

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 23

READT 056/18

IN THE MATTER OF a charge laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 412

AGAINST SURECAPITAL REAL ESTATE LIMITED
Defendant

Hearing 3 and 4 June 2020, at Auckland

Tribunal: Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms C Sandelin, Member

Appearances: Ms C Paterson, on behalf of the Committee
Mr T Rea, on behalf of the Defendant

Date of Decision: 12 June 2020

DECISION OF THE TRIBUNAL

Introduction

[1] Complaints Assessment Committee 412 (“the Committee”) has charged SureCapital Real Estate Limited (“SureCapital”) with misconduct under s 73(b) of the Real Estate Agents Act 2008 (“the Act”). The charge is concerned with SureCapital’s compliance with its obligations as to the supervision and management of salespersons engaged or employed by it, pursuant to s 50 of the Act and r 8.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the supervision obligations”).

[2] The Committee alleges that SureCapital failed to comply with its supervision obligations, and its conduct constituted seriously incompetent or seriously negligent real estate agency work. In the alternative, it alleges that SureCapital is guilty of unsatisfactory conduct under s 72(b) (contravention of a provision of the Act or a rule) and/or (c) (incompetent or negligent real estate agency work) of the Act.

[3] SureCapital accepts that it is guilty of unsatisfactory conduct under s 72(b) of the Act, having breached s 50 and r 8.3, and that (in relation to the period from 11 October to 1 December 2017) it is guilty of unsatisfactory conduct under s 72(c), in that its conduct constituted incompetent or negligent real estate agency work. It denies that it should be found guilty of misconduct under s 73(b).

[4] The Tribunal is required to determine whether SureCapital is guilty of misconduct or unsatisfactory conduct.

Background

[5] Mr Shuo (Frank) Cui is the sole director of SureCapital, incorporated in September 2015. SureCapital purchased a RE/MAX franchise, having branches at Greenlane and Flatbush, Auckland. The charge is concerned with the Flatbush branch of SureCapital.

[6] Mr Cui does not hold any licence under the Act. Before he established SureCapital, his work experience was in commercial banking, and in a family property development business. He told the Tribunal that when SureCapital purchased the franchise, he received some training from RE/MAX in relation to the Act and Rules.

[7] SureCapital held an agent's licence under the Act. Pursuant to s 44(2) of the Act, a real estate company may be licensed as an agent if at least one officer¹ of the company is licensed as an agent or branch manager. Section 36(3) of the Act, albeit in slightly different terms, is to similar effect. The position of a person nominated as the person by virtue of whom a real estate company may hold an agent's licence was referred to in the proceeding as the "licensee agent", or "eligible officer". Neither of these terms is defined, or referred to, in the Act, and there is no defined function or responsibility of an "eligible officer" or "licensee agent" under the Act. In this decision, we will use the term "licensee agent".

[8] Between 30 March 2016 and 30 November 2017,² Ms Julie Pepper, a licensed agent, was employed as licensee agent for SureCapital. At the time, Ms Pepper was based in Whangarei, and worked from there.

[9] When Ms Pepper was first engaged by SureCapital, Mr Gabriel Tuhoro was the manager of the Flatbush branch. He was a licensed agent, and provided day to day supervision of salespersons at the branch. However, Mr Tuhoro was demoted from his position as manager in May 2017 and subsequently left SureCapital. Between 10 May 2017 and 21 September 2018, Mr Antony McGirr was employed by SureCapital. Mr McGirr is a licensed salesperson³.

[10] There was a dispute as to Ms Pepper's and Mr McGirr's position and responsibilities at the Agency. We refer to this further later in this decision.

¹ The definition of "officer" in s 4 of the Act includes "any person, however designated, who is responsible for the management of the company and any person who is responsible for the management of any branch of the company".

² As recorded in the Authority's licensing and employment history for Ms Pepper.

³ As recorded in the Authority's licensing and employment history for Mr McGirr.

[11] Ms Pepper was not involved with Mr McGirr's appointment, and was advised of it by Mr Cui. She understood that Mr McGirr was a licensed branch manager, and would provide supervision, as Mr Tuhoro had done. However, she became concerned that she was being "cut out" from involvement with the branch. In about July or August 2017 she submitted her resignation. She was asked, and agreed, to stay on while SureCapital found a replacement licensee agent.

[12] Ms Pepper became more concerned at the time that SureCapital's registration with the Real Estate Institute of New Zealand was due in September 2017. She said that only the "Principal officer", which she said was herself, could complete the registration. She required certain information from Mr Cui to do this, but he did not provide it. Ms Pepper said she contacted the Institute and learned that the registration had been completed by Mr McGirr, as branch manager, and that SureCapital had advised the Institute that he was the branch manager. That advice prompted her to make further enquiries, as a result of which she learned that Mr McGirr held a salesperson's licence, not a branch manager's licence.

