

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 14

READT 030/20

IN THE MATTER OF

An appeal under section 111 of the Real Estate Agents Act 2008

BETWEEN

RUTH OGILVIE
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 1901)
First Respondent

AND

KEIGHLY ABEL
Second Respondent

Hearing:

10 March 2021, at Napier

Tribunal:

Hon P J Andrews, Chairperson
Ms C Sandelin, Member
Mr N O'Connor, Member

Appearances:

Ms Ogilvie, Appellant
Ms C Paterson, on behalf of the Authority
Mr F Holland (Manager) on behalf of Ms Abel

Date of Decision:

6 April 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Ogilvie has appealed pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 1901 (“the Committee”) to take no further steps on her complaint against Ms Abel.

Background

[2] Ms Ogilvie listed her property in Napier (“the property” or “Ms Ogilvie’s property”) for sale with Ms Caroline Meo, a licensed salesperson engaged at Ray White Napier, in November 2018. She received a conditional offer of \$900,000 from Ms W, which was later cancelled. The property was sold at auction in March 2019.

[3] Ms Abel is a licensed salesperson, engaged at New Zealand Sotheby’s International Realty, at Napier (“Sotheby’s”). In her complaint, Ms Ogilvie said she had been told that Ms Abel was present at the property at an open home with Ms W, and made negative comments about the property to Ms W. She noted that Ms W later bought a property marketed by Ms Abel.

[4] Ms Ogilvie referred to a text message email sent to her by Ms Meo after an open home:

7 groups through. [Ms W] who put an offer on your house came through wuth [sic] a friend and told me ‘I don’t believe there has been any remedial work here you need to disclose’ can you get written confirmation from your builders? Hi Ruth I’m working. Yes please Grant summary be great font wHt [Ms W] killing it! [sic]

[5] Ms Ogilvie said in her complaint that the “friend” with Ms W was Ms Abel, and that even after she provided evidence of repairs to the property, the damage had been done, and Ms Abel continued to gossip about the property. She raised her concerns with the manager of Ray White Napier, Ms Domney, in January 2019. She recorded the conversation, which was later transcribed. Ms Domney’s recorded statements included:

Then you talk about Sotheby’s. Sotheby’s are the biggest baggers of your property and, and your behaviour and property transactions than anybody.

...

... [Ms Abel] bagged your house to [Ms W] right in front of us, ...

[Ms Abel] who works for Sotheby's

She came through the house with [Ms W] very early on and I wouldn't be surprised if she fuelled the fire from the other side.

[6] Ms Ogilvie alleged that Ms Abel's comments lost her the sale to Ms W and stigmatised the property in the real estate network in Napier, leading to it achieving a much lower price at auction than its appraised value.

[7] In a decision issued on 1 May 2019, the Committee decided not to inquire into the complaint, pursuant to s 79(2)(c) of the Act. The Committee's reason for this decision was that the "complaint is frivolous, based as it is on gossip, and ought therefore not to be pursued". Ms Ogilvie appealed to the Tribunal.

[8] In a decision issued on 8 October 2019, the Tribunal allowed the appeal and directed the Committee to give further consideration to the complaint.¹ An Authority investigator then conducted interviews with Ms Abel, Mr Vaughan Wilson (licensed salesperson at Sotheby's), Ms Meo, Ms Dianne Martin (licensed salesperson at Ray White), Ms Domney, Mr Max Morton (retired salesperson, with whom the property was listed when it sold at auction), and Ms W. We will refer to this as "the Committee's second investigation".

[9] In its decision issued on 7 October 2020, the Committee determined that there was insufficient evidence on which it could find that Ms Ogilvie's allegations were made out. It said that Ms Abel was adamant that she had never attended at the property, and that there were statements from other witnesses confirming her evidence, and that Ms Domney's recorded comments reflected merely what she had heard in the office, and that in her interview she had said she had no first-hand knowledge.

Appeal issue

[10] The key issue on appeal is whether the Committee was wrong to find that the evidence did not establish Ms Ogilvie's allegations that Ms Abel had been to the property and made negative comments about it. The burden of proof is on Ms Ogilvie,

¹ *Ogilvie v Real Estate Agents Authority (CAC 1901)* [2019] NZREADT 41.

to establish on the balance of probabilities that the Committee's decision was wrong, and that events occurred as she had claimed.

