

Case Study - Listing Agent purchased property marketed to sell (Tribunal decision)

Background

This matter was referred by the Property Agents Board (the Board) to the Property Agents Tribunal (the Tribunal) as it was considered that the conduct amounted to more than minor misconduct.

As this matter occurred before 1 April 2017, the relevant legislation in relation to the conduct is the *Property Agents and Land Transactions Act 2005* (the former Act) and the Code of Conduct (the former Code) appearing in schedule 2 of that Act. However, the orders and actions taken were imposed under Section 110 of the *Property Agents and Land Transactions Act 2016* (the Act).

Relevant Facts

In early February the Complainant contacted the Property Agent to discuss the potential sale of his property (the Property). At all material times the Property Agent was an employee of a Real Estate Agency.

The Property Agent attended the Property in the presence of the Complainant's partner and conducted a walk-through, carried out an appraisal of the Property and discussed the timing of marketing the Property, a suitable price range and what chattels were to be included in the sale. The Property Agent suggested to the Complainant's partner that the Complainant contact the Property Agent when he was ready to go to market with the Property, which was expected to be at the end of the year. The Property Agent advised that an achievable sale price for the Property was mid to high \$300,000's.

On 3 September the Property Agent met with the Complainant and his partner to discuss when to place the Property on the market; marketing options including recommendations for a \$4,000 advertising package; a range of possible sale prices for the Property; and the chattels that were going to be included in the sale.

During this meeting the Property Agent stated that his commission on a sale of \$375,000 would be \$11,000 and that he planned to begin to market the Property the following week and would organise a promotional video. The Complainant with his partner orally agreed to the marketing proposal and told the Property Agent to go to market the following week.

During this meeting the Complainant and/or his partner had disclosed to the Property Agent that they were selling because they intended to construct a house on another block which they had already purchased.

Between 3 and 6 September, the Complainant and his partner revealed the lowest price that would 'not disappoint' them would be \$375,000 (the minimum acceptable price) as well as their 'absolute goal price' and confirmed that they would want to be on the market in the coming weeks.

Between 6 September and 9 September, the Property Agent contacted the Complainant and made an offer to purchase the Property himself for \$375,000 less \$11,000 for the potential commission and less \$4,000 for marketing (the offer price). The offer price was accepted by the Complainant and no deposit was made by the Property Agent upon signing the contract.

At the time the Property Agent made the offer to purchase the Property, the Complainant had not signed a written appointment authorising the Property Agent to act. The Complainant had not paid the Real Estate Agency for any marketing and there was no marketing of the Property undertaken by the Property Agent or Real Estate Agency.

Grounds of referral

The Board in the referral to the Tribunal alleged that:

1. The Property Agent had been instructed by the owner to sell the Property.
2. The Property Agent acquired an interest in a property that he had been instructed to sell, contrary to Section 22 of the former Act.
3. The Property Agent's conduct fell short of the standard of competence and diligence that a reasonable member of the public is entitled to expect from a reasonably competent property agent, and the Property Agent was therefore guilty of unsatisfactