

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 64

READT 066/12

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

BETWEEN **DAVID FAGAN**

Appellant

AND **REAL ESTATE AGENTS AUTHORITY (CAC 20005)**

First respondent

AND **NEIL SINCLAIR**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD at WHANGAREI on 22 April 2013 (with subsequent series of typewritten submissions)

DATE OF DECISION 30th July 2013

COUNSEL

Ms E L Smith for appellant
Mr R M A McCoubrey for the Authority
Ms H McKenzie for licensee

DECISION OF THE TRIBUNAL

The Issue

[1] David Fagan (the appellant) appeals the decision of Complaints Assessment Committee 20005 to take no further action on his complaint against Neil Sinclair (the licensee).

[2] Was the licensee's conduct, in handling the real estate transaction described below, unsatisfactory conduct or misconduct as respectively defined in ss.72 and 73 of the Real Estate Agents Act 2008?

[3] The complaint is that the licensee should not have disclosed to a prospective (and ultimate) purchaser whether or not the vendors were registered for GST purposes because the vendors made it clear to the licensee that was to be kept confidential. The Committee found that no such requirement had been proved.

Background

[4] In October 2010, the appellant listed for sale three rural properties at Hoanga Road, Dargaville. One property was owned by the appellant's mother, Velma Fagan, and the other two properties were owned by two separate companies controlled by the appellant's family. One of the vendor companies was GST registered (Feltrim Farms Ltd), the other two vendors were not (Hoanga Properties Ltd and the appellant's mother).

[5] The licensee was a licensed salesperson with PGG Wrightson Real Estate Ltd, Dargaville. He was aware of interest in the properties from a potential (and the ultimate) purchaser (the Bowmore Trust). On 9 October 2010, the licensee met with the appellant to discuss an offer for the properties of \$1,500,000 exclusive of GST from the Bowmore Trust.

[6] On 12 October 2010, Bronwyn Williamson, also a salesperson with PGG Wrightson, prepared market appraisals for the properties and listing agreements were signed on 14 October 2010. Ms Williamson was the listing agent with Mr Sinclair the licensee to act as the agent on the sale, and commission was to be split 50/50 between them.

[7] On 18 October 2010, the licensee emailed the solicitor for the Bowmore Trust (the purchaser) stating:

"I have just learnt from the listing agent that the Vendors of 7.5797 ha [Velma Fagan] and the 76.5416 ha [Hoanga Properties Ltd] arent GST registered. David and Colleen Fagan are the owners of these properties so the Kays offer will be GST inclusive on these properties."

[8] As explained below, the vendors had sought a price of \$1,825,000 (inclusive of GST). The purchaser subsequently put its offer at \$1,550,000 plus GST which the appellant (as controller for the vendor family) felt required to accept, due to financial circumstances and pressure from a mortgagee.

Complaint and Response

[9] The appellant contends that the licensee's disclosure of the GST registration status of the vendors was contrary to an explicit instruction given by him. It is put for the appellant that the licensee's disclosure allowed the purchaser to restructure its offer, with the benefit of information it would not otherwise have had, to the advantage of the purchaser and the detriment of the vendors.

[10] The licensee contends that no such instruction was given and that, in any event, he was required to disclose the information to avoid misleading the purchaser.

The Statute

[11] Section 72 and 73 of the Act respectively define "*unsatisfactory conduct*" and "*misconduct*" under the Act and read:

"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.”*

Relevant Evidence

Evidence of the Appellant

[12] The appellant referred, inter alia, to meeting with his accountant Ms C Gilmore on 15 October 2010 to discuss the sale of the properties. He put it “*we discussed the GST components of the sale and the need for confidentiality in that regard*”. He then rang the licensee, Ms Williamson, and, he says, gave her clear instructions that the GST registration details of the various properties were confidential and not to be disclosed to any prospective purchaser.

[13] The appellant also puts it that, in any case, the GST status of anyone is tax information which, of itself, is confidential. He asserts that he did not at any time consent in writing or otherwise to the disclosure of such information to the purchaser (the Bowmore Trust) or any other interested party.

[14] The appellant noted that in a 12 April 2011 letter to his solicitor, the respondent's solicitor stated “*at no stage did your clients inform either of the agents that the GST status was to be kept confidential. There was no implied obligation on our client to keep such information confidential*”. He also refers to paragraph 7 of that letter asking what loss he experienced as vendor from such a disclosure. He concluded that there was such a disclosure by either the respondent or Ms Williamson. He asserts that at no time did the respondent licensee indicate to him that he would need to disclose the GST status of the properties in order to market them, and the appellant does not think that any such disclosure was necessary. He emphasises that the information he gave Ms Williamson regarding the GST status of each of the three properties “*was done so strictly on the basis that it was confidential information not to be disclosed*”.

