

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2024] NZREADT 13

Reference No: READT 019/2023

IN THE MATTER OF

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

BETWEEN

BU
Appellant

AND

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 2201)**
First Respondent

AND

HI
Second Respondent

Hearing on the papers

Tribunal:

D J Plunkett (Chair)
P N O'Connor (Member)
F J Mathieson (Member)

Representation:

The appellant:

Self-represented

Counsel for the first respondent:

M Mortimer-Wang, M Clement

The second respondent:

Self-represented

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 02 May 2024

INTRODUCTION

[1] The appellant, one of the owners of a commercial unit (the vendor), listed it with a real estate agency for sale. A prospective buyer (the buyer) made a conditional offer which was accepted. The second respondent licensee (the licensee) worked for a different agency but was selling other units in the complex. He allegedly told the buyer there were problems with the body corporate. The buyer therefore did not proceed.

[2] In a complaint made to the Real Estate Agents Authority (the Authority), the vendor says the body corporate performs well and accuses the licensee of losing him the sale. The complaint was referred to Complaints Assessment Committee 2201 (the Committee) which decided to take no further action. The vendor now appeals to the Tribunal.

BACKGROUND

[3] BU (the vendor) and a trustee company own a warehouse and office unit in a commercial complex in Wellington. The vendor listed the unit with NT (the listing agent) of U Ltd, trading as XX, on 1 February 2022, with tenders to close on 2 March 2022.

[4] On about 8 February 2022, DM (the buyer), through T Ltd, made a conditional offer of \$650,000 on the unit. It was accepted by the vendor.

[5] HI (the licensee) is engaged by K Ltd, trading as KK (the agency). He was in the process of selling two other units in the complex. The licensee rang the listing agent on 9 February 2022 to advise he had purchasers interested in the complex and seeking a conjunctual agreement (commission sharing arrangement). The listing agent replied that he already had an offer.

[6] The buyer inspected the property on 10 February 2022.

[7] The buyer rang the listing agent on 11 February 2022. The latter made a file note of the discussion.¹ He recorded that the buyer told him he would not go through with the sale because an agent, who had recently sold two units in the block, informed him that the body corporate was not well run.

[8] The buyer then sent an email to the listing agent on the same day (*verbatim*):²

As discussed on the telephone we will not be confirming on the property due to the ongoing issues with body corporate and owner occupiers not following rules.

¹ Listing agent's file note (11 February 2022); Authority's bundle at 147.

² Email (11 February 2022) from the buyer to the listing agent; Authority's bundle at 074.

[9] Also on the same day, the two units being sold by the licensee went unconditional.

[10] On 17 February 2022, the vendor rang the licensee posing as an interested purchaser. According to the vendor, the licensee said the body corporate was “okay, not good – not bad” but “inferred” that it could be much better.³

[11] On 18 February 2022, the vendor rang the sales manager of the licensee not only to complain about the licensee’s comment concerning the body corporate, but also to ask the manager to remove the web advertising for the two units being marketed by the licensee since they had been sold.

Complaint to Authority

[12] On 25 February 2022, the vendor made a complaint to the Authority against the licensee. To the extent relevant to the appeal, the following allegations were made:⁴

Body corporate

[13] The buyer expressed himself to be very happy with the unit when he inspected it. He said he would ask his solicitors to complete the sale and purchase. The next day he telephoned the listing agent and said he had been told by an agent who had just sold two units that there were body corporate issues, so he was pulling out of the sale.

[14] The vendor rang the licensee on 17 February 2022 posing as a potential purchaser. When asked about the body corporate, the licensee stated it was okay, inferring it could be much better.

[15] The licensee’s comment about the body corporate was wrong. His conduct was unprofessional and unethical. It was responsible for him losing an offer.

Web advertising

[16] The vendor stated that he rang the agency’s sales manager on 18 February 2022 to ask him to remove the advertisements for the two units being marketed, as they had been sold. The manager replied that he would immediately attend to the issue. As of 20 February 2022, the advertisements were still live.

³ Complaint (25 February 2022); Authority’s bundle at 028.

