BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 27

READT 043/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	KAI DENG Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1901) First Respondent

On the papers

Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Mr N O'Connor, Member
Submissions received from:	Ms H Bowering-Scott, on behalf of Mr Deng Ms A-R Davies, on behalf of the Authority
Date of Decision:	25 June 2020

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Deng has appealed pursuant to s 111 of the Real Estate Agents Act 2008 ("the Act") against the decision of Complaints Assessment Committee 1901, issued on 20 September 2019 ("the substantive decision"), in which it found he had engaged in unsatisfactory conduct. Mr Deng has also appealed against the Committee's decision, issued on 27 November 2019, in which it made penalty orders ("the penalty decision").

Background

[2] Mr Deng is a licensed salesperson, engaged at Barfoot & Thompson Ltd in Auckland ("the Agency"). He was the listing agent for two adjacent properties, which we will refer to as "No. 26" and "No. 28". The property at No. 28 was to be sold by mortgagee sale. The Agency had a sole agency for both properties from 23 July 2018 ("the original agency agreements"). The original agency agreements were renewed from time to time and finally expired on 20 October 2018.

[3] Mr Deng's associate salesperson, Mr Han, had brought the properties to the attention of a prospective purchaser in early October 2018, but no offer was made as the vendor's price expectation was considered to be too high.

[4] The vendors entered into a sole agency agreement with another agency, Glover Real Estate ("Glovers") in respect of No. 26. The sole agency was to begin on 21 October 2018, and was for 90 days. Glovers advertised No. 26 on TradeMe on 20 October 2018, at a lower price.

[5] Mr Deng saw the TradeMe advertisement and contacted the vendors. Mr Deng told the Committee that one of the vendors was very clear in saying that he had only signed a general agency agreement with Glovers, not a sole agency, and that it was "just for one week". He said that the vendor said he wanted to sell the property as soon as possible, and that it was very clear that this was extremely urgent for the vendor.

[6] Mr Deng then told Mr Han that the price for No. 26 had been reduced. As a result, Mr Han's prospective purchaser was interested in buying both properties, and indicated that offers would be submitted.

[7] Mr Deng was instructed by the Agency to obtain a general agency agreement with the vendors before taking any further action or putting the prospective purchaser's offer forward. On 21 October 2018, Mr Deng signed general agency agreements with the vendors, in respect of both properties, for ten days ("the new agency agreements").

[8] We note that in each of the new agency agreements clause 3.0 (headed "Prior Agency"), was completed by selecting cl 3.2 ("The Client has appointed the following real estate agent/s prior to signing this agreement") and adding "Barfoot Pt Chevalier" as the name of the agency, and "end at 20/10/2018" as the period of agency. We also note that in each agreement, at cl 16.1.7, the vendors initialled an acknowledgment that they had been "advised and [have] had an explanation of the circumstances in which the client could be liable to pay full commission to more than one Agent in the event a transaction is concluded".

[9] After some negotiation, the prospective purchaser's unconditional offer on each property was accepted by the vendors late on 21 October 2018.

[10] Upon the sale of the properties, Glovers claimed commission on No. 26, pursuant to their sole agency agreement, and lodged a caveat against the title, preventing settlement until commission was paid. In order to achieve settlement, the vendors paid Glovers a commission and legal fees.

[11] The vendors then made a complaint to the Authority about Glovers' conduct in relation to the 90-day sole agency, and lodging a caveat for payment of commission. The Tribunal has not been advised of the outcome of this complaint. The Committee was concerned as to the steps taken by Mr Deng when entering into the general agency agreement on 21 October 2018, and commenced an "own motion" investigation under s 78(b) of the Act. That investigation resulted in the finding which is the subject of the present appeal.

