BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 44

READT 047/17

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	MAXWELL VERTONGEN Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 413) First Respondent
AND	JAMES DUNLOP Second Respondent
Hearing:	9 August 2018, at Wellington
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Ms N Dangen, Member
Appearances:	Mr J Waymouth, on behalf of the appellant Mr J Simpson, on behalf of the Authority No appearance by or on behalf of Mr Dunlop (not participating in the appeal)
Date of Decision:	17 August 2018

DECISION OF THE TRIBUNAL

---

[1] The background to this proceeding is accurately set out in the submissions that were filed on behalf of the first respondent by counsel, Mr Simpson. The following statement is taken largely from his submissions.

[2] Mr Vertongen (the Appellant) appeals against the decision of Complaints Assessment Committee 413 (Committee) finding that he engaged in unsatisfactory conduct.

[3] The finding concerned events where the appellant had been contacted by the purchaser of a property that his agency had listed. The purchaser raised a number of safety and electrical issues. The appellant tried to contact the vendor twice by telephone in the United States where he was travelling unsuccessfully, and then authorised repairs to the property. The agency later claimed the costs back from the vendor in the Disputes Tribunal.

[4] The appellant applied for leave to adduce further evidence on the appeal which, it was claimed, would establish that he made other attempts to contact the vendor by email but that application was dismissed. Mr Waymouth, counsel for the appellant, advised that his instructions were that no statement of the reasons for that decision would be required and the Tribunal has proceeded accordingly.

[5] The Committee found that the appellant failed to act in good faith or deal fairly with the vendor, contrary to r 6.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules), as he should have exhausted all avenues of contacting the vendor before incurring significant cost. The appellant challenges this finding on appeal. The broad grounds for the appeal will be considered at the appropriate point in this judgement.

[6] The Authority submits that the Committee's finding was correct and the appeal should be dismissed. There were available means of contacting the vendor that could reasonably have been taken and would have been obvious to the appellant. It was unfair and not in good faith not to make those attempts. The Authority, Mr Simpson

acknowledged, and accepted that, as did the Committee, that this is unsatisfactory conduct at a low level.

Factual overview

[7] The facts of this matter are set out in the Committee's decision.

[8] The appellant is the principal of Unique Realty Limited (the agency), which listed the property at 115A Te Awe Awe Street, Palmerston North (the property) in early 2016. The vendor was 115 Te Awe Awe Investments Limited. The sole director was the second respondent, James Dunlop, who was the complainant in this matter.

[9] The property had been a tenanted property managed by Redex Bryant Limited. Mr Dunlop was a director along with his father, Craig Dunlop.

[10] The property was sold to Louisa Smith, with settlement taking place on 14 March 2016. It is understood that the appellant was not involved in the listing or the sale. The listing agent was Ms Eileen Farquhar, another salesperson at the agency.

[11] In the second half of March 2016, the appellant was in contact with Craig Dunlop in respect of a number of issues identified upon taking possession. In the course of email exchanges on 30 March 2016, Craig Dunlop advised the appellant that further requests from the purchaser needed to be directed to the vendor, James Dunlop, whose email address was provided.

[12] On 6 May 2016, the purchaser contacted the agency raising a number of further health and safety concerns with the property, including electrical issues. The appellant's evidence to the Committee was that Ms Smith was distressed and agitated, and considered the property unsafe. She reported that electrical connections in the property were malfunctioning or not working at all. He contacted the electrician directly who prepared a report on about 10 May 2016, advising that there were safety risks from the electrical issues combined with bad weather and flooding.

[13] The appellant made phone calls to the vendor but these were unanswered. The vendor was known to be overseas, having advised the listing agent before his departure.

[14] On or about 23 May 2016, after taking legal advice, the appellant resolved at a senior management meeting to authorise an electrician to carry out repairs on the property. This decision was made based on the perceived urgency of the repair work and health and safety risks.

[15] The vendor's evidence is that he was never contacted before the repairs were authorised. Most of the dealings regarding the property had been done through email, but he was never emailed in respect of these repairs.