⁴ The vendor also raised an issue as to a valuation of his unit given by the licensee over the telephone but this has not been pursued on appeal.

Investigation by Authority

[17] A facilitator from the Authority had a conference call with the vendor and the listing agent on 7 April 2022. The listing agent said the buyer had called him the day after his inspection to say he was pulling out of the deal. This was because another agent, who had sold two units, said the body corporate was poorly run. The listing agent and the vendor concluded that agent had to be the licensee. The vendor said he then rang the licensee posing as a potential purchaser. The licensee rubbished the body corporate. The vendor added that the body corporate was well run.

[18] In reply to the complaint, the former counsel for the agency sent the following statements to the Authority on 21 July 2022:

1. Statement of the licensee (20 July 2022). He said he never spoke to the buyer or any prospective purchaser as alleged. He did speak to a person who gave an incorrect name and whom he now knows was the vendor. The licensee said he was asked about the body corporate. He offered his opinion that it was “alright” but thought a little maintenance could be attended to. He made no other comment. As for the advertising, the two sold units went unconditional on 11 February 2022 and were due to settle on 28 February 2022. The advertising was removed on 21 February 2022. The licensee added that sometimes agents keep it live in case there was an issue with settlement.
2. Statement of the sales manager (19 July 2022).
3. Statement of the branch manager (11 October 2022).⁵

[19] There were also submissions to the Authority (21 July 2022) from the agency’s former counsel. He contended that it was abundantly clear the conversation between the licensee and the buyer never took place. As for the conversation with the vendor, he rang using a false name. It was entrapment. Furthermore, it was not real estate work under the statute. In respect of the advertising, it was a normal process to maintain marketing in case the property had to be resold.

[20] The buyer’s partner sent an email to the Authority on 29 August 2022 stating that neither she nor the buyer could recall conversing with the named licensee nor any other licensee. She further stated that an acquaintance who was not in real estate advised them there were issues with the body corporate.

⁵ A corrupted version was originally sent on 21 July 2022.

[21] An officer from the Authority interviewed the listing agent by telephone on 6 October 2022. He confirmed the conversation with the buyer on 11 February 2022. The buyer said he was no longer interested, since an agent who had just sold two properties told him the body corporate ran very, very poorly. The listing agent said that agent was obviously the licensee because he was the only agent to have recently sold two units.

[22] A second statement (6 October 2022) was provided to the Authority by the sales manager.

[23] The licensee provided a second statement (10 October 2022) to the Authority. He recorded that it was best practice within the agency to remove all web advertising once the property became unconditional. In regard to the two units in question, a request to remove the advertisements was made to the third-party advertising providers within two working days of the sales becoming unconditional and they were removed within five working days.

[24] The vendor provided the Authority with his comments on the evidence of the licensee and the buyer, on 13 December 2022. He contended that the licensee's denial of a conversation with the buyer was false. The buyer had said to the listing agent that he had spoken to an agent who had sold two units in the building. That agent could only be the licensee. It was unsurprising that with the passage of time, the buyer did not remember the phone call with the agent, or more likely did not wish to be involved in the investigation. As for his own phone call with the licensee, he did not give a false name. He offered no name at all. The vendor repeated to the Authority that the body corporate was well run.

[25] In terms of the web advertising, the vendor noted in his comments to the Authority that it took 10 full days to remove it, something that should have taken a few days. Furthermore, the physical sold sign was up, yet the online advertising was still live.

Decision of the Committee

[26] On 6 September 2023, the Committee decided to take no further action.⁶

Body corporate

[27] The Committee noted that the buyer and his partner could not recall a discussion with the licensee about the body corporate, but said they had a discussion with an

⁶ Complaint No. C46939 (6 September 2023).

acquaintance. The licensee denied the call. Given the conflicting evidence, the Committee was unable to conclude that a conversation between the licensee and the buyer took place. Furthermore, there may have been other reasons for the buyer pulling out since the offer was conditional. Additionally, any such discussion would not have amounted to real estate agency work under the statute.⁷

[28] As for the phone call between the vendor and the licensee, the latter offered his opinion that the body corporate was alright, though the building required a little maintenance. This also did not amount to real estate agency work as defined in the statute, since the licensee was not acting on behalf of another person for the purpose of bringing about a transaction. In any event, his statements were not misleading and he did not give false information.