The substantive decision

[12] The Committee found that Mr Deng's conduct was in breach of r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), and constituted unsatisfactory conduct. Its reasoning was as follows:

> 3.1 … [Mr Deng's] conduct in not undertaking due diligence with respect to the agency agreement already in place falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee and contravened r 5.1 of the [Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012].
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> 3.2 The agency agreement entered into by the Agency with the Vendor, via [Mr Deng], at clause 3.1[1] makes no mention of the fact that another agency agreement (with Glovers) is in place. This is despite the fact that [Mr Deng] acknowledged he was told by the Vendor about the existence of the other agency agreement (albeit he claims he was told it was a general agency agreement and not a sole agency agreement).
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> 3.3 The Committee considers that, in not noting the existence of the other agency agreement on the listing agreement with the Agency, and in not taking steps to view the other agency agreement, and ascertain the true status of it rather than just relying on what he was told by the Vendor about it, shows a breach of rule 5.1 by [Mr Deng].
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> 3.4 Rule 5.1 requires that a licensee exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
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> …
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> 3.6 The Committee considers that due diligence on [Mr Deng's] part necessitated that he ask the Vendor to view the existing agency agreement to satisfy himself that it was indeed a general agency as the Vendor maintained. In the Committee's opinion, [Mr Deng] ought not to have relied on his previous relationship and WeChat message from the Vendor to determine the status of the other agency agreement. Proper due diligence would have seen [Mr Deng] take steps to scrutinise the agency agreement already in place and verify its information. This step would have brought to light the fact that a sole agency agreement was already in place and the offer from [the prospective purchaser] could have been dealt with in the appropriate manner.

The penalty decision

[13] The Committee recorded submissions on behalf of Mr Deng that the finding of unsatisfactory conduct would in itself be a sufficient penalty, and that he is a successful salesperson with an excellent record. It also recorded submissions that Mr Deng had made a judgment on how best to handle a unique situation, and taken advice from his

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[1] The reference to cl 3.1 of the agency agreement is clearly a typographical error, as cl 3.2 applies where another agent has been appointed.

manager, and that Mr Deng's error in omitting reference to Glovers was at the low end of the scale.

[14] The Committee took into account that Mr Deng had no previous disciplinary history, was acting to protect the vendor who was having to act quickly, and that he was confronted with a unique situation. Nevertheless, the Committee noted that despite the relatively minor nature of Mr Deng's breach, the consequences of not carrying out due diligence by not viewing a copy of the Glovers agency agreement were significant, exposing the vendor to the considerable risk of double commission.

[15] The Committee ordered that Mr Deng be censured, and that he pay a fine of $4,000.

Appeal against the substantive decision

Submissions

[16] Ms Bowering-Scott submitted for Mr Deng that the Committee was wrong to find that due diligence necessitated that Mr Deng ask to view the Glovers agency agreement and satisfy himself that it was indeed a general agency, rather than relying on the advice and information provided by the vendor.

[17] She submitted that the Committee had accepted that Mr Deng met his responsibilities under r 9.10, under which he was required to explain to a prospective client that if another agency agreement was, or had already been, entered into, the client could be liable to pay commission to more than one agent, in the event that a transaction was concluded. She submitted that it is unclear how conduct which satisfies r 9.10 can then amount to a failure to exercise skill, care, competence, and diligence.

[18] Ms Bowering-Scott submitted that Mr Deng had exercised skill, care, competence, and diligence by explaining the consequences of a potential double commission, entering into a new agency agreement, and completing the sale in accordance with his client vendor's instructions. She submitted that Mr Deng had

asked the vendor about the Glovers agency agreement, and was expressly told that it was a general agency, for ten days. She submitted that Mr Deng had no reason to question the vendor's advice, as the vendor had reasonable real estate experience.

[19] She further submitted that Mr Deng had double checked the status of the agreement in a WeChat conversation with the vendor. She submitted that it was clear that the vendor understood that he had entered into a general agency with Glovers, for ten days. She quoted from the vendor's complaint to the Authority that an agent "came to my house and told my mother that we can sign a 10-day open contract to sell this property".