[13] Ms Pepper became even more concerned as to SureCapital's supervision arrangements. She said she spoke to Mr Cui and told him that she had been relying on Mr McGirr to provide supervision, as she could not herself provide supervision from Whangarei. She followed this up with the following email to Mr Cui, dated 11 October 2017, to which was attached an Information Sheet as to supervision, published by the Institute:

Hi Frank

Have you familiarised yourself with this information on Supervision and the Guidelines in August introduced by the REAA?⁴

I have had a good look through both documents and it is evident that the Office and myself as agent are failing in this area. I am simply not able to meet these new requirements leaving both the office and myself exposed. You should immediately this week [appoint] a new Licensee Agent for the office that is onsite and can meet the requirements. I know you are not in favour of using [Mr Tuhoro] in this capacity, but as an interim measure I suggest you use his licence with delegated supervisory responsibilities to the branch manager. The branch manager should work through the requirements ensuring all are met which will entail creating supervisory

⁴ We assume this is a reference to the "Professional Standard on Supervision", set by the Authority under s 12(1)(i) of the Act, effective from 1 July 2017.

plans for each salesperson and regular one on one meetings with each to ensure compliance.

I understand RE/MAX are soon putting out some guidelines in this area too, but I don't feel you can wait on this, measures should be put in place now to avoid any consequences.

I will advise the REAA that I am unable to continue in this capacity at the end of the week.

Let me know if you need further guidance with this.

Regards

Julie

[14] Mr Cui took advice from RE/MAX, and approached two people suggested by them, neither of whom was in a position to replace Ms Pepper. He then spoke to Mr Jeffrey Brill, a licensed agent, who was available to work at the Flatbush branch, but not immediately. Mr Brill was appointed the licensee agent for SureCapital as from 1 December 2017.⁵

[15] Ms Pepper continued as licensee agent until 30 November 2017. She told the Tribunal she did not think she should walk out, as that would mean the branch would have to close as it would not be complying with s 44(2) of the Act. She thought she should give SureCapital time to find a new branch manager or licensee agent.

Supervision under the Act

[16] Section 50 of the Act provides:

50 Salespersons must be supervised

- (1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or branch manager.
- (2) In this section, **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—
 - (a) that the work is performed competently; and
 - (b) that the work complies with the requirements of this Act.

⁵ As recorded in the Authority's licensing and employment history for Mr Brill.

[17] Rule 8.3 of the Rules provides:

8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.

[18] Accordingly, SureCapital, as an agent operating a business, was required to ensure that all of the salespersons employed or engaged by it were properly supervised and managed.

[19] In its decision in *Hutt City Ltd v Real Estate Agents Authority (CAC 20002)*, issued on 9 December 2013, the Tribunal accepted that “the supervision of salespersons is imperative for the proper functioning of the real estate industry.”⁶ The Tribunal went on to say:⁷

Simply put, in terms of s 50 of the Act a salesperson must be properly supervised and managed by an agent or branch manager in the sense that the salesperson’s work is carried out under some experienced direction. This is to ensure that the salesperson’s work is performed competently and complies with the requirements of the Act.

[20] In *Maserow v Real Estate Agents Authority (CAC 404)*, issued on 24 February 2016, the Tribunal said in respect of supervision:⁸

Supervision must be actual, it must be tailored to the circumstances of the agent and the property being sold, it must involve active involvement by the branch manager with the agent(s), including a knowledge and understanding of the issues with each of the properties being sold by the agency, if any. It should include an assessment of the competence of an agent to draft an agreement in English. As New Zealand’s population becomes more ethnically diverse the number of agents for whom English is not a first language will grow. While this offers a better service to vendors and purchasers who speak the same language it may also mean that the branch manager needs to be more actively involved in the drafting of agreements. Agencies must demonstrate that agreements which are drafted by all agents are well written and the clauses on their face sensible and understandable. The branch manager should be alert to identifying potential problems rather than waiting for a possibly inexperienced agent to identify them. At regular meetings of staff branch managers should ask questions to elicit matters which might be of concern such as issues with the boundary, lack of code compliance, and disclosure of known defects and issues with the LIM. All of these matters should be considered by the branch manager and agent when a property is listed for sale and in regular reviews relating to the sale process.

⁶ *Hutt City Ltd v Real Estate Agents Authority (CAC 20002)* [2013] NZREADT 109, at [35].

⁷ At [42].

