is negligent or incompetent to such a degree as to reflect on a licensee's fitness to practice. We consider solely whether the conduct is "likely to bring the industry into disrepute". Nor does it require there to be a relationship of agency with a client or customer.

[30] We adopt the comments accepted by the Tribunal in *Jackman* and, more recently, in *Complaints Assessment Committee 403 v Goundar*,[6] and *Complaints Assessment Committee 414 v Goyal*.[7] The inquiry is into the conduct of the licensee concerned, and whether that conduct was such that if known by the public generally, was more likely than not to lead members of the public to think that licensees should not condone it or find it to be acceptable.

[31] In the present case, Mr Kettle disclosed information that he had gathered in the course of preparing an appraisal of 5J, when seeking to obtain a listing of 5J. He disclosed it to Mr Weaver when he was marketing a different unit, 5F, to him, knowing that Mr Weaver was interested in purchasing 5J. We accept Mr Mortimer's submission that there was a clear risk of deterring or undermining the marketing of a "rival" property for which Mr Kettle had not been given a listing agreement.

[32] We are not persuaded that the Committee was wrong in its reasoning, or to conclude that Mr Kettle's conduct in disclosing to Mr Weaver that "the complainant had agreed for me to do an appraisal, but obviously changed his mind, and that I had started doing the numbers already, which suggested it should be marketed at Buyer

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5 *Re Raos* Complaint No. CA4315602, 9 June 2011, at 4.39 (in that case, the Committee concluded that the relevant conduct did not breach r 6.3).

6 *Complaints Assessment Committee 403 v Goundar* [2017] NZREADT 52, at [83]–[84].

7 *Complaints Assessment Committee 414 v Goyal* [2017] NZREADT 58, at [28]–[34].

Enquiry Over $695,000" was, in all the circumstances, in breach of r 6.3, and constituted unsatisfactory conduct.

[33] The fact that the appraisal was not presented to the complainant is not relevant to determining whether Mr Kettle breached r 6.3, nor is it relevant whether Mr Kettle's statements had any effect on the price 5J was sold for.

Result

[34] Mr Kettle's appeal is dismissed.

[35] 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

_____
Ms C Sandelin
Member