[20] Ms Bowering-Scott further submitted that "despite general agency being a common form of agency agreement, and frequently used when a vendor wished to list their property for sale or lease with one or more agency", the Authority had never provided guidance to licensees that they should request to view previous existing agency agreements signed by a vendor. She submitted that Mr Deng was not on notice that he should request to see copies of other general agency documentation when signing his own general agency.

[21] Ms Davies submitted on behalf of the Authority that the starting point is the purpose of the Act, which is to protect consumers in real estate transactions. She submitted that r 5.1 sets out the overarching standard of professional skill, care, competence, and diligence required of a licensee, and covers a wide variety of behaviour. She submitted that whether there has been a breach of r 5.1 will be a matter of degree, having regard to the circumstances of a transaction.

[22] In the present case, she submitted, the key factor was Mr Deng's express knowledge of the earlier agency agreements, in particular the Glovers agreement. She submitted that Mr Deng should have sought a copy of the Glovers agreement, to satisfy himself that the vendor was not going to be exposed to a double commission. She submitted that this was especially so when the vendor's financial situation is taken into account.

[23] Ms Davies submitted that compliance with r 9.10 does not mean that it was not available to the Committee to find Mr Deng in breach of r 5.1. She submitted that the two rules establish separate obligations. She submitted that in the present case, Mr Deng knew that there was in fact a potential exposure to double commission, and that context required him, in compliance with r 5.1, to satisfy himself as to the details of the Glovers agency agreement, rather than simply accepting the word of the client vendor. She submitted that Mr Deng owed the vendor fiduciary obligations, and that by failing to review the Glovers agency agreement himself, he did his client a disservice.

[24] Ms Davies submitted that the Authority has provided general guidance that licensees not enter into agency agreements with vendors who have existing sole agency agreements with another agency. She referred to Continuing Professional Development materials which note that it is important to establish whether a vendor already has a sole agency agreement with another agency. She further submitted that the focus must be on what r 5.1 required Mr Deng to do in the circumstances presented to him.

[25] In reply, Ms Bowering-Scott submitted that the standard of care required by a licensee does not vary according to a client's financial position, and that it is not a licensee's job to assess a vendor's financial situation and provide financial advice on agencies.

[26] She also submitted that the Authority's submissions rely on a presumption that the vendor would have been willing and able to produce a copy of the Glovers agency agreement, and does not consider the possibility that the vendor would not do so, for a number of reasons. She submitted that "a simple search of commercial listings for sale or lease, and many residential sale listings, will reveal that a property being listed with multiple agencies is a common occurrence". She submitted that it may not be easy for a vendor, in signing a new general agency, to produce copies of all previous general agencies, which may have been signed at different points in time and contain commercially sensitive terms.

[27] She further submitted that "signing a general agency agreement without sighting prior general agencies is common and universal practice in New Zealand."

[28] With respect to rr 5.1 and 9.10, Ms Bowering-Scott accepted that they are separate obligations. However, she submitted that satisfying r 9.10, that has been drafted specifically to address the risk of double commission, suggests that the overarching standard of professional skill, care, competence, and diligence required of a licensee under r 5.1 is also satisfied. She submitted that there is nothing in the Rules, or the Authority's commentary on the Rules, to indicate that r 9.10 is a minimum standard and r 5.1 sets a higher standard.

Approach on appeal

[29] This is an appeal against a Complaints Assessment Committee's decision to take no further action on a complaint, following an investigation. It is a "general appeal". The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee's decision was wrong.[2] Mr Deng has the onus of satisfying the Tribunal that the Committee was wrong to find that his conduct in failing to refer to the Glovers agency agreement in the new Agency agreement, and in failing to view the Glovers agreement before entering into the new Agency agreement, constituted a breach of r 5.1 of the Rules and was unsatisfactory conduct.

Reference to the Glovers agreement in the new Agency agreements

[30] It is evident on the face of both of the two new Agency agreements that they do not refer to the Glovers agency agreement in response to cl 3.2: "The Client has appointed the following real estate agent/s prior to signing this agreement". They refer only to "Barfoot Pt Chevalier", noting the "period of agency" as "end on 20/10/2018".