[15] The appellant then detailed to us, as did his accountant, that a price of \$1,825,000 inclusive of GST would have been a good sale price for the vendors while also allowing the purchaser to claim GST inputs and not pay any further net amount than it had originally offered. However, the appellant stated that the disclosure by the licensee placed the purchaser in a very favourable bargaining position to the vendor's detriment and he

asserted “we had no opportunity to enter into an arms length negotiation of the purchase price on a GST inclusive basis”. He continued:

- “19. The disclosure of the tax status directly benefited the Bowmore Trust by allowing them to target their offer which they knew the bank would accept and provided for a more favourable net price on their part.
20. Had the Bowmore Trust not had knowledge of the reserve and the GST status, we would have had the opportunity to negotiate for an increased price or alternatively achieve a GST inclusive (if any) price ...”

[16] The appellant also denied that, at a Christmas party subsequent to the sale, he told the respondent he was very happy with the sale.

[17] The appellant was carefully cross-examined. It seems that the appellant had contemplated that if a prospective purchaser had asked the GST status of the vendors, that person was to have been told it would not affect the purchaser who could claim some GST inputs in due course and did not need to know the position. The appellant seemed to think that such a stance about GST would not concern the purchaser.

Evidence from the Appellant’s Accountant

[18] Ms C Gilmore gave evidence as a very experienced and highly regarded accountant in the area. She noted that the land was on three separate titles with the proprietor of each title being controlled by a family trust.

[19] She noted that the offer from the purchaser of \$1,550,000 plus GST “*demonstrated that the purchaser was prepared to pay a net price of \$1,550,000*”. She recorded how she had discussed with the appellant and his wife their view that because the purchaser was prepared to pay a net figure of \$1,550,000 and the purchaser could claim a GST refund either under the second hand goods provision or pursuant to standard GST sections of the Goods and Services Tax Act 1985; so that the sale price should be at a net figure “*no worse than the purchaser’s offer*”. The accountant’s focus seemed to be that the purchaser should have been able to claim GST inputs on the purchase based on the secondhand goods provision so that the following breakdown might apply:

	\$
Total Price	1,825,000
Less dwelling (exempt supply)	100,000
<u>Balance</u>	1,725,000
GST portion 3/23	225,000
Net cost to purchaser	1,500,000

[20] Ms Gilmore then stated: “8. *This total being \$50,000 less than their original offer [the cost net of GST] we saw no reason why the documentation would not be accepted by the purchaser.*”

[21] The accountant referred to a 20 October 2010 email from the licensee indicating which vendors were not GST registered, and put it that enabled the purchaser to reduce its net cost price to the disadvantage of the vendors, and she also put it:

“11. The advantage the purchaser got from the knowledge of the GST position vendor entities and their subsequent amendment to their offer was as follows:

Amended purchase price per Neil Sinclair e-mail

<i>Total value</i>	1,595,750
<i>Less dwelling</i>	<u>100,000</u>
	1,495,750
<i>Less GST claim of 3/23</i>	<u>195,098</u>
<i>Net cost to purchaser</i>	1,300,652
<i>Per their original offer</i>	<u>1,550,000</u>

Cash benefit to Purchaser over and above its original offer

\$249,348

12. *Therefore, the knowledge the purchaser had of the vendors’ GST position and their awareness of the vendors’ financial pressures resulted in them amending their offer down. As a result they gained \$249,348.”*

Discussion

[22] As indicated above, the Committee determined that there was insufficient evidence to support the appellant’s contention that he had told the licensee that the information as to GST status was to be kept confidential and, under s.89(2)(c) of the Act, the Committee decided to take no further action. It went on to comment that, in the course of selling commercial property, Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 would require that a licensee disclose the GST status of the vendor. Rule 6.4 reads:

“6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.”

[23] The key issues for determination are:

- [a] whether or not the appellant gave the licensee explicit instructions that the GST status of the vendors not be provided to the purchaser;
- [b] whether the licensee’s conduct in disclosing the information was a breach of the Rules and constitutes unsatisfactory conduct.

[24] While the Rules require that licensees not mislead purchasers nor withhold information that should by law or fairness be provided to purchasers (Rule 6.4), licensees are also obliged to act in the best interests of a client and in accordance with the client’s instructions unless to do so would be contrary to the law (Rule 9.1). That Rule 9.1 reads:

“9.1 A licensee must act in the best interests of a client and act in accordance with the client’s instructions unless to do so would be contrary to law.”

