

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 75

READT 026/17

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	ANJAY and RESHMI LAKHAN Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 414) First Respondent
AND	LING ZHU Second Respondent
Hearing:	23 November 2017, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Ms C Sandelin, Member
Appearances:	Mr and Mrs Lakhan Mr Simpson, on behalf of the Authority Mr Rea, on behalf of Ms Zhu
Date of Decision:	7 December 2017

DECISION OF THE TRIBUNAL

Introduction

[1] On 28 November 2016 the Real Estate Agents Authority (“the Authority”) received a complaint from Mr and Mrs Lakhan regarding the conduct of Ms Zhu. Complaints Assessment Committee 414 (“the Committee”) inquired into the complaint, and in a decision dated 26 July 2017, the Committee decided pursuant to s 89(2)(c) of the Real Estate Agents Act 2008 (“the Act”) to take no further action on it.

[2] Mr and Mrs Lakhan have appealed against the Committee’s decision.

Background

[3] The Complaint concerned Ms Zhu’s conduct as salesperson of a property at Ranui, Auckland (“the property”), which Mr and Mrs Lakhan bought on 7 August 2016.

[4] The property was listed with Barfoot & Thompson Ltd (“the Agency”) on 11 May 2016. Ms Zhu is a licensed salesperson engaged by the Agency, at its Parnell branch. An Agency “Property Description” named Ms Zhu as salesperson. The owner of the property was YJ Construction Ltd. Another licensee engaged by the Agency, Ms Fan, is associated with YJ Construction Ltd. The Property Description records “Listing agent is vendor”. Ms Fan acknowledged to the Authority’s investigator that she was both the vendor and salesperson for the property.

[5] On 5 July 2016, Ms Fan accepted an offer to buy the property from Mr and Mrs Ashish, for \$1.5 million (“the Ashish offer”). The Ashish offer was conditional on their selling their own property by 1 October 2016. Their offer was presented to Ms Fan by Mr Suchak, a licensee engaged by the Agency at its Te Atatu branch. Mr Suchak was also acting as salesperson for the sale of Mr and Mrs Ashish’s own property.

[6] We set out below a timeline of events relating to Mr and Mrs Lakhan’s purchase of the property. We record conflicts in the statements given to the Committee.

[7] Mr and Mrs Lakhan viewed the property at an open home conducted by Ms Zhu on 6 August. They said that Ms Zhu told them that there were at that time no prospective purchasers and that an offer over \$1.47 million should be accepted. Ms Zhu said that she told Mr and Mrs Lakhan that there was no offer at that point, but there were potential buyers in the wings – one in particular who could not sell his house. She further said that she had told all buyers that an offer had been accepted and fallen through at \$1.5 million, and that was the price the vendor wanted.

[8] Mr and Mrs Lakhan also said that when at the open home they asked Ms Zhu if the property was fibre-enabled, a matter of some concern to them, and that she said that she knew the vendor very well, and that it was fibre-enabled. Ms Zhu said that she definitely did not tell them this, and it was not something she would discuss.

[9] On 7 August, Mr Lakhan called Ms Zhu and told her that they wanted to make an offer to buy the property. That evening, Ms Zhu emailed them an agreement for sale and purchase, which Ms Zhu had filled in with their names, and recorded the offer price of \$1.48 million. The offer was conditional on sufficient finance being obtained within five working days. Mr and Mrs Lakhan both signed the agreement and initialled each page, and the boxes on the front page headed “Payment of purchase price”, “Conditions”, and “Tenancies”. They emailed the agreement back to Ms Zhu at about 10.30 pm.

[10] Ms Zhu said she took the conditional offer to Ms Fan, and was told that the offer was too low, as Ms Fan had had a previous agreement for \$1.5 million. Ms Zhu said she “talked the vendor into counter signing at \$1.49 million”, then telephoned Mr Lakhan and told him about the counter signing. She said she told him that the vendor had not accepted \$1.48 million but had dropped down to \$1.49 million and that it was up to him. She said she also told Mr Lakhan that there was serious other interest, and she had had a very interested party through the property that day, but that there were no other offers.