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[2] See *Austin Nicholls & Co Ltd v Stichtung Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141, and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, at [112].

"Guidance or indication" given by the Authority

[31] We note the submission for Mr Deng as to the absence of "guidance and or indication" by the Authority as to viewing previous agency agreements, and the reference to material issued by the Authority in the submissions for the Authority.

[32] Determination of whether or not a licensee has complied with the Act or Rules, or has engaged in unsatisfactory conduct or misconduct in any other respect, does not depend on the promulgation of "guidance or indication". A licensee's conduct will be assessed against the applicable legislative or regulatory provisions, and the facts and circumstances of the conduct concerned. While material issued by the Authority (and other appropriate entities) may be referred to, it cannot be determinative of the question whether a licensee should be found guilty of unsatisfactory conduct or misconduct.

Rules 5.1 and 9.10

[33] Rule 5.1 is the first rule under the heading "Standards of professional competence", and provides:

> A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

The Authority's "Real Estate Agents Handbook 2013" ("the Handbook") comments that r 5.1 "sets out the basic standard of professional competence required of a licensee".

[34] Rule 9.10 is under the heading "Client and customer care", and provides:

> A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.

The Handbook comments that "[r 9.10 as set out above] extend[s] the obligation to point out the risk of double commission to all types of agency", and that "while the greatest risks are in relation to sole agencies, any situation where there are, or could be, multiple agents involved means there is a risk of double commission". The Handbook further comments "Licensees need to explain to prospective clients how

they could potentially become liable for more than one commission before they sign any type of agency agreement".

Was the Committee wrong to find that Mr Deng failed to comply with r 5.1?

[35] We do not accept Ms Bowering-Scott's submission that if a licensee complies with r 9.10, then the overarching standard of skill, care, competence, and diligence under r 5.1 will have been complied with. The issue is not simply whether an explanation has been given. In order for any advice as to the risk of a double commission to be useful to the prospective client, the licensee should understand the nature of any previous agency agreements. Rule 5.1 applies to the consideration of whether the licensee had sufficient information on which to give the explanation to the prospective client, and whether the explanation given is adequate.

[36] It was accepted that Mr Deng asked one of the vendors about the Glovers agency and was told that it was "just for one week", and "not sole agency". This appeal requires us to determine whether the Committee was wrong to find that this was not a sufficient basis for Mr Deng to advise as to the risk of a double commission.

[37] As the Authority's commentary on r 9.10 says, the "greatest risks" of double commission are in relation to sole agencies. If a sole agency is in place, there is an immediate risk of a vendor being required to pay double commission if another agency agreement is entered into. Exposure of a client to a commission challenge may lead to a delay in settlement, or litigation, and the consequences are likely to be serious. In the present case, the risk was realised when Glovers lodged a caveat on the title to No. 26. Exposure of a vendor to a commission challenge may also lead to a complaint against a licensee for breach of duties owed to the vendor, and disciplinary proceedings.

[38] We accept Ms Davies' submission that a key factor in this case is that Mr Deng knew that the vendors had entered into an agency agreement with Glovers. Another key factor was, as Mr Deng said in his statement to the Committee, that one of the vendors told him he "wanted to sell as fast as possible", that "it was very clear that this was very urgent for him", and that he was asked "to sell both properties … as quick as

possible". It was clearly important for the vendors that the sale of the properties proceed as quickly as possible, and that there should not be any impediment to the sale process.

[39] We note Ms Bowering-Scott's submission that "a property being listed with multiple agencies is a common occurrence". She did not provide any evidence to support the submission, other than to refer to "a simple search of commercial listings for sale or lease, and many residential sale listings". Aside from the fact that the present case involved residential properties, not commercial properties, we could not reach a conclusion as to the frequency of sole agencies as opposed to general agencies without evidence on the point. Further, as we have said earlier, the greatest risk of double commission issues arising is in relation to sole agencies. Whether or not they are common in residential sales is irrelevant when the risk is considered.