⁸ *Maserow v Real Estate Agents Authority (CAC 404)* [2016] NZREADT 19, at [25].

[21] SureCapital has admitted that during the period from May to December 2017, the following breaches of its supervision obligations occurred:

- [a] Mr McGirr was responsible for requiring salespersons employed or engaged at SureCapital to carry out all necessary tasks on transactions, and to audit checklists and documents provided. He was providing supervision when, as a licensed salesperson, he was not licensed to do so.
- [b] Mr McGirr advised the Committee that he held regular conversations with a licensed salesperson engaged at SureCapital, Mr David Hilliam, about his real estate activities, and that he had regular “1 on 1 meetings” with Mr Hilliam. Again, he was providing supervision when not licensed to do so.
- [c] Mr McGirr signed off an agency agreement for Mr Hilliam, dated 7 June 2017, in relation to a property at Waiuku.
- [d] Mr McGirr signed off transaction reports for Mr Hilliam’s sales, of two lots in the property in Waiuku.
- [e] Mr McGirr signed off a further agency agreement for Mr Hilliam, dated 26 July 2017, in relation to a property at Mellons Bay.
- [f] Mr Hilliam signed off eight of his own agency agreements, dated 23 May, 29 May, 26 July, 1 August, 26 September, 18 October, and 2 November (two agreements), in the space provided for the branch manager’s signature.

Dispute as to Ms Pepper’s and Mr McGirr’s roles

[22] Ms Pepper’s evidence was that she was engaged solely as licensee agent, with general oversight of the branch, its business operation (including its trust account), training, and behaviour. She told the Tribunal that while some “licensee agent” appointments may involve greater responsibilities, her appointment at SureCapital was more in the nature of a “name on the papers” in order for it to have an agent’s licence.

[23] Ms Pepper said that she had a written contract with SureCapital, but had not been able to locate a copy of it. She said that it was about two paragraphs long, and did not include any requirement that she provide supervision of salespersons. She said this was because, being resident in Whangarei, she was not able to provide such supervision. She said that supervision was to be provided by the branch manager at Flatbush, at first Mr Tuhoro, then by Mr McGirr after Mr Tuhoro was demoted.

[24] Mr Cui's evidence was that Ms Pepper was recommended by RE/MAX as a suitable person to be licensee agent. He was aware that she was resident in Whangarei, and would be working with the Flatbush agency remotely. He understood that Ms Pepper was to be responsible for all aspects of SureCapital's compliance with its statutory and regulatory obligations, including providing supervision of salespersons. He said that he relied on Ms Pepper to operate the Flatbush branch in a manner that complied, and that as "eligible officer", it was her responsibility to ensure that everything was compliant.

[25] As recorded earlier in this decision, other than that the person must be a licensed agent or branch manager, there is no requirement as to who may be nominated as the licensee agent for the purposes of ss36(3) and 44(2) of the Act. Nor is there any provision of the Act which imposes on the licensee agent any particular responsibility, by virtue of being nominated as such.⁹ It was SureCapital's responsibility to ensure that salespersons were properly supervised and managed.

[26] We accept Ms Pepper's evidence, and Ms Paterson's submission, that at no time was it Ms Pepper's obligation to provide supervision and management of salespersons at SureCapital. We find that she was engaged as licensee agent for the purpose of enabling SureCapital to hold an agent's licence. She had overall oversight of the branch, but was not in a position to provide supervision of salespersons. We find that supervision was provided first by Mr Tuhoro, and that Ms Pepper understood that Mr McGirr was providing supervision after Mr Tuhoro's demotion.

⁹ See the discussion in *Baker v Real Estate Agents Authority* (CAC 413) [2018] NZREADT 73, at [22]–[32].

[27] With respect to Mr McGirr, as noted above, Ms Pepper’s understanding was that he was appointed by Mr Cui to replace Mr Tuhoro as branch manager, and was responsible for providing supervision of salespersons.

[28] Mr Cui’s evidence was that Mr McGirr was appointed in a business development role. At the hearing, Mr Cui said that Mr McGirr was managing the sales team. He described Mr McGirr as “sales manager”, and Ms Pepper as responsible for “compliance and risk”.

[29] The Tribunal was provided with a copy of Mr McGirr’s employment contract. His position title was “Head of Sales and Operations”. Schedule A of the contract, headed “Duties and Responsibilities”, included in the list of his duties and responsibilities:

...

Ensure an effective compliance and risk management plan and procedures are in place, including licensee supervision as required by the Real Estate Agents Act as the supervising Agent in charge. You are empowered with the Authority to bind the company in this regard.

...