[16] The appellant subsequently claimed the cost of repairs, which totalled $7,038.22 (GST inclusive) from the vendor in the Disputes Tribunal.[7] The basis of the claim was that the vendor had confirmed, in the agency agreement, that the property was "rewired, re-piled and re-plumbed" and that he was not aware of property defects, when this was not the case.

[17] In its decision, the Disputes Tribunal:

[a] found there was an implied term in the agency agreement that the vendor would indemnify the agency for loss resulting from any false representation for which the vendor was responsible;

[b] found the property had not been recently rewired, and the vendor's statement was therefore false;

[c] ordered the vendor to pay $3,252.34 for repairs relating to wiring; and

[d] declined the claim insofar as it related to repairs other than wiring. Those other repairs authorised by the agency were outside the scope of the implied term and false representation, and so could not be claimed by agency.

[18] In particular, the Disputes Tribunal concluded that

> "aspects of the electrical wiring were unsafe"

[19] The vendor subsequently complained to the Authority.

The Committee's decision

[20] The Committee found that the appellant did not act in good faith as, notwithstanding the perceived urgency of the situation, he should have exhausted all avenues for contacting the vendor before taking potentially costly remedial action. There was ample time to attempt contact by email in the period between being contacted by Ms Smith, and actually taking remedial action.

[21] The CAC determined in its Unsatisfactory Conduct Finding dated 18th October 2017 [para 3.5] that the charge of unsatisfactory conduct had been established. It concluded that the Appellant.

> Did not act in good faith, as notwithstanding the perceived urgency of the situation, he should have exhausted all avenues for contacting the complainant before taking action that was potentially costly to the complainant.

[22] The CAC also determined it was "*low level* "and "*motivated by good will"* in its Unsatisfactory Conduct Penalty Orders dated 11th December 2017 [para 3.2].

[23] Particular conclusions which the Committee came to were that even if the vendor might have been unlikely to respond, an attempt to make contact before carrying out the repairs should have been made to discharge the appellant's obligations to act in good faith.

[24] The Committee's finding of unsatisfactory conduct was based on a breach of r 6.2, which provides:

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

[25] The Committee found the appellant's conduct amounted to real estate agency work as it was only two months after the sale of the property was completed. In the view of the Committee this was an essential aspect of follow up work from the transaction that is expected as part of real estate agency work.

Approach to determining the appeal

[26] The approach that we take on this appeal is to determine the matter on the basis of the evidence that was placed before the Committee together with the additional evidence admitted on appeal and then to determine the matter by way of a rehearing.

Assessment

[27] The point which the Tribunal is required to determine is whether it was unfair, or not in good faith, for the appellant not to have made greater attempts to contact the vendor before authorising potentially costly repairs.

[28] The question of whether the conduct of the appellant was in fact "real estate work" was not one of the issues that was inquired into. The question was not raised for our determination and therefore we are not required to express a view on whether the activity did amount to "real estate work".

Was the charge appropriate?

[29] At the hearing of this matter there were a number of exchanges between the Tribunal and counsel about the charges. In particular there was discussion about whether a charge pursuant to rule 6.2 was appropriate in circumstances where there is no question but that the appellant acted honestly and with the objective of taking swift steps to remedy what he perceived as a dangerous situation that existed at the property because of the conjunction of the circumstances of the wet weather and the wiring of the house. If it were necessary to prove that the appellant had not acted in good faith in order for the charge to succeed then it would have been our view that that element of the charge had not been established. That is because the conduct of the licensee was the antithesis of bad faith conduct. He went out of his way to do what he thought was the right thing in a difficult situation.

[30] However, the case as it was put for the authority was that the definition of the offence established by 6.2 was not speaking conjunctively when referring to an absence of good faith and the need for fairness. It would be sufficient, in other words, if the prosecution were able to establish that only one of those elements was present.

[31] Our understanding is that Mr Waymouth for the appellant did not dispute that that was so.