[40] We also note Ms Bowering-Scott's submission that "signing a general agency without sighting prior general agencies is common and universal practice in New Zealand". She did not refer to any evidence for this submission, and we could not reach a conclusion on the point without evidence. In any event, the submission begs the question as to what it was that Mr Deng failed to "sight". In this case, it was a sole agency, and his failure to sight it led to a commission challenge.

[41] We must bear in mind the "consumer protection" purpose of the Act[3]. In the circumstances of this case, we are not persuaded that the Committee was wrong to find that in order to comply with his obligation to exercise skill, care, competence, and diligence in carrying out real estate agency work, Mr Deng should have viewed the Glovers agency agreement before advising the vendors as to the risk of double commission.

[42] Given the consumer protection purposes of the Act, and the importance of the issue for the prospective client, and bearing in mind the potential impact on the licensee and the Agency, a reasonably competent licensee exercising due skill, care, competence, and diligence would have asked to see the Glovers agency agreement in order to be satisfied that it was in fact a general agency, as one of the vendors asserted.

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[3] See s 3 of the Act.

[43] This was not a situation (such as was referred to in Ms Bowering-Scott's submissions) of there being "multiple" agencies, with different agency agreements having been signed over a period of time, where it might have been difficult to produce the prior agreement. In this case the prior agreements comprised only the original Agency agreement and the Glovers agreement.

[44] Further, if the vendors had refused to show the licensee the prior agreement, a reasonably competent licensee would have advised them that it was not possible to advise as to the risk of double commission, and that the licensee could not proceed to enter into an Agency agreement, at the very least until the vendor confirmed that they had sought independent legal advice on the matter.

[45] Accordingly, we will dismiss Mr Deng's appeal against the Committee's substantive decision.

Appeal against the Committee's penalty decision

Submissions

[46] Ms Bowering-Scott submitted that even if the Tribunal were to consider that the finding of unsatisfactory conduct was properly made against Mr Deng, a fine was not appropriate. She submitted that a finding of unsatisfactory conduct is sufficient penalty. She further submitted that no fine should be imposed as there is no risk to the standard or perception of the industry.

[47] Ms Bowering-Scott further submitted that the obligation to insist on seeing all of a vendor's previous agency agreements, where a vendor has given direct advice otherwise, is a "novel" obligation. She submitted that there is no way Mr Deng should have known this was required of him, or that the public would have expected it of him. She submitted that it was unfair that he should be punished, either financially or by way of an unsatisfactory conduct finding.

[48] Ms Davies submitted that the penalty imposed does not reach the high threshold required before a Committee's penalty decision may be overturned.

Approach on appeal

[49] In contrast to an appeal against a Committee's substantive finding, an appeal against penalty orders made following a finding of unsatisfactory conduct or misconduct is appeal against the Committee's exercise of its discretion as to penalty orders.[4] That is, an appellant must establish that the Committee made an error of law or principle, took into account irrelevant matters, failed to take relevant matters into account, or that the Committee's decision is plainly wrong.

[50] We are not persuaded that the Committee was wrong to impose a fine. However, we accept that a fine of $4,000 (where the maximum available fine was $10,000), was excessive, and plainly wrong, in the light of the Committee's findings that the breach was "minor" (albeit with serious consequences), and its acceptance that Mr Deng had no history of disciplinary findings, was acting to protect a homeowner who was having to act quickly, and was confronted with a unique situation.

[51] Accordingly, we allow the appeal against penalty to the extent that the fine of $4,000 will be reduced to $2,500.

Outcome

[52] Mr Deng's appeal against the Committee's substantive finding is dismissed. The finding of unsatisfactory conduct remains.

[53] Mr Deng's appeal against the Committee's penalty orders is allowed to the extent that the order that he pay a fine of $4,000 is quashed and he is ordered to pay a fine of $2,500 to the Authority, which must be paid to the Authority within 20 working days of the date of this decision. The order for censure remains.

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4 See *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [81]–[86].

[54] 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.