

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 65

READT 005/15

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

BETWEEN **WILLIAM LAMBERT**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 301)**

First respondent

AND **LULU WONG AND SAM WONG**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson

Mr G Denley - Member

Ms C Sandelin - Member

HEARD at AUCKLAND on 9 September 2015

DATE OF THIS DECISION 21 September 2015

APPEARANCES

Mr L W Divers, counsel for the appellant

Ms N E Copeland, counsel for the Authority

Mrs L Wong for the second respondents

DECISION OF THE TRIBUNAL

Introduction

[1] The complainant second respondents, Lulu and Sam Wong, made a pre-auction offer for the property referred to below. That offer was firmly rejected by the vendors. The complainants then thought they could negotiate upwards from that offer price. However, another party made a much higher offer which was so acceptable to the vendors that they wished to immediately accept it and cancel the auction. When the appellant real estate agent endeavoured to advise the complainants of the vendors' change of plan by contacting the complainants' real estate agent (a Ms B Wong), she could not reach the complainants so that the property was sold to the other offerors. The complainants maintain they would have offered much more but lost the chance to do so due to the conduct of the appellant licensee.

[2] William Lambert (“the licensee”) appeals against a 26 August 2014 decision of Complaints Assessment Committee 301 finding he had engaged in unsatisfactory conduct in respect of the complaint which we explain below. The licensee also appeals against the 23 January 2015 penalty decision of the Committee ordering him to apologise to the complainants and that he be censured.

Background Facts

[3] The licensee was the listing agent for 12 Perendale Close, Somerville and works for Pakuranga and Howick Realty Limited.

[4] On 24 January 2014, the complainants (Mr and Mrs Wong) visited the property with Ms Brenda Wong (another agent of Pakuranga and Howick Realty); and on 26 January 2014 the complainants put in a written pre-auction offer for \$850,000 through Ms Wong who advised the licensee of the offer.

[5] The licensee telephoned Carol and Brian Wharton (“the vendors”) and advised them of the offer but Ms Wharton very firmly rejected the offer on the basis of the price being too low and stated that she did not wish for the licensee to visit her to present the offer as she had other social engagements that evening. The licensee understood that he was told by the vendors not to waste their time with the offer. The complainants did not make a further offer but remained interested in the property and intended to attend the auction on 12 February 2014.

[6] On 6 February 2014 (Waitangi Day), at approximately 4.30 pm, the licensee received another pre-auction offer through Francis Chaplin (another agent of Pakuranga and Howick Realty). This offer was for \$900,000 from the ultimate buyers. At 5.00 pm that day, the licensee presented this offer to the vendors who indicated they were prepared to accept it.

[7] The licensee then spoke to Paul Judd, the auctioneer and manager for Pakuranga and Howick Realty. Mr Judd indicated that an auction could be held the following day. The licensee discussed the auction situation with Ms Chaplin who conveyed that the offerors (the ultimate buyers) would not attend an auction and would withdraw their offer if the auction was to go ahead as they had a number of bad experiences with auctions.

[8] The licensee then spoke again to Mr Judd and agreed to contact all interested parties. Ms Wharton then telephoned the licensee back and advised that she had spoken directly to Ms Chaplin and that the vendors wished to accept the \$900,000 offer and cancel the auction. The licensee responded that he felt obligated to contact all interested parties.

[9] The licensee was able to contact four of the other interested parties and ascertained they did not wish to make an offer. The licensee also telephoned Ms B Wong (the agent for the complainants) and left her a voice message asking her to call the licensee urgently.

[10] Ms Chaplin then telephoned the licensee and stated that the buyers were getting extremely anxious and wanted to know what was happening with their offer.

[11] At approximately 6.00 pm on 6 February 2014, the licensee presented the buyers’ offer to the vendors and the vendors signed it. The vendors then also cancelled the auction scheduled for 12 February 2014. At approximately 6.00 pm on

6 February 2014. The licensee conveyed to Ms Chaplin that the offer had been accepted.

[12] Ms Wong returned the licensee's telephone call that evening and was told by the licensee that the house had already sold.

[13] On 6 March 2014, the complainants complained to the Authority, feeling that they had not been given notice and a fair amount of time regarding the pre-auction offer of the buyers and that they did not have a chance to put forward their best offer.

The Committee's Findings

[14] In a decision of 26 August 2014 the Committee determined that the licensee's failure to provide the vendors with a written copy of the complainants' offer amounted to unsatisfactory conduct in that the licensee breached Rule 10.10 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (Rules) which provides: "*A licensee must submit to the client all offers concerning the grant, sale, or other disposal of any land or business, provided that such offers are in writing.*"

[15] In its 23 January 2015 decision on penalty, the Committee considered the licensee's explanation that, if he had abided by Rule 10.10, he would have antagonised the vendors but ultimately considered that the obligation to comply with the Rules applied irrespective of whether the vendors could feel antagonised or not. The Committee then ordered that the licensee apologise to the complainants in writing and that the licensee be censured. The Committee also determined that its decision was to be published at the expiry of the appeal period.

