

Decision No: [2011] NZREADT 27

Reference No: READT 081/10

IN THE MATTER OF an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN **KENNETH ROBERT COOKE**

Appellant

AND **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10031)**

First Respondent

AND **BRUCE ENGLAND AND PAUL HUMPHRIES**

Second Respondents

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport – Chairperson
Ms J Robson – Member
Mr J Gaukrodger – Member

APPEARANCES

Appellant in person
Mr L Clancy for First Respondent
Mr T Rea for Second Respondent

Introduction

[1] In early 2007 Mr Kenneth Cooke and his wife Doreen decided to develop the property that they had owned for a number of years at 86 Kitchener Road, Milford. They built two houses at 86 and 86A Kitchener Road, Milford. By late 2007 the properties were both listed for sale with Barfoot and Thompson. The properties were listed for sale at \$2.595 million. In March 2008 Mr and Mrs Cooke changed from Barfoot and Thompson to Prestige Real Estate and the price was dropped to \$2.49 million. Prestige continued to market the properties until 2009. Unfortunately the properties did not sell. An auction was held in November 2008 but the best offer received for either property was \$1.2 million. In March 2009 the ASB Bank commenced mortgagee sale proceedings. 86A Kitchener Road was sold at mortgagee sale for \$1.26 million and 86 Kitchener Road was sold privately sometime later. Barfoot and Thompson acted as agents on the mortgagee sale.

[2] Mr and Mrs Cooke were very unhappy about the mortgagee sale process and the appraisal that Barfoot and Thompson had carried out for the ASB Bank. They felt the appraisal was too low and not carried out professionally. Mr and Mrs Cooke felt that in

preparing such a low appraisal Barfoot and Thompson would (and did) indicate to purchasers that the likely sale price for the house was in the low \$1 millions, when in fact a recently redone CV for the property showed that the capital value was \$1.75 million. This figure they felt, was more in keeping with the value of the property. Mr and Mrs Cooke also claimed that the marketing done for their property was perfunctory, that there were errors in the Point of Sale material, that Mr Humphries (an agent of Barfoot and Thompson) did not honour his undertaking to Mr and Mrs Cooke to obtain the best possible price for their property. Finally after Mr and Mrs Cooke complained to Barfoots about the matters of concern to them Barfoots took three months to answer their complaint.

[3] As a result of the forced sale of their two properties Mr and Mrs Cooke have suffered a significant financial setback, as well as the stress and anxiety caused by the failure of the properties to sell in a market that was falling throughout 2008, culminating in the mortgagee sale.

[4] Mr Cooke acted for himself. He represented himself very competently and had prepared very clear materials which he had divided up into the areas of complaint. He gave evidence as did Mrs Cooke.

The Issues

[5] The issues identified by Mr Cooke were:

- (i) The integrity of the Barfoot and Thompson appraisal undertaken in March 2009.
- (ii) Integrity of the pre-sale briefing by Mr Humphries for Barfoot and Thompson.
- (iii) The on-site marketing.
- (iv) The complaint not dealt with properly.

Issue (i): The Barfoot and Thompson Appraisal

[6] Barfoot and Thompson did not produce a written appraisal with supporting documentation but provided a written property report for the ASB Bank which included at page 6 (page 90 of the bundle) an appraisal that the current market value of the property was \$1.4 to \$1.5 million and the mortgagee sale value was \$1.1 to \$1.2 million. Mr Cooke initially complained that this must have been based on the Albion Bank's valuation. This was a valuation carried out for the bank in 2009 which valued 86A Kitchener Road at \$1.4 million and for a forced sale \$1.1 million. However it was never provided to Barfoot and Thompson. Mr Cooke has subsequently accepted the evidence given by the ASB Bank that only the bank saw this valuation. He nevertheless complains that the appraisal was not done appropriately. He says it was supported by very general sales information and limited sales data from the Milford office. The Milford data Mr Cooke says, only had one property of comparable size and location. Mr Cooke said that his analysis showed that while the Auckland market for housing declined in 2008 by about 10%, in Milford and Takapuna property prices actually improved. He said that Barfoot and Thompson should have used sales data