[25] We also set out Rules 6.1, 6.2 and 9.21:

“6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent.

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

9.21 A licensee must not disclose confidential personal information relating to a client, unless-

(a) the client consents in writing; or

(b) the licensee is required by law to disclose the information; or

(c) disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the licensee by the client.”

[26] Where a client instructs that information be withheld from a purchaser, and a licensee considers that the information should be disclosed under the Rules, a licensee should raise and discuss the issue in detail with his vendor client. If the client maintains that information must be withheld and the licensee remains of the view that it should be disclosed, the licensee must then decline to act further on that transaction.

[27] In terms of defects in land, we note that Rule 6.5 requires disclosure of known defects to purchasers and Rule 6.6 provides that a licensee must not continue to act for a client who directs that such information be withheld. Those Rules do not, therefore, require disclosure against the instructions of the vendor client, but that where such instructions would involve the licensee breaching the Rules, he or she should cease to act.

[28] A licensee must be very clear with a client when a conflict over disclosure arises. If the client maintains that information be withheld that the licensee considers should be disclosed, the licensee's duty is to cease to act; not to disclose the information contrary to the client's instructions.

[29] Here, a key question is whether the appellant gave explicit instructions that the GST registration status of the vendor entities were to be kept confidential. This has not been proved from the evidence adduced to us. There still remains the issue whether the licensee breached Rule 9.21. Simply put, we think not because the GST status of the vendors does not amount to *“confidential personal information”* of the vendors in the particular circumstances of this case.

[30] We refrain from general comment on the commercial necessity of disclosing the GST registration status of a vendor entity on every sale of commercial property. While the GST status of a vendor is often disclosed, the statutory obligation imposed on purchasers to provide GST details is not imposed on vendors (Goods and Services Tax Act 1985, s.78F). The transaction relevant to this appeal occurred before changes to the Law Society standard form agreement for sale and purchase in April 2011. That form now includes a schedule inviting (but not requiring) the vendor to confirm GST registration status.

[31] Frankly, the GST status of a vendor should be available to a prospective purchaser just as are ownership details under our Land Transfer system.

[32] Arising specifically from the hearing, counsel for the Authority made the following points:

- [a] If a licensee is placed by a vendor in a position where the licensee feels he (or she) can no longer act, the onus is on him or her to explain that to the vendor, and then cease to act. As Mr McCoubrey also put it, it is difficult to conceive of a situation where the correct response would be to tell the purchaser what the vendor was doing. Mr Sinclair accepted that in evidence before us;
- [b] A licensee should not consider himself or herself an independent referee between the vendor and the purchaser, and remains the vendor's agent.

[33] In this case, Mr Sinclair's initial relationship was with the purchaser. In addition, his situation was, perhaps, made more difficult because the negotiations were prior to an offer or form of a Sale and Purchase agreement being drawn up. Mr Sinclair noted that it was an unusual situation in his undated letter to the Fagans of early October 2010 which began "*This is not the way we like to present offers to you ...*". Nevertheless, the principles we have outlined above need to be strictly observed. This is all the more the case when the licensee's relationship was with the purchaser before he became the vendor's agent.

[34] Ms McKenzie submitted, the appeal can be dismissed because, on the balance of probability, we cannot find on the evidence that the appellant instructed the licensee to maintain confidentiality regarding the vendors' GST status. That presumes compliance with Rule 9.21.

[35] Had the licensee been so instructed, he would have needed to engage with the ethical issue whether disclosure of the GST status was required as a matter of fairness and so as not to be misleading in accordance with Rules 6.2 and 6.4.

[36] GST status became a material issue because, inter alia, the appellant proposed a price of \$1,825,000 to be expressed as being inclusive of GST. The appellant sought this offer to be GST inclusive when two of the family vendors were not GST registered but the other one was. Such a proposal could infer that the vendors were GST registered for all properties and we wonder whether the intention of the appellant in not properly disclosing the GST information was an attempt to mislead purchasers in order to gain a higher price from them. The appellant seemed to concede to us that he intended that purchasers assume that all three entities were GST registered when, in fact, they were not. It seems to us that it would have been misleading for the licensee to have not disclosed the true position to the buyers. However these aspects are theoretical in the present case because we find that the appellant did not instruct the licensee to withhold the GST status of the vendors. It follows that the licensee was not put on notice that he was being asked to act contrary to good ethics. Also, we have found there was no breach of Rule 9.21 in the circumstances of this case.