Additional Evidence

[16] There is no dispute about material facts. We heard evidence from the appellant and from Mrs C L Wharton (one of the vendors) and, unexpectedly, from one of the complainants because they had not participated previously before us. There is no need to cover that evidence in any detail as it is consistent with the facts set out above. All witnesses appeared to us as honest and candid.

The Appellant Licensee

[17] In cross-examination the appellant accepted that he could have emailed Mrs Wharton a copy of the Wongs' offer at \$850,000 but, as he knew the vendors well and had been a close friend of theirs for 30 years, he believed that would achieve nothing. Also, he prefers to hand people offers in person rather than by email. He was satisfied that the vendors had understood from him the offer and its terms. He accepted the point put to him by Ms Copeland that he could, nevertheless, have provided a copy of the complainants' written offer to the vendors but did not.

[18] Ms Copeland also pressed the appellant that when the vendors wished to immediately accept the offer from the ultimate purchasers and cancel the auction immediately at that point (i.e. at about 5.00 pm on Waitangi Day 6 February 2014), he insisted that he must be given time to tell other interested parties of the change in procedure and give them the opportunity to counter-offer.

Mrs Wharton (as a vendor)

[19] Mrs Wharton made it clear to us that, at the time the appellant advised her of the \$850,000 offer from the complainants, she was utterly adamant to him that the price was too low and she did not want to be bothered by it. She also said that, in any case, she had very pressing family matters to attend to at that time. She made it clear to the appellant that he not trouble her again unless there was an offer at the \$890,000 to (preferably) \$900,000 mark. She told us that she made it absolutely clear to the appellant that she was not remotely interested in the offer at \$850,000 which he was holding from the complainants and that, if it had been sent to her in any way, she would have regarded it as quite irrelevant.

Mrs L Wong (as a complainant)

[20] Mrs Wong made it clear that the incident on which her (and her husband's) complaint was based is now past history as she and her husband have bought another property and are very satisfied living in it. However, she maintains that she and her husband were treated unfairly by the appellant and she feels that unfairness needs to be highlighted and clarified for the benefit of others.

[21] Mrs Wong considers that the above facts show that she and her husband were treated unfairly; although she seemed to have come to accept that the vendors were entitled to cancel the auction and accept the offer from the ultimate purchasers because they offered the price the vendors sought. She also seemed to accept that she had understood and signed a standard form dealing with a pre-auction offers procedure. She understood the standard form of acknowledgement of multiple offer presentation. Those documents had been explained to her by the appellant.

[22] Mrs Wong's concern seemed, realistically, to be that it had been very disappointing for her and her husband to be unable to follow expected procedures leading to the auction. She felt that they lost the opportunity to negotiate before the auction because their own agent was unavailable when the appellant left a message about the intention of the vendors to accept \$900,000 and, of course, they lost the chance to bid at the auction when, apparently, they could have made a much higher price offer.

Issues on Appeal

[23] Four issues are raised:

- [a] Whether the licensee breached Rule 10.10 by failing to submit the complainants' offer to the vendors;
- [b] If we find there was a failure to comply with Rule 10.10 on the basis that the written offer itself must be provided to the clients, was that omission justified by the requirement of Rule 9.1 that the licensee act in accordance with the clients' instructions?
- [c] If we decide there was a breach of Rule 10.10 which was not justified by reference to Rule 9.1, was a finding of unsatisfactory conduct still appropriate in the circumstances? and

[d] If the licensee's conduct has been unsatisfactory, were the penalties imposed appropriate?

[24] Rule 10.10 is set out above. 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."

Submissions for the Authority

Rule 10.10

[25] Ms Copeland observes that Rule 10.10 requires that written offers are submitted to the client and that there is no dispute that Ms Wong (the appellant's licensee colleague) advanced a written offer for \$850,000 from the complainants to the licensee.

[26] Ms Copeland also observes that there is no dispute that the licensee did advise the vendors of this offer verbally and, as Ms Wharton explained, she was on her way out when the licensee telephoned her and advised her of the offer and she left the licensee in no doubt that she did not want to see him regarding that offer.

[27] Ms Copeland emphasises that the licensee has not disputed the factual situation that led to him only verbally advising the vendors of the complainants' \$850,000 offer.