from properties in a similar location and a similar type as a basis of their analysis. Mr Cooke produced detailed graphs as appendix to his evidence showing the quarterly statistics of property prices in Milford and Takapuna during 2008 and 2009 compared with the Auckland housing market. He also provided some property sale data for properties which he said were similar to his own home. In evidence he said that Barfoot and Thompson should have looked at the side roads off Kitchener Road for more comparable values and that the value which they reached was “*simply plucked out of the air*”. He said that he felt that there was a lack of information and logic in the appraisal done by Barfoot and Thompson. He also pointed to the fact that the reappraisal of the CV, which was available in February 2009 (but backdated to September 2008) showed that the value of 86A Kitchener Road was \$1.75 million. Mr Cooke also complained that there was a complete absence of working papers and analysis to support the Barfoot and Thompson appraisal. Mr Cooke said that the last registered valuation Mr and Mrs Cooke had for the property showed that it was worth \$2.15 million. His conclusion was that the \$1.4 million figure was simply too low and it was unethical. He argued that Barfoot and Thompson had a duty of care as professionals to show that their analysis was done properly, thoroughly and carefully.

[7] Mr Rea for the second respondents (on behalf of Barfoot and Thompson) argued that there was no ethical obligation on the agency at that time to carry out a written appraisal. This was because the appraisal was carried out before the Real Estate Agents Act 2008 was in force. Therefore it was carried out under the 1976 Act which contained no such requirement. He submitted that in any event there was nothing wrong with the appraisal. He said that the Albion Bank valuation had been challenged by Mr Cooke and the Valuer’s Board had determined not to investigate this complaint. He argued that if the Albion Bank valuation (which was for less than the appraisal done by Barfoot and Thompson) could not be challenged, then equally it could not be argued that Barfoot and Thompson had in any way erred in reaching the appraisal at the higher level. He pointed to the fact that the best offer the Cooke’s had ever had for their property prior to the mortgagee sale auction was \$1.2 million. He submitted that the properties had been on the market since late 2007, a period of almost one and a half years without offers, at a time when there was a drop in the market. He said therefore that it was simply not tenable to argue that there had been any breach of any obligation or duty of care for by Barfoot and Thompson.

Relevant Law

[8] In determining Mr Cooke’s complaints we must look at the relevant law.

[9] The Tribunal may discipline an agent if they have been guilty of conduct which breaches either s 72 or s 73.

[10] “72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or

- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.”

“73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee’s conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
- (c) consists of a wilful or reckless contravention of—
 - (i) this Act; or
 - (ii) other Acts that apply to the conduct of licensees; or
 - (iii) regulations or rules made under this Act; or
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee’s fitness to be a licensee”.

[11] A Complaints Assessment Committee may find an agent has breached s 72 but only the Tribunal can find a breach of s 73.

[12] In deciding how to determine an appeal it is relevant to understand the basis on which the Tribunal must consider an appeal.

[13] In *Kacem v Bashir* [2010] NZSC 112 the Supreme Court has clarified that the principles in *Austin, Nichols* apply to Courts exercising jurisdiction over general appeals from lower Courts, not appeals from decisions made in the exercise of a lower Court’s discretion. The distinction between general appeals and appeals from discretionary decisions is set out at paragraph [32]:

“[32] But for present purposes, the important point arising from ‘Austin, Nichols’ is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation

and a value judgment does not of itself mean the decision is discretionary. (emphasis added)".

[14] The CAC determined to take no further action on any of Mr Cooke's complaints pursuant to s 89(2)(c) of the Act. In determining an appeal from s 89 under s 111 the Tribunal may confirm, reverse or modify the determination of the Committee and exercise any power that the Committee could have exercised. Thus the Tribunal is able to find that a real estate agent has been guilty of unsatisfactory conduct under s 72 of the Act. However if it wished to make a finding misconduct pursuant to s 73 then it would need to refer the matter back to the Complaints Assessment Committee for it to lay a charge under this section.

[15] The Tribunal is dealing with this appeal as a general appeal. In its decision the Complaints Assessment Committee decided to take no further action on issue 1. However the issue set out above was not articulated as clearly as it has been before the Tribunal.

Discussion

Has there been a breach of s 72?