Web advertising

[29] The Committee noted the vendor's complaint that the other two units continued to be marketed online, despite "sold" signs on the boards outside the properties. The live advertisements were not removed until 21 February 2022. The Committee could not conclude, as the vendor alleged, that the licensee left the advertising online as he was seeking a conjunctural arrangement with the listing agent. Nor was it proven, as alleged, that any harm had been caused to the vendor because of the online advertising. It concluded that the licensee did not breach any professional obligation in this regard.

APPEAL

[30] On about 14 November 2023, the vendor appealed to the Tribunal against the decision of the Committee.

Submissions of the vendor

[31] There are submissions (14 November 2023) attached to the notice of appeal:

Body corporate

[32] The licensee's negative comments were simply wrong. They led to the buyer pulling out of the sale. Had the licensee not given his opinion, the sale would have proceeded. The licensee's interference with another agency's listing was unethical.

⁷ At [47].

Web advertising

[33] The other two properties were advertised long after they were sold, without a “sold” sticker. The advertisements could easily have been pulled. They led to the licensee being contacted.

[34] The vendor declined to provide any submissions in reply to those of the Authority.

Submissions of the Authority

[35] There are submissions (22 March 2024) from counsel for the Authority:

Body corporate

[36] It is submitted that it was reasonable for the Committee to conclude there was insufficient evidence to establish that a phone call between the buyer and the licensee occurred, after considering the conflicting evidence.

[37] As for the phone call between the vendor and the licensee, it was open to the Committee to determine that the conduct did not amount to real estate agency work, so a finding of unsatisfactory conduct was not available. The circumstances of that call did not rise to the level needed for a referral to the Tribunal for misconduct.

Web advertising

[38] There is no specific requirement in the statute or the rules for when advertising material must be removed. There was a lack of evidence to support the allegation that the listings were left online to interfere with the sale to the vendor, so it was open to the Committee to take no further action.

JURISDICTION AND PRINCIPLES

[39] This is an appeal pursuant to s 111 of the Real Estate Agents Act 2008 (the Act).

[40] The appeal is by way of a rehearing.⁸ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.⁹ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination

⁸ Real Estate Agents Act 2008, s 111(3).

⁹ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].

of the Committee.¹⁰ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.¹¹

[41] A hearing may be in person or on the papers.¹² A hearing in person may be conducted by telephone or audiovisual link.

[42] This appeal is against the determination of the Committee under s 89(2)(c) of the Act to take no further action. It is a “general appeal”. The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee’s determination is wrong.¹³ An appellant has the onus of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.¹⁴

[43] The Tribunal issued Minute 1 (20 December 2023) as to the conduct of the appeal. The Authority filed a bundle of the documents that were before the Committee, on 23 January 2024. No applications were made by the parties for an oral hearing or to produce fresh evidence.

DISCUSSION

Body corporate

[44] The vendor accepted an offer from the buyer on about 8 February 2022. The latter inspected the unit two days later. Then on the next day, 11 February, he rang the listing agent and said (according to the listing agent’s file note) that he would not go through with the purchase because an agent who had recently sold two properties informed him the body corporate was not run well. The buyer then sent an email to the listing agent the same day confirming he would not go ahead due to ongoing issues with the body corporate and the owner occupiers not following the rules. The transaction did not proceed.

[45] The vendor says the buyer must have spoken to the licensee, as he was the only person to have recently sold two units in the complex. He says the information is incorrect, as the body corporate is well run. The licensee’s false and misleading information cost him the sale.

¹⁰ Real Estate Agents Act, s 111(4).

¹¹ Section 111(5).

¹² Sections 107 and 107A.

¹³ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16]; and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

¹⁴ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22], citing *Stichting Lodestar*, above n 13, at [4]–[5]; and *Scandrett*, above n 13, at [112].

[46] The Committee noted the conflict in the evidence between the vendor's claim (that there was a discussion between the buyer and the licensee) and the denial of any such conversation by both of the participants in the alleged discussion. It was unable to conclude that such a conversation took place.