[28] Ms Copeland recorded that, in considering this issue, the Committee held:

"The Committee accepts, that although the licensee did not present a copy of the complainants' written offer to the vendors, he had phoned them with details of the offer. The vendors have acknowledged that they had been verbally advised and that they had rejected the offer as being too low. Rule 10.10, however, requires licensees to submit all written offers to their client for consideration. This rule aims to ensure that clients are aware of offers and have the opportunity to consider them, rather than having a licensee "filter" information. The obligation is qualified in that offers must be submitted in writing. The focus on a written agreement means that a client obtains a "serious" offer from a potential buyer who feels sufficiently committed to the purchase to be ready to enter into a written agreement. It also means that the details of the offer are clearly recorded and can form the basis for negotiations, which may not be the case when purely verbal offers are submitted. The Committee noted that the licensee has no explanation as to why he did not present the complainants' written offer."

[29] Ms Copeland noted that, in *Henaghan & Henderson & REAA & McDonald* [2014] NZREADT 55, we discussed the predecessor to Rule 10.10 as follows:

"[66] The licensees had received a written offer from Ms Mao. Until that offer was signed by the complainants there was a real risk that it could be withdrawn, as occurred in this case. Making the complainants aware of the terms would be insufficient; the licensee needed to present the offer to the complainants for the fulfilment of this Rule 9.13 to be effective. We have no particular reason to

disbelieve the licensees and, at this stage, there seems to us to be confusion between the parties as to who said what to whom at material times.”

[30] The Authority submits that the purpose behind Rule 10.10 is to ensure that all written offers are submitted to the vendors for consideration; that this Rule is intended to ensure that the vendors are given the opportunity of considering the offer and with all relevant information; and, consequently, it is not sufficient to simply advise the vendors of the offer verbally as this does not allow presentation of full information (without the risk of information being filtered by the licensee) and time for the vendors to give sufficient consideration to the offer.

[31] The Authority submits that the Committee was correct to conclude that the licensee breached Rule 10.10 by failing to present the written offer to the vendors.

Breach of Rule 10.10 not Justified by Rule 9.1

[32] Ms Copeland refers to the licensee explaining that he was simply following the vendors' instructions by not submitting the written offer to them and putting it that action was consistent with his obligation under Rule 9.1 to follow his clients' instructions.

[33] Ms Copeland submits that the requirement to follow a clients' instructions in Rule 9.1 must be balanced against the requirements to submit all written offers in Rule 10.10. She puts it that this must be done in the particular circumstances which arise, and neither Rule is absolute so as to trump the other as a matter of course. It is submitted that, in a consumer protection regime with the obvious desirability of the free flow of information allowing consumers to make informed choices, there will be a heavy emphasis on the need to follow the process of submitting all written offers to vendors.

[34] Ms Copeland accepted that, in circumstances where a vendor is not interested in an offer that is perceived to be too low, the submission of the written offer may make little difference to the vendors' consideration of that offer. However, it is submitted that, in the particular circumstances set out above, the licensee could have reconciled his obligations under both Rules 9.1 and 10.10 by facilitating the submission of the offer to the vendors at a more convenient time for them. This could have been the next morning, or by email, or, if not before, at the same time as presenting the \$900,000 offer. It is put for the Authority that the appellant could have explained to the vendors that he understood their position regarding the \$850,000 offer, but was required to present the written offer to ensure that he met his obligations under the Rules; and it would then have been entirely a matter for the vendors as to how they responded.

[35] Ms Copeland submitted that it is noteworthy that the licensee was able to reconcile his obligation to inform all interested parties of the offer and the vendors' express instruction to cancel the auction as they wanted to accept the offer; and the licensee simply explained to the vendors what his obligations were. Ms Copeland emphasised that aspect when cross-examining the appellant.

[36] Ms Copeland submits for the Authority that it was open to the licensee to reconcile his obligations under both Rules 9.1 and 10.10 and that the breach of Rule 10.10 was not justified by reference to Rule 9.1.

[37] The Authority submits that the Committee's finding of unsatisfactory conduct and penalty were appropriate and should be upheld by us.

The Stance of the Appellant

[38] Mr Divers (as counsel for the appellant) submits that although Rule 10.10 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 requires a licensee to submit all written offers to the vendors, the word "*submit*" does not necessarily mean that the offer be conveyed to the vendors in hard copy written form and that the most common definition of "*submit*" used in the context of Rule 10.10 (he puts it) is "*to present for the approval, consideration, or decision of another or others*". He submits that Rule 10.10 does not exclude details of the offer being provided to a vendor in a manner other than providing a copy of a written offer. He stresses that there are no suggestions that, in the present case, the vendors were not fully informed by the appellant of the material details of the offer made by the complainants.