[16] The Tribunal has a great deal of sympathy for the position that Mr and Mrs Cooke found themselves in. There was no doubt that they were sadly caught by having undertaken their development at a time when the market began to fall rapidly at a time of global recession. They were clear about their own expectations of the value of the property. Mr Cooke in evidence said he felt that \$1.9 million would have been a fair price for the property. It is also clear that (for reasons to be covered in more detail under the second issue) Barfoot and Thompson did not seem to be aware of or take cognisance of the increase in CV from \$1.4 to \$1.75 million. This should have been factored into their decision making. The Tribunal has not had the opportunity of hearing from Mr Humphries or Mr England (the employees who carried out the marketing and auction of the properties). They have provided written statements. In this statement Mr England says that he was not aware of the increased CV until after the first week of marketing of the property (early March). Mr Cooke rightly points out that this must be incorrect as the Point of Sale material produced by Barfoot and Thompson is dated February 2009 and clearly shows a Capital Value of \$1.75 million. Thus at the time of appraisal Barfoots should have known the CV was \$1.75 million. However the obligation to prove that the agency or the agents have been guilty of unsatisfactory conduct rests with Mr and Mrs Cooke. They bear the entire responsibility of proving that the appraisal falls short of the standard to be reasonably expected from a competent licensee, or that Barfoots' agents were incompetent or negligent or would reasonably be regarded by agents of good standing as being unacceptable (from s 72).

[17] From the evidence that Mr Cooke has presented we do not find this has been established on the balance of probabilities (i.e. more likely than not). The Barfoot appraisal and the Albion valuation reached similarly low figures. Mr Cooke has accepted that the Albion valuation was never seen by Barfoot and Thompson. We accept Mr Rea's explanation that if a Valuer's Board, having looked at the valuation of Albion, did not find it warranted a further investigation then it is not arguable that the Barfoot and Thompson appraisal (which was slightly higher) was in any way deficient. We accept that while there may have been some lack of care on the part of Barfoot and

Thompson in not considering the new CV, or more detailed sales data, the actual process of the appraisal was not clear as we did not hear from Mr England or Mr Humphries. Further a lack of detail in the process does not necessarily mean the result will be wrong. However we find this claim does not reach the threshold of unsatisfactory conduct required by s 72.

Issue (ii): The Integrity of the pre-sale briefing by Mr Humphries

[18] Mr Cooke did not press this issue to a great extent. He and Mrs Cooke confirmed that Mr Humphries said that they would get the best market price for the property. The Cooke's claimed that as the bidding at auction opened at \$850,000 they did not feel that Mr Humphries had been honest with them. It is their view that if the appraisal had been carried out more professionally and if Barfoot and Thompson had genuinely believed that the property was worth \$1.5 million or more then the auction process should have started at a much higher opening bid. In the alternative they say the auction should have started with a figure in the \$2 millions and come down until someone was prepared to bid in order to ensure that the best possible price was obtained for Mr and Mrs Cooke. Mr Cooke also argued that there must have been some complicity between Barfoot and Thompson and the ASB over the reserve price that the ASB would set at auction. Mr Cooke subsequently accepted that he was mistaken in relation to the timing of the auctioneer's knowledge of the reserve price (accepting it was just before the auction).

[19] Mr Rea argued there was no tenable evidence to support a finding that Mr Humphries acted dishonestly or unreasonably in any statements or representations he made to the Cookes. He said that there is no evidence that the price achieved was less than the appropriate figure for a mortgagee sale.

[20] After having considered this matter and the evidence presented we agree there is insufficient evidence (other than the fact of the opening bid) to show that in any way Barfoot and Thompson did not work appropriately to achieve the best possible price at an auction.

Issue (iii): The lack of professional and responsible marketing/point of sale

[21] Mr Cooke says that Mr England failed to market the property in a professional and responsible way, namely because he continued to provide information that was confusing as to the properties' current CV. Further he argued that Mr England did not accept Mr Cooke's advice on the fact that a CCC had been obtained or provide a copy of that to purchaser. He also claimed that Mr England told prospective purchasers that the property would sell for about \$1 million.