[11] Mr Lakhan said Ms Zhu telephoned him after 11 pm and told him that another buyer was negotiating with the vendor at that exact moment, and the vendor was now considering it against their offer. He said Ms Zhu told them that unless they increased

their offer by \$10,000 they would lose the property. They believed it would be necessary to pay an extra \$10,000 to secure the property against the other offer, so agreed to increase their offer.

[12] Ms Zhu then took an amended agreement to Mr and Mrs Lakhan's home. It is apparent from the documents presented to the Tribunal that Ms Zhu did not amend the signed and initialled agreement Mr Lakhan had emailed to her. Rather, she appears to have amended the agreement she had originally emailed, by crossing out "\$1,480,000" and adding "\$1,490,000". Mr and Mrs Lakhan signed and initialled the amended agreement (but not in the same manner as in the initial agreement) and gave it to Ms Zhu.

[13] The agreement contained, under clause 17 "Counterparts", a clause (which appears to be numbered 19) which provided: "The Purchaser is aware and accepts that the Vendor is associated with Barfoot & Thompson Ltd" ("the disclosure clause").

[14] The Committee was provided with copies of text messages between Ms Fan and Mr Suchak on 6 and 7 August. On 6 August at 6.46 pm, Mr Suchak asked Ms Fan to call him. At 9.18 pm on 7 August, Mr Suchak sent Ms Fan a text message: "Sorry Jenny couldn't close it was \$15,000 difference". At 11.43 pm Ms Fan sent Mr Suchak a message: "Hi Jay: I already signed another offer tonight. It is better than your one. It only has 5 working days finance condition. If your buyer want to put the offer, it will be a back up offer. All the best for your client. Regards Jenny Fan".

[15] Although it appears that the Committee did not have a copy of the final agreement for sale and purchase, and the Tribunal was not provided with one, there was no dispute that Ms Fan signed the amended agreement.

[16] The purchase was settled on 6 October 2016. Mr and Mrs Lakhan said it was not until after settlement that they learned that the vendor was Ms Fan, a licensee at the Agency. They also said that Ms Fan told them that no other offer was being negotiated at the time they agreed to amend their offer. Ms Fan denied that she had told Mr and Mrs Lakhan that there was no other interest in the property.

[17] Mr and Mrs Lakhan also learned after settlement that the property was not fibre-enabled. They arranged for fibre to be provided to the property, at a cost of \$375.00. This was less than it could have been, as they were provided with the fibre optic cable at no cost.

[18] At the time of settlement Mr and Mrs Lakhan were provided with access key-codes for entry to the property, but not the manual keys. They were concerned, for security reasons, that they did not have the keys and tried several times to call Ms Zhu. They then called Ms Zhu's manager. Another licensee came to the property at about 9.30 pm that evening and gave them the keys. They were told that Ms Fan had arranged for her brother to deliver the keys, but he had forgotten to do so. An apology was made to them.

Complaint

[19] Mr and Mrs Lakhan complained to the Authority that Ms Zhu:

- [a] misled them about the presence of a competing offer, which placed them under undue pressure to increase their offer by \$10,000, when no such offer was being negotiated;
- [b] did not disclose to them that the vendor was another licensee with the same Agency;
- [c] told them the property was fibre-enabled, when it was not; and
- [d] delayed providing them with the manual keys to the property on the day of settlement.

[20] The complaint was dealt with initially by the Authority's Early Resolution Team. On 10 March 2017 the Authority sent a "Compliance Advice" letter to Ms Zhu. The letter recommended that she review her practice to ensure she met her obligations as a licensee. In particular, the Authority recommended that Ms Zhu familiarise herself with r 5.1 (as to the obligation to exercise skill, care competence and diligence at all times when carrying out real estate agency work), and r 6.4 (as to the obligation not to

mislead a customer or client, nor provide false information, or withhold information that should by law or in fairness be provided) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

[21] The letter also recommended that Ms Zhu familiarise herself with ss 136 and 137 of the Act, as to disclosure of benefits that may be obtained from a transaction. The Authority said that the disclosure clause in the agreement for sale and purchase did not appear to meet the requirements of s 136, as it did not tell a potential purchaser that a licensee may benefit financially from a transaction. The Authority expressed the view that where the vendor is the listing agent for the property, this information should be shared with potential purchasers, as a potential purchaser might act differently, or share different information, if they knew that the licensee they were talking to was the vendor as well.