[30] Mr Cui told the Tribunal that the above provision was included in Mr McGirr’s employment contract in error. He said he had used a RE/MAX template contract, and had not noticed this clause.

[31] The Tribunal was provided with a copy of advice given by the Office Manager of the Flatbush branch to the Real Estate Institute on 12 June 2017, that Mr McGirr was the new branch manager. Mr Cui said that the office manager had made a mistake in describing Mr McGirr as “branch manager”.

[32] In a statement to the Committee, Mr McGirr referred to his supervision of a salesperson engaged at SureCapital as follows:

...

In my role as Sales (line) manager David is supervised on a daily basis, being the days David is in the office, firstly with general conversation in regard to his Real Estate activities. We also have under arrangement a regular 1 on 1 meeting.

...

My role is to oversee and manage the office to the capacity of making sure all relevant administration roles were completed correctly and to company policies, answer any questions from sales team to the best of my ability, help and oversee [Comparative Market Appraisals] and [Sale and Purchase] agreements, these are now in place in a dropbox since November 2017 and sent to the Licensing Agent. If either had issues as a result of my checking then they would be instantly referred to the Licensee Agent, I would talk on a regular basis with the Licensee Agent, and more recently he would attend Sales Meetings, this being on a monthly basis.

[33] We note that in an email to Ms Pepper dated 16 November 2017, Mr McGirr described himself as “General Manager”.

[34] We find that Mr McGirr was, in essence, providing supervision of salespersons. That is clear from his statement to the Committee. However, as a licensed salesperson, his supervision was not in compliance with r 8.3. It resulted in SureCapital being in breach of r 8.3.

Did SureCapital’s failure to ensure that salespersons were properly supervised and managed constitute misconduct?

[35] We accept Ms Paterson’s submission that between May and November 2017, SureCapital did not ensure that there was an organisational structure permitting adequate supervision of salespersons in the Flatbush branch, as:

- [a] Mr Tuhoro who, as a licensed agent, was qualified to provide supervision, was no longer engaged;
- [b] Ms Pepper who, as a licensed agent, was also qualified to provide supervision, was resident in Whangarei and not in a position to provide day to day supervision; and
- [c] Mr McGirr was providing some supervision, but as a licensed salesperson, was not qualified to do so.

Submissions

[36] Ms Paterson submitted that the Tribunal should find SureCapital guilty of misconduct. She submitted that SureCapital engaged Ms Pepper to have oversight of the Flatbush branch, and to be involved with running the branch remotely, but never relied on her to provide day to day supervision of salespersons. She submitted that responsibility lay with Mr Tuhoro, who was then replaced by Mr McGirr.

[37] Ms Paterson did not submit that SureCapital intended to deceive people into thinking that Ms McGirr was a licensed branch manager, or that Mr McGirr held himself out as branch manager. She submitted that SureCapital knew that Ms Pepper was based in Whangarei, but did not take adequate steps to ensure there was an effective system of supervision in place following Mr Tuhoro's departure.

[38] She submitted that this was a systemic failure, persisting for months, and not a "one-off" event, and warranted a finding of serious negligence.

[39] Ms Paterson further submitted that even if SureCapital could be considered to have met its supervision obligations by relying on Ms Pepper to perform that function, it was expressly put on notice by her (in her email of 11 October 2017) that supervision was not being provided as required, that she could not be expected to provide it, that immediate action was needed, and that there could well be consequences.

[40] Ms Paterson submitted that Mr Cui did not make immediate changes to SureCapital's supervision structures, but continued on for a further six weeks knowing that it had no effective supervision structure in place.

[41] Mr Rea submitted that SureCapital accepted that it had breached r 8.3 and s 50, but should be found guilty of unsatisfactory conduct, not misconduct.

[42] He submitted that there is no legal requirement that any director or shareholder of a real estate company must hold, or be eligible to obtain, a real estate agent's licence in his or her own right, or to have any real estate training or experience. He submitted that the eligibility of a company to hold an agent's licence (pursuant to ss 36(3) and

44(2)) is satisfied by engaging a person who holds an agent's licence. He submitted that in the present case, SureCapital satisfied this requirement by engaging Ms Pepper.

[43] Mr Rea further submitted that the consequence of the absence of any requirement as to training and experience for directors and shareholders of a company is that the standard of care and competence expected of a real estate company in respect of its supervision obligations will be different than that expected of its licensee agent, who must have specific training and experience.

[44] In the present case, he submitted, SureCapital's understanding was that it was Ms Pepper's responsibility to ensure that salespersons were properly supervised, and that SureCapital complied with any legal obligations it had from a real estate and licensing perspective. He further submitted that Mr Cui never said anything to Ms Pepper that could have led her to believe differently.