[32] It is also implicit in the approach which the Committee adopted and which is supported by the submissions on behalf of the first respondent on appeal that whether or not there has been unfairness depends upon the outcome that resulted rather than the subjective state of mind of the person who has been charged. Given that the Act and the regulatory framework have as their purpose protection of consumers in respect of transactions[1], we would accept that such an approach is legitimate.

[33] As it was, Mr Simpson's case was that it was "unfair" for the appellant to proceed with authorising the electrical repairs without taking all reasonable steps to obtain the sanction of the owner of the property, the complainant.

[34] An alternative would have been to charge the appellant with negligence under s 72(c). Such a charge may have more closely conformed to the type of conduct that was complained about in this case.

[35] Be that as it may, a charge against the appellant under rule 6.2 is tenable. The reference to dealing "fairly with all parties" that appears in rule 6.2 is a broad one. It would be apt in a case where the licensee has not been even-handed in his/her dealings with both sides to a transaction. We consider that whether there has been unfairness is to be judged by reference to its consequences, and not to the intentions of the person whose conduct is under review.

[1] s 3 Real Estate Agents Act 2008.

[36] "Unfairness" could occur where a licensee has unconsciously or inadvertently failed to take steps that might have been taken in order to ascertain the position of the vendor which we consider was what happened in this case.

[37] Assuming for the purposes of this case that the appellant was required to carry out repairs, and indeed had the authority to do so, he should only have taken steps that would result in physical work being done on the property of the appellant and charges incurred to that person's expense only after taking all reasonable steps to advise of the proposed course of action. The failure to send an email to an address which the appellant had available for that purpose fell below the standard of conduct required.

[38] The consequence of the failure to notify the vendor by email was, as counsel for the Authority submitted, that the vendor was not given an opportunity to be involved in these events or to respond directly to the concerns raised by the purchaser.

[39] We consider that the charge is proved because the appellant did not take all reasonably practicable steps that he could have taken to contact the licensee to obtain authority for the electrical repairs to have been made and in these circumstances has unilateral authorisation of substantial expenditure for that purpose was unsatisfactory.

The seriousness of the conduct

[40] On the basis of the conclusions set out in the preceding subsections of this decision, we do not consider that the question of the seriousness of the conduct needs to be dealt at any length. We agree that the Committee was correct in its judgement that, as the Committee acknowledged, that this was unsatisfactory conduct at a low level.

Alternative approach suggested by the appellant

[41] Counsel for the appellant submitted that the Tribunal and rehearing the charge against the appellant was entitled, just as was the Committee, to determine that no

further action be taken on the complaint pursuant to section 89 or to take no action in regard to the complaint pursuant to section 80 of the Act.

[42] Mr Waymouth submitted-

> 37. Counsel further refers to the determination of the High Court in *Vosper v REAA [2017] NZHC 453*. In particular, the finding by His Honour Justice Heath relative to "competing *goals* ".
>
> 38. His Honour stated:
>
> > *"A balance needs to be struck between the competing goals of promoting a consistent and effective disciplinary process and avoidance of the stigma of a finding of unsatisfactory conduct where the conduct in issue is relatively minor and all other circumstances point to the absence of a need to mark the conduct in that way."*

[43] We have considered the above dictum and have been guided by it in making our assessment of this case.

[44] We have no doubt that in this case the appellant acted in what he considered was the best interests of the parties concerned. Assuming as the parties have done, that the actions of the appellant were "real estate work", they would be subject to the Act and the regulatory regime. But we cannot agree that it is a minor or trivial matter for a licensee to assume that he has authority to take unilateral steps to effect repairs in the absence of exhaustive efforts to contact the vendor. We therefore consider that the finding of the Committee ought not to be disturbed.

[45] We consider that no additional penalty is required. We are also of the view that the terms on which we have recorded our views and this decision, particularly that part of it which acquits the appellant of any lack of good faith, will mitigate the effect of having an adverse finding entered against him by the Tribunal. We do not propose to interfere with the conclusion of the Committee on penalty.

[46] The appeal is therefore dismissed.

[47] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, 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.

_____
J Doogue
Deputy Chairperson

_____
G Denley
Member

_____
N Dangen
Member