[37] At the outset, we understood that the appellant was also alleging against the licensee a failure to communicate with clients and follow instructions; and a loss of control of the marketing process. These concepts did not really feature at the hearing before us but were covered in prior typed submissions. In any case, we do not think they have merit on the facts of this case. We do not think that the licensee failed to communicate with the vendors, nor follow their instructions, nor lose control of the sale and purchase process. It seems to us that the licensee communicated as expected with the solicitor for the appellant and with the vendors in a normal professional manner for the type of transaction. He seemed to organise the form of agreement for sale and purchase, although it was

driven by Ms Williamson and the solicitor for the appellant, as one would expect in the circumstances.

[38] At all times it was open to the appellant's family to refuse the offer from the purchaser. The vendors were not required to accept it and it is beside the point, for the purposes of the licensee's conduct, that they seem to have been under pressure from their mortgagee.

[39] We respectfully endorse the comment made by the Committee in its decision at its para 4.7; *"... we also make comment that we believe that for a licensee to sell a commercial property it would be commercially essential for them to reveal the GST status of the subject vendor and a requirement under Rule 6.4 of the Rules as well."*

[40] It seems to us a fair inference that the vendors were putting it to the prospective purchaser that they (the vendors) would be required to pay output GST on the transfer of the three properties whereas, in fact, that was the case for one property only. It would follow that they seemed to be seeking an allowance for GST on two properties, and having the overall price GST inclusive, when they would not be required to pay GST output tax on the price for two of the properties. We consider that if the licensee had realised what seemed to be going on, it would have been quite unethical for him to collude with such slickness which is not overcome by the purchaser, probably, being able to claim a GST input on the two properties; and the purchaser could have been misled into formulating its price offer.

[41] The concern of the vendors must be that the purchaser was probably able to obtain an input regarding the two properties where the vendors were not GST registered; and the vendors wanted the value of those inputs built into, i.e. or added to, the sale price.

[42] A submission put for the appellant in opening submissions is:

"39. Mr Sinclair's actions are serious breaches and resulted in Mr and Mrs Fagan suffering serious financial loss which is directly attributable to Mr Sinclair's release and disclosure of the confidential information. The financial loss to Mr and Mrs Fagan from the unauthorised disclosure was approximately \$230,000."

[43] Frankly we find that submission puzzling. The vendors must have felt that they were obtaining the market value of the property at material times or they would not have accepted the offer from the purchaser trust.

[44] We agree with Ms Smith that Rule 9.21 is clear and must be observed at all times. We also agree with Ms Smith that the fact that the licensee, Mr Sinclair, was informed of the GST status of the vendors did not permit him to disclose that information except that, in the context of the negotiations relating to the transaction in question, it was reasonable for him to infer that permission. We agree with Ms Smith that, by its very nature, the GST status of any individual is normally privileged and confidential tax information. However it would be difficult for a real estate agent to properly carry out his or her duty if required to cover up, or mislead about, the correct GST status of a vendor.

[45] It follows that we do not quite agree with Ms Smith's submission that while the vendors' GST status was disclosed by Mr and Mrs Fagan to Ms Williamson, and subsequently to Mr Sinclair, this did not give an automatic approval or authority for its further dissemination to the purchasers without first having recourse to Mr and Mrs Fagan. That would have been a safe course for the real estate agents to have taken but, in the context of their instructions to achieve a sale in this case, it was a reasonable assumption

by the licensee that he was to be open and honest about the GST status of the vendors. In context we can understand the licensee when he says he did not give the matter of the GST status of the vendors any thought when communicating it to the lawyer of the purchaser.

[46] Inter alia, it is put by Ms Smith for the appellant that the licensee failed to communicate a formally instructed counter-offer to the purchaser “*communicating instead the GST status of the vendors and inviting the purchaser to make a revised offer*”. It is also put that was not in accordance with the instructions from the vendors as his clients and that such conduct provided the purchaser with the opportunity to revise its initial offer and “*placed a purchaser determined upper limit on the negotiations circumventing any possibility for Mr and Mrs Fagan to negotiate for a higher purchase price*”. However, in effect, the vendors had hired the licensee to negotiate in their best interests. He was doing that and cannot be blamed for not comprehending a type of slickness behind the price structure sought by the vendors upon the advice of their accountant. In any case, the vendors were always entitled to refuse to sell to the purchaser except on their own terms, and they cannot pass their failure to do that on to the licensee.

[47] Accordingly, this appeal is dismissed.

[48] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

Judge P F Barber
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member