[22] The Early Resolution Team advised Mr and Mrs Lakhan that the Authority had decided to respond to their complaint by way of the Compliance Advice letter. They were not satisfied with this response and asked for their complaint to be referred to a Complaints Assessment Committee.

The Committee's decision

[23] The Committee decided:

- [a] On the evidence, Ms Fan was re-considering the lapsed Ashish offer at the time Mr and Mrs Lakhan's offer was presented to her, and there was nothing untoward in such ongoing discussions, nor in Ms Fan's instructions to Ms Zhu to counter-offer at \$1.49 million. Accordingly, Mr and Mrs Lakhan had not established that they had been misled, or lied to, by Ms Zhu.¹

¹ Committee's decision, at paragraphs 3.2–3.5.

- [b] The breach of s 136 in the disclosure clause, if any, was minimal, and there was no need for further action given the compliance advice issued by the Authority.²
- [c] It could not be sure, on the evidence, what had been said regarding the property's fibre connection, but in any event the work required to install it was minor.³
- [d] The delay in receiving the property's manual keys did not cause substantial inconvenience to Mr and Mrs Lakhan, as they had gained access on the day of settlement. Further, Ms Zhu had already apologised for the late delivery of the keys.⁴

Appeal principles

[24] Section 89(1) of the Act provides that after inquiring into a complaint, the Committee "may" make one or more of the determinations set out in s 89(2). In the present case, the Committee exercised its powers to decide to take no further action against Ms Zhu, pursuant to s 89(2)(c).

[25] The word "may" indicates that the Committee had a discretion as to what action it took with regard to Mr and Mrs Lakhan's complaint. Their appeal is against the Committee's exercise of its discretion. The Tribunal is required to determine whether they have established that in exercising its power to take no further action against Ms Zhu the Committee made an error of law or principle, took irrelevant considerations into account, failed to take relevant considerations into account, or was plainly wrong (that is, that its decision was not reasonably open to it on the evidence before it).⁵ In this case, the appeal focusses on whether the Committee's decision was "plainly wrong".

² At paragraph 3.7.

³ At paragraph 3.8.

⁴ At paragraph 3.6.

⁵ See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 2011; *Edinburgh Realty Limited v Real Estate Agents Authority* [2016] NZHC 2898, at [111].

[26] If the Tribunal is satisfied that the Committee erred in one or more of those respects, it can only exercise such powers as the Committee could have exercised.⁶

Appeal issues

[27] Mr and Mrs Lakhan have appealed against the Committee's decisions on each aspect of their complaint. They submit that the Committee should have found that Ms Zhu engaged in unsatisfactory conduct, or laid charges of misconduct. They seek relief by way of a refund of the \$10,000 increase on their offer, and the cost to install fibre (\$375.)

[28] The Tribunal is required to determine whether Mr and Mrs Lakhan have established that the Committee was wrong to make its findings. In respect of each finding, the Tribunal must decide whether they have established that it was not open to the Committee to come to the conclusions it did, on the evidence before it.

[29] Before considering the appeal issues, we record that, without opposition, Mr and Mrs Lakhan submitted further evidence at the appeal hearing. This was a translation of a recording of a telephone conversation they had with Mr Ashish concerning his offer to purchase the property. Mr Ashish is recorded as saying:

After 1 August 2016, my Real Estate agent, Mr Jay Suchak, did try his best to get an extension on my offer. However, Mr Jay Suchak's statement to REAA is correct as Jenny Fan did not give me extension so I could negotiate and so I was not able to buy the property.

[30] Mr and Mrs Lakhan say that Mr Ashish also said that if he was given an extension his offer would have gone through as he was offering \$1.5 million and their own offer would have been a backup offer.

The finding that Ms Zhu did not mislead Mr and Mrs Lakhan as to continuing negotiations with another buyer

[31] The Committee was presented with conflicting evidence from Mr and Mrs Lakhan, and Ms Zhu. The Committee found that there were discussions in progress regarding the Ashish offer at the time Mr and Mrs Lakhan made their offer. The

⁶ Section 111(5) of the Act.