[47] The contemporary file note and email are strong evidence that such a conversation did take place between the buyer and the licensee and the latter made negative comments about the body corporate. However, the difficulty faced by the vendor is that the only two participants in the conversation, the buyer and the licensee, both deny the conversation. Hence, we find the Committee correctly concluded, applying the balance of probabilities standard, that the conversation was unproven.

[48] Moreover, the Committee was right to find that any such conversation did not amount to "real estate agency work", as defined in the Act:¹⁵

- (a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and

...

[49] In any discussion with the buyer, the licensee was not engaged in the vendor's "transaction", nor was he engaged in his two transactions. The licensee was not doing work on behalf of another person and the alleged conversation was not for the purpose of any transaction in which the licensee and the buyer were involved. Neither the vendor nor the buyer were clients or customers of the licensee.¹⁶ We do not even know whether the buyer identified himself as an offeror or prospective purchaser of the vendor's unit. We do not see how the licensee could be guilty of undertaking work in respect of a transaction for which there was no evidence he had knowledge of.

[50] Since the conversation (if any) was not real estate agency work, it could not amount to unsatisfactory conduct.¹⁷ The statement concerning the body corporate certainly could not amount to the graver offence of misconduct (which need not be based on real estate agency work). To be considered as misconduct, it would have to be established that the licensee's statement was wrong (which has not been proven) and that he had made the statement knowing it to be wrong.

[51] As for the discussion between the vendor and the licensee, the Committee correctly found it was not real estate agency work, for the same reason the licensee's conversation with the buyer was not such work. It did not therefore amount to

¹⁵ Real Estate Agents Act, s 4(1) "real estate agency work" (a).

¹⁶ Real Estate Agents Act, s 4(1) "client" and Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, r 4.1 "customer".

¹⁷ Real Estate Agents Act, s 72.

unsatisfactory conduct. Nor was it sufficiently serious to be considered misconduct. Indeed, the statement made by the licensee about the body corporate, as reported by the vendor, was innocuous.¹⁸

Web advertising

[52] The transactions concerning the two units sold by the licensee became unconditional on 11 February 2022, with settlement on 28 February 2022. However, the web marketing was not removed until 21 February 2022.

[53] It is difficult to understand the vendor's concern. The extended advertising of other units that had already sold did not affect him. He accuses the licensee of intentionally leaving the advertising for his two units live as the latter was seeking a conjunctural arrangement for the vendor's unit.¹⁹ The argument here appears to be that the licensee was trying to put the buyer off, so the licensee could introduce a purchaser and get some of the commission by way of the proposed conjunctural arrangement. This was dismissed by the Committee. We agree. There is not an iota of evidence to support this far-fetched accusation.

[54] The vendor says having the advertisements live after the units were sold "most likely contributed to this issue". The issue is presumably the buyer contacting the licensee and getting the negative information about the body corporate. The vendor is probably correct (if we assume such a discussion took place). However, given that we have dismissed the complaint concerning the licensee's alleged comment to the buyer about the body corporate, it is a matter of no moment that the extended advertising led to the licensee being contacted by him (if at all).

[55] We note that the web advertising was removed on the first working day after the vendor rang the sales manager to request its removal. The removal was only 10 days after the sales became unconditional and occurred prior to settlement. There is no breach of any professional obligation here. Indeed, the complaint is trivial.

Conclusion

[56] There is no evidence of any breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 or other unsatisfactory conduct on the part of the licensee. There is no misconduct. The Committee correctly decided to take no further action.

¹⁸ See vendor's complaint (25 February 2022); Authority's bundle at 028.

¹⁹ Vendor's reply comments to Authority (13 December 2022); Authority's bundle at 174.

OUTCOME

[57] The appeal is dismissed. The Committee's decision is confirmed.

[58] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

PUBLICATION

[59] Having regard to the interests of the public in the transparency of the Tribunal and knowing of wrongdoing by licensees, as well as the privacy of the people involved, it is proper to order publication of the decision of the Tribunal without identifying any party or the agencies.

D J Plunkett
Chair

P N O'Connor
Member

F J Mathieson
Member