[22] The Tribunal accept that the Point of Sale material could have been confusing. Although the Tribunal had a very poor copy it seems that the document "*Property Summary Report*" showed a CV of \$1.4 million on the front page and a Valuation Report with a CV of \$1.75 million on the second page. In Mr England's written statement he claims was not aware that there had been an updated CV when he first began to market the property. This would seem to be belied by the fact that the Property Summary Report is dated February 2009, prior to the marketing commencing. When however it was drawn to Mr England's attention he simply put a line through the CV of \$1.4 million (see page 18) and circled the Capital Value of \$1.75 million. Mr Cooke argued that marketing research shows that a person will automatically react to

the lowest price that they see and their price expectations will be fixed by this. The Tribunal find that the Property Summary Report should have been updated so that there was no chance of a purchaser failing to realise that the CV was not \$1.4 million but rather was \$1.7 million. It did create lower price expectations. Is this sufficient to create a finding of unsatisfactory conduct under s 72?

[23] The Courts have set a high threshold for a disciplinary finding as set out in a disciplinary finding as set out in *Complaints Committee Number One of the Auckland District Law Society v APC*.

[24] The charge is one of professional misconduct. The test for professional misconduct was set out in the decision *Complaints Committee Number One of the Auckland District Law Society v APC* (29 April 2008 HC Auckland CIV 2007-404-4646 Randerson, Williams and Winkelmann JJ). The High Court said that the test for professional misconduct was not the test set out in *Auckland District Law Society v Atkinson* (decision 15/8/90) but that the proper test was as set out in *Pillai v Messiter* (No 2)(1989) 16 NSWLR 197 [see paras 29-32]. In that case, professional misconduct was defined as:

“a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner.”

[25] This case involves a lesser charge of unsatisfactory conduct. While the threshold for this is not as high as misconduct it is still a serious departure from expected behaviour. We do not find that the evidence presented does reach this threshold. It was careless but does not amount to unsatisfactory conduct.

[26] Mr Cooke also complains that the information that he gave to Mr England about the CCC should have been more actively promoted by Mr England. Mr Cooke gave hearsay evidence that his agent from Prestige had told him that when one of his clients came through the property Mr England had said he did not know whether the property had a CCC and that the property would sell for about \$1 million. The other Point of Sale material seems entirely appropriate. We can understand that this information would have been very distressing to Mr Cooke but as this is complete hearsay we cannot act upon it. We find therefore that there is insufficient evidence for us to find on the balance of probabilities to find that there has been any breach by Mr England or Barfoot and Thompson of s 72 of the Real Estate Agents Act.

Issue (iv) Barfoot and Thompson’s failure to reply promptly and fully to the complaints made

[27] Mr and Mrs Cooke complained orally to Mr Humphries on 28 April 2009. They told him the areas in which they had concerns. They say that Mr Humphries promised to look into the matter and get back to them but never did. They subsequently complained that when they did make a written complaint it took three or four months for Barfoot and Thompson to respond. Mr Cooke sets out a timeline from the initial complaint to response. This was from April to February 2010. There is no doubt that a timely and full response will often make the complainant feel more listened to than a cursory and delayed response. Mr Cooke also argues that Mr Humphries’ response contained quite clear departures from the facts. Mr Rea argues that this complaint

does not fall within the definition of “*real estate agent’s work*” contained by the Real Estate Agents Act 2008. Mr Clancy for the Complaints Assessment Committee argues that if the work subject of the complaint is within the ambit of the Act then this issue is also within it. We do not find it necessary to make a definitive determination on this point but accept that if the subject matter of the complaint is covered by the Act then no doubt the complaint and issues arising from it would also be.

[28] We have reviewed the response from Mr Humphries which came in February 2010 following a written complaint in November 2009. We agree that this is an unsatisfactory length of time for a response. However the response seems to address the issues raised by Mr Cooke. The Tribunal accepts that Mr Cooke did not agree with the response received from Barfoot and Thompson but this does not make the response to the complaint itself unsatisfactory conduct. We do find the delay unacceptably long but given that it involved the Christmas period we do not think it crosses the threshold of seriousness to reach a finding of unsatisfactory conduct. We therefore do not find that there has been any breach of s 72.

[29] In summary while the Tribunal feels a great deal of sympathy for Mr and Mrs Cooke and finds that the conduct of Barfoot and Thompson could have been improved as set out above we do not find that the conduct complained of meets the threshold for unsatisfactory conduct set by s 72. We accordingly confirm the decision of the Complaints Assessment Committee to take no further action on this complaint.

Rights of Appeal

[30] Pursuant to s.113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s.116 of the Act.

DATED at AUCKLAND this 17th day of October 2011

Ms K Davenport
Chairperson

Ms J Robson
Member

Mr J Gaukrodger
Member