Committee also found that Ms Fan was entitled to negotiate in whatever form she wished to, and her instruction to Ms Zhu was to request \$10,000 more before she would accept their offer.⁷

[32] Mr and Mrs Lakhan did not contend at the appeal hearing that another written offer had been submitted to Ms Fan, but submitted that, in reality, the Ashish offer had lapsed, and no extension of time had been given. Accordingly, they submitted, Ms Zhu misled them, and placed undue pressure on them to increase their offer, by saying that another buyer was negotiating with the vendor. They submitted that the text messages between Mr Suchak and Ms Fan, together with the statement by Mr Ashish, established that the Ashish offer had lapsed and had not been renewed.

[33] We are not persuaded that the text exchanges between Mr Suchak and Ms Fan establish that the Ashish offer was at an end. Rather, they tend to suggest that Ms Fan remained open to receiving an offer. Ms Fan's text at 11.43 pm on 7 August that "if your buyer want to put the offer, it will be a back up offer" tends to suggest that she was still open to receiving a further offer from Mr and Mrs Ashish. The recorded statement by Mr Ashish (presented to the Tribunal) does not negate the fact that Mr Suchak and Ms Fan were continuing to exchange texts showing negotiations concerning a possible purchase of the property at the time Ms Zhu was dealing with Mr and Mrs Lakhan.

[34] We are not persuaded that the Committee could not reasonably reach the conclusion, on the evidence before it, that Ms Zhu did not mislead Mr and Mrs Lakhan as to there being ongoing negotiations with another possible buyer. Nor are we persuaded that the Committee could not reasonably conclude on that evidence that Ms Zhu did not place undue pressure on them, leading to their increasing their offer by \$10,000.

[35] Accordingly, we are not persuaded that the Committee was wrong to decide to take no action on this aspect of the complaint.

⁷ Committee's decision, at paragraph 3.4.

Disclosure of the fact that Ms Fan was a licensee at the same Agency

[36] Mr and Mrs Lakhan said that they should have been (but were not) told that the vendor of the property, Ms Fan, was a licensee at the Agency. They said that if they had been aware of that, they would have negotiated differently.

[37] Sections 134 to 137 of the Act set out disclosure requirements where licensees have an interest in a transaction. Section 134 is concerned with licensees' direct or indirect acquisition of a client's land or business, or a legal or beneficial interest in a client's land or business. Section 136 is concerned with the situation where a licensee or "any person related to the licensee" may benefit financially from a transaction undertaken by the licensee in the course of real estate agency work. The term "related" is defined in s 137(2) of the Act and provides (as relevant in this case) that a person is "related" to a licensee if the person is "a partner of the licensee under a partnership agreement", "an employee of the licensee", or "a branch manager or salesperson engaged by the licensee".

[38] Sections 134 and 136 of the Act reflect the Act's important "consumer protection" purposes, as set out in s 3 of the Act. In both cases, the licensee is required to give written disclosure.

[39] The Committee's decision to dismiss this part of the complaint was based, in part, on its finding that "[Mr and Mrs Lakhan] were aware the vendor was someone associated with the Agency, as there was a clause in the [agreement for sale and purchase] which they had signed", and that "the breach, if any, was of a minimal nature".⁸ The Committee's finding was, in effect, that the disclosure clause complied with Ms Zhu's obligations as to disclosure.

[40] We are not persuaded that the Committee was wrong to decide to take no further action on this part of the complaint. However, we make two observations as to the Committee's reasoning.

⁸ Committee's decision, at paragraph 3.7.

[41] First, the disclosure clause in this case could easily have been overlooked. It appears under the heading “Counterpart”, to which it bears no relation. (As an aside, we note that the disclosure in the Ashish offer appeared under the heading “Further terms”, so is more prominent.) If disclosure were required in the present case, the disclosure clause in the agreement for sale and purchase signed by Mr and Mrs Lakhan would not have complied with s 136.

[42] Secondly, we doubt that the fact that Ms Fan is a licensee at the same Agency as Ms Zhu would have given rise to a requirement to give disclosure under ss 134 or 136. It is clear that s 134 does not apply in the present case, as Ms Zhu was not acquiring the property. Section 136 would apply only if Ms Zhu were either herself obtaining a financial benefit from the sale of Ms Fan’s property (other than by way of commission), or if Ms Fan is a “person related to Ms Zhu”.