Submissions

[11] Ms Ogilvie submitted that the Committee reached the wrong decision as a result of having not involved her in its investigation, as had been promised to her. She submitted that as a result of her having not being kept in the loop, chronological events were not documented, evidence was not considered in its proper context, and the licensees who were interviewed in the course of the Committee's second investigation were not cross-examined sufficiently. She said that had she been involved in the second investigation, she would have been able to provide the Authority's investigator with times and dates to enable clarification of timelines for visits, open home records and records of viewing of properties.

[12] With reference to Ms Domney's statements in the recorded meeting with Ms Ogilvie, she submitted that Ms Domney was very clear in what she said, and that she did not make the statements without reason. She submitted Ms Domney was truthful in what she said to Ms Ogilvie, but not truthful when she spoke with the investigator.

[13] Ms Ogilvie also submitted that Ms Abel had lied to the Authority when she said that she had never been to the property. Ms Ogilvie submitted that Ms Abel visited the property when it was listed with another Sotheby's licensee, Ms Nathan, some months before it was listed with Ray White. She submitted that she was at the property and saw Ms Abel there, and that Ms Abel left her business card.

[14] She further submitted that the Committee had failed to establish relationships between the two agencies involved, Sotheby's and Ray White. She submitted that if the Committee was not prepared to accept what Ms Domney had said in the recorded meeting, the investigator should have made enquiries at other agencies or agents, from which the Committee would have learned how agents are treated, and about the infighting between agencies.

[15] Mr Holland submitted on behalf of Ms Abel that Ms Ogilvie's complaint had been thoroughly investigated, all members of the Sotheby's team had been made available to the investigators, and transcripts of interviews with all parties were available. He submitted that given the competitive nature of the real estate industry, it was a complete fallacy that real estate agencies in Hawke's Bay had a pact and worked together to cover up any misdemeanours.

[16] Mr Holland further submitted that Ms W's statement to the Authority's investigator in the second investigation can be relied on as establishing that she withdrew her offer on Ms Ogilvie's property on the basis of the builder's report and the delay by Ms Ogilvie in countersigning her offer, she revisited the property with a neighbour after she withdrew the offer, she met Ms Abel through Mr Wilson who was marketing the property she later bought, she never visited Ms Ogilvie's property with Ms Abel, and Ms Abel never said anything about the property, either positive or negative.

[17] Ms Paterson's submissions for the Authority focussed on points of law and principle. The Authority appropriately took a neutral view as to the appeal, and its submissions were made in order to assist the Tribunal to determine the appeal.

[18] Ms Paterson acknowledged that making disparaging comments about another licensee's listing, particularly while at the property and within earshot of the licensee's clients, may engage rr 6.2 to 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), and may reach the level of unsatisfactory conduct under s 72 of the Act.

[19] She submitted that on Ms Ogilvie's narrative of events, two possible scenarios may arise. First, Ms Abel may have attended the property with Ms W as a friend, in which case it would be unlikely that Ms Abel was performing real estate agency work, as defined in the Act, at the time. While acknowledging that a charge of disgraceful conduct (under s 73 of the Act) may be available where a licensee's conduct does not fall within "real estate agency work", she submitted that it is unlikely that making comments about a property to a friend would reach that threshold.

[20] She submitted that secondly, Ms Abel may have been at the property in the capacity of a buyer's agent, which would bring her conduct within the definition of real estate agency work. If that were the case, the determination of whether there was a breach of the Rules would depend on the nature of the comments and the context in which they were made.

[21] Ms Paterson submitted that there is no evidence before the Tribunal as to the context in which Ms Abel was at the property, as alleged by Ms Ogilvie, and therefore it cannot be determined which of the two possible scenarios applies. In the circumstances, she submitted that it is unlikely that Ms Abel could be found guilty of unsatisfactory conduct, even if Ms Ogilvie's narrative were accepted.

[22] Ms Paterson referred to the evidence before the Committee, comprising Ms Domney's statements in the recorded meeting with Ms Ogilvie (set out in paragraph [5], above), the text message from Ms Ogilvie's listing agent (Ms Meo), (set out in paragraph [4], above), the conditional agreement for sale and purchase submitted by Ms W, and the evidence of statements given to the Authority by Ms Abel, Ms Meo, Ms Domney, Ms Martin, Ms W, Mr Wilson, and Mr Morton.