[45] Mr Rea submitted that there is some confusion in the real estate industry around the concepts of "supervision", "management", and "guidance", and those concepts are not easily understood. He submitted that it was evident in the present case that there was confusion as to Mr McGirr's position, as to whether he was a "branch manager", as defined in the Act, and carrying certain duties and responsibilities, or was (in a more general sense) "managing the branch". He submitted that when determining whether SureCapital's breaches constituted misconduct or unsatisfactory conduct, the Tribunal should take into account that Mr Cui did not have (and was not required to have) industry training and qualifications.

[46] He submitted that the Tribunal's decision in *Maserow*, referred to in paragraph [19], above, had led to guidelines being issued by the Authority and the Real Estate Institute, but any training Mr Cui received when purchasing the RE/MAX franchise could not have addressed those guidelines.¹⁰

[47] Mr Rea further submitted that upon receiving Ms Pepper's email of 11 October 2017, Mr Cui immediately contacted RE/MAX, and sought guidance. Through RE/MAX, Mr Brill was engaged, but he was not able to start immediately. Mr Rea

¹⁰ *Maserow v Real Estate Agents Authority (CAC 404)*, above fn 6.

submitted that the period following Ms Pepper's email was relatively brief, and SureCapital had acted promptly to obtain a replacement for Ms Pepper.

[48] Mr Rea also submitted that there was no evidence of any complaints about real estate agency work undertaken by anyone during the period after May 2017. Accordingly, he submitted, Mr Cui could not have had reason to consider that the public was put at risk.

Discussion

[49] We accept that there appears to have been some confusion as to the term "branch manager". It is a defined term under s 4 of the Act (as "a person who holds, or is deemed to hold, a current licence as a branch manager"), and pursuant to s 50 of the Act, salespersons must be "properly supervised and managed by an agent or a branch manager". However, the term may also apply more generally to a person who manages a branch of a commercial entity.

[50] We conclude, on the balance of probabilities, that this confusion led to Ms Pepper's understanding that Mr McGirr was, as branch manager, providing the required supervision at the Flatbush branch, and Mr Cui's understanding that he was performing a different role while "managing" the sales team.

[51] That said, it was clearly SureCapital's responsibility under r 8.3 and s 50 to ensure that all of its salespersons were properly supervised and managed. It cannot be said to be a novel obligation. While the Authority's "Professional Standard on Supervision" was effective from 1 July 2017, the issue of supervision had been canvassed by the Tribunal much earlier.¹¹

[52] After Mr Tuhoro's demotion, SureCapital did not comply with its supervision obligations because although some supervision was provided by Mr McGirr, he held a salesperson's licence and was not a licensed agent or branch manager, and his supervision did not comply with s 50. SureCapital's admission of the breach was properly made.

¹¹ For example, in *Hutt City*, in 2013: above, fn 5.

[53] SureCapital's breach persisted during the period from Mr Tuhoro's departure in May 2017 until Mr Brill commenced on 1 December 2017. We accept Ms Paterson's characterisation of the breach as systemic, and not a "one-off". Further, the Flatbush branch continued to trade after 11 October without supervision in accordance with the Act and Rules, after being put on notice by Ms Pepper as to what was required.

[54] However, we do not accept Ms Paterson's submission that SureCapital sat back and allowed the Flatbush branch to trade in breach of the Act and Rules. We accept that Mr Cui was advised by RE/MAX, and contacted possible agents who could take over the role of licensee agent, including the provision of supervision. He appointed Mr Brill, who appears to have been the only available person who was qualified and able to work in the branch. Also, Ms Pepper stayed on until Mr Brill was able to start, so that there was a licensed agent in the company, enabling compliance with s 44(2).

[55] We have concluded that SureCapital's breach does not reach the level of severity at which a finding of misconduct is justified. We are satisfied that the proper finding is one of unsatisfactory conduct.

Orders

[56] We find SureCapital breached r 8.3 of the Rules and s 50 of the Act. We find SureCapital guilty of unsatisfactory conduct under s 72(b) of the Act. We do not consider it necessary to make a finding of unsatisfactory conduct under s 72(c).

[57] Mr Rea indicated that the determination as to penalty may be made on the papers. Submissions on behalf of the Committee are to be filed and served within 15 working days of the date of this decision. Submissions on behalf of SureCapital are to be filed and served within a further 15 working days after receipt of the Committee's submissions. If the Committee wished to file submissions in reply, such submissions are to be filed and served within 5 working days after receipt of the submissions for SureCapital.

[58] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member