[43] It was not submitted that Ms Zhu, herself, stood to gain a financial benefit from the sale to Mr and Mrs Lakhan, other than by way of commission.⁹ In the present case, Ms Fan would have a person “related to” Ms Zhu pursuant to s 137 of the Act if she was a partner of Ms Zhu under a partnership agreement, employed by Ms Zhu, or a branch manager or salesperson engaged by Ms Zhu. It was not submitted that those applied here.

[44] As recorded above, we are not persuaded that it was not open to the Committee to decide to take no further action on this aspect of the complaint.

Did Ms Zhu mislead Mr and Mrs Lakhan as to the property being fibre-enabled?

[45] As recorded earlier, Mr and Mrs Lakhan said that they asked Ms Zhu whether the property was fibre-enabled, and she said that she knew the vendor very well, and the property was fibre-enabled. In support of their evidence, Mr Lakhan referred to statements made by Vielvin Naidu and Ryan Lakhan, who attended the open home with Mr and Mrs Lakhan. Ms Zhu said that she did not, and would not have, told them this, and it was not something she would discuss.

⁹ Section 136(4) provides that “an agent does not benefit financially from a transaction merely because of any commission payable to the agency under a signed agent agreement in respect of the transaction”.

[46] The Committee could not be sure, on the evidence before it, what Ms Zhu told Mr and Mrs Lakhan about the property with regard to fibre but found that, in any event, the work required to remedy the situation was not large. It considered that it is usual for there to be small costs involved when moving into a new house to sort out minor matters such as that.¹⁰

[47] The Committee did not refer to the supporting statements provided to it. The Committee did not, therefore, undertake any evaluation of the competing evidence. Such an evaluation would have been of assistance to the Tribunal.

[48] We conclude that on the evidence before it, in particular the supporting evidence provided by Mr and Mrs Lakhan, the balance should have fallen in favour of accepting their evidence that Ms Zhu told them that the property was fibre-enabled. However, that finding would not, in the absence of any other finding against Ms Zhu, have justified a finding of unsatisfactory conduct.

[49] Further, and notwithstanding Mr Lakhan's submission that the cost involved in remedying the situation was less than it would have been had they not been able to obtain the fibre optic cable at no cost, we are not persuaded that it was not open to the Committee to decide, in the circumstances, to decide to take no further action on this aspect of the complaint.

Access to the property

[50] It was not disputed that Mr and Mrs Lakhan were given keypad codes at the time of settlement, so had access to the property, but were not given manual keys until later on the evening after settlement. Their concern that, in the absence of an ability to lock doors with manual keys, the property was not properly secure is entirely understandable.

[51] The Committee found that the delay in providing the manual keys did not cause substantial inconvenience to Mr and Mrs Lakhan, as they did have access. It also

¹⁰ At paragraph 3.8.

referred to the apology given by Ms Zhu. On these two bases, the Committee dismissed the complaint.¹¹

[52] Good practice requires that full access to a property (in whatever form access to, and security of, a property is provided) is given at settlement, or within a reasonable time after settlement. What appears to have been a loose arrangement that Ms Fan's brother would deliver the manual keys deviates from best practice. However, given that Mr and Mrs Lakhan had immediate access to the property, the manual keys were in fact delivered within the day of settlement, and Ms Zhu apologised to Mr and Mrs Lakhan, a finding of unsatisfactory conduct would not have been justified.

Outcome

[53] We are not persuaded that the Committee was wrong to decide to take no further action on Mr and Mrs Lakhan's complaint. Accordingly, their appeal is dismissed.

[54] We add that we are not persuaded by the submission on behalf of Ms Zhu and the Authority that the decision to take no further action should have been made pursuant to s 80(2), rather than s 89(2)(c) of the Act. It is not necessary in this case to set out the arguments on the point, but where (as is the case here) a complaint has been made, investigated, and considered by the Committee, and where the Committee's decision depends in essence on credibility findings, the decision to take no further action is properly made pursuant to s 89(2)(c) of the Act.

[55] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member

¹¹ At paragraph 3.6.