[23] She submitted that on the evidence before it, it was open to the Committee to find there was insufficient evidence to support Ms Ogilvie's allegations, and it was clearly open to the Committee to decide to take no further action on Ms Ogilvie's complaint.

Discussion

[24] Ms Paterson referred to rr 6.2 to 6.4 of the Rules. These provide:

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction

6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.

6.4 A licensee must not 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.

We agree that these Rules are relevant to the consideration of Ms Ogilvie's complaint.

[25] As the Tribunal noted in its first decision, Ms Domney's recorded statements that Ms Abel "came through the house with [Ms W]" and that Ms Abel "bagged your house to [Ms W] right in front of us" were unequivocal. There was nothing to indicate that Ms Domney may have been speculating, or repeating gossip, in those statements.² Ms Ogilvie took Ms Domney at her word.

[26] However, when Ms Domney, Ms Meo, and Ms Martin were questioned during the Committee's second investigation, different evidence emerged:

[a] Ms Meo (Ray White listing agent) said Ms Abel did not go through an open home at the property, but Ms Domney had told her that Ms Martin had said she had had a private viewing of the property with Ms W and Ms Abel.

[b] Ms Domney (Ray White manager) said she personally did not see Ms Abel at the property and she never heard Ms Abel say anything negative about the property, but Ms Abel may have gone to a private appointment at the property with Ms Martin. She could not remember who had told her that Ms Abel had been at the property, but she had heard it "third hand".

[c] Ms Martin (Ray White salesperson) said she showed Ms W the property, and Ms W went back for a second viewing with her husband or partner. She said that Ms Abel was not with Ms W at the property at any point, and she never heard Ms Abel say anything about the property.

[27] It is clear from the above evidence that the evidence of Ms Downey, Ms Meo, and Ms Martin must be treated with considerable caution. It was equivocal, and contained multiple hearsay evidence. It was not reliable evidence in support of Ms Ogilvie's complaint.

[28] Ms W was also questioned. She confirmed she had gone to the property with Ms Martin, and made a conditional offer soon after. She said the offer never became unconditional, first because Ms Ogilvie wanted Ms W to wait six to eight weeks before

² At [32].

she accepted the offer, and secondly because the building inspection report disclosed issues with bathrooms and under the house that would have involved additional costs.

[29] Ms W also provided the investigator with an email sent to Ms Domney on 5 November 2018 (copied to her solicitor) in which she formally withdrew her offer on the property. Ms W said:

Further to my text sent to you yesterday 4th November at 3 pm, I am writing to formally withdraw my offer to buy the above property. I am of the understanding that the owner has not signed the agreement.

Our reason to withdraw is the uncertainty with the owner not wanting to sign [the] agreement till 15th December and issues highlighted in the [building] report. There are engineering issues with the excavations carried out some years ago and the 2 bathrooms with serious leakages including underfloor rot.

I would appreciate a reply to this email as acknowledgement that I have no legal obligation to you or the owner in regard to this sale and purchase, please cc my lawyer into all correspondence.

[30] Ms W said she visited the property later with her neighbour, and accepted that she may have discussed the property and the builder's findings. She said she had only met Ms Abel at open homes for the property she bought later, and Ms Abel did not discourage her, or say anything about not going ahead with Ms Ogilvie's property.

[31] We note also the statement by Mr Morton, who listed Ms Ogilvie's property for sale at auction in February 2019, that he had not heard any comments or rumours circulating about the property at the time, and never heard Ms Abel say anything about it. However, Ms Ogilvie had told him that she had had heard of rumours about the property.

[32] While we accept that Ms Ogilvie relied on Ms Domney's recorded comments in making her complaint, we are not persuaded that the Committee was wrong to decide to take no further action after its second investigation. Ms Domney's statement to Ms Ogilvie was negated by her subsequent statement that she had not personally seen Ms Abel at the property, and was repeating what she had heard from others. We are not persuaded that there was credible evidence before the Committee supporting Ms Ogilvie's complaint that Ms Abel attended the property and made disparaging remarks about it to Ms W.

[33] Significantly, it is also clear that Ms W's decision to withdraw her offer was made on the basis of the concerns set out in her email to Ms Domney: her concern as to Ms Ogilvie's wish to delay accepting the offer, and the issues disclosed in the building report.

Outcome

[34] Ms Ogilvie'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.

Hon P J Andrews
Chairperson

Ms C Sandelin
Member

Mr N O'Connor
Member