[39] Mr Divers then referred to Rule 9.1, under which a licensee must act in the best interests of the vendor client and in accordance with that client's instructions unless to do so would be contrary to the law, and referred to Mrs Wharton's evidence of her firm instructions to the appellant that she and her husband did not want to be bothered about the \$850,000 offer from the complainants and would only become interested if the price was increased to at least \$890,000.

Discussion

[40] We note that in the concise Oxford English Dictionary (11th ed) "*submit*" is defined as "***submit*** v. (***submits, submitting, submitted***) **1** *accept or yield to a superior force or stronger person.* **2** (*usu. submit something to*) *subject to a particular process, treatment, or condition.* ➤ (***submit oneself to***) *consent to undergo.* ➤ *agree to refer a matter to a third party for decision or adjudication.* **3** *present (a proposal or application) for consideration or judgement.* ➤ (*especially in judicial contexts*) *suggest; argue.*" Meaning 3 is particularly relevant to the facts of this case.

[41] We consider that the matters of legal principle raised by Ms Copeland are broadly correct. However, we also consider that the facts of this case are rather unique and that the outcome turns precisely on them.

[42] As Mr Divers suggests and as we take from hearing the evidence of Mrs Wong, the complainants' concern was that the auction was cancelled and, because of their own unavailability on the evening of 6 February 2014, they lost a chance to counter offer or bid against the ultimate purchasers.

[43] The Committee found no fault with the procedure relating to the cancellation of the auction and the complainants did not themselves make the point that there might be a breach of Rule 10.10 as that was raised by the Committee.

[44] Mr Divers emphasised, as had the appellant in his evidence, what else was the licensee supposed to do in the circumstances where the vendor required the auction cancelled and he was obliged to accept the vendor's instruction under Rule 9.1 with regard to that and with regard to their disinterest in the \$850,000 offer of the complainants.

[45] Inter alia, Ms Copeland referred to our statement in *Henaghan and Henderson v REAA and B and J McDonald* which we set out above. That reference to Rule 9.3 is to the present 10.10. We do not see the views we express below as being in conflict with what we said in the *Henaghan* case where the factual situation is quite different from the present and there was some confusion “as to who said what to whom at material times” as we put it in paragraph [66] of *Henaghan* set out above.

[46] In the present case we do not see any particular conflict for the licensee between Rules 10.10 and 9.1. The fact is that he did submit the complainants’ offer in terms of Rule 10.10 to the vendors. The preferable way to make such a submission in terms of Rule 10.10 is by handing a copy of the written offer to the vendors but we think that, in all the circumstances, the particular communication, made by the agent to Mr and Mrs Wharton by telephone is a submission which complies with Rule 10.10. That Rule does not state that a licensee must submit an offer to a vendor in writing i.e. as hard copy. Technically, it can be adequate to convey (by telephone in this case) the effect of the offer document held by the agent. A submission may be oral or written, as it can be when put to a Court. In this case the vendors were told by the appellant the essence of a written offer he held as their agent.

[47] In any case, Mrs Wharton made it clear that her instructions were that the agent not bother her more about the \$850,000 offer from the complainants. If it is perceived that her stance created a conflict for the appellant licensee between Rules 9.1 and 10.10, then it is simply a case of resolving the matter by the application of common sense. In this case the vendors were adequately briefed about the offer from the complainants. It did not interest them in any way and they were quite dismissive of it and instructed the licensee not to trouble them further about it. The appellant’s acquiescence in that is not unsatisfactory conduct. As Ms Copeland put it, neither Rule should be regarded as absolute and as trumping the other.

[48] Insofar as Ms Copeland puts it that the licensee could have resolved matters by either emailing the complainants’ \$850,000 offer to Mr and Mrs Wharton or, later, leaving a copy of the offer with them, that may well have been a preferable course for him to have taken; but, in the particular circumstances of this case, failure to do that does not cross the threshold of misconduct in our view. Frankly, we think that had the appellant insisted on the communication course suggested by Ms Copeland, he would have greatly antagonised Mr and Mrs Wharton. We think it is a false analogy to infer that he should have, nevertheless, done that because he insisted that Mr and Mrs Wharton not accept the ultimate \$900,000 offer without allowing him to comply with the procedure to notify all interested parties.

[49] Having said all that, we expect licensees to comply with Rule 10.10 by handing a hard copy of an offer from a prospective purchaser to vendors or, at least, by emailing it to those vendors.

[50] As we advised at the conclusion of the hearing and as we have indicated above, we consider the facts of this case to be rather unique and to require the application of common sense. We consider that the appellant has not breached his duties and this appeal succeeds. The Committee’s finding of unsatisfactory conduct (and consequent penalty) is hereby quashed. No further action is to be taken.

[51] 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

Ms C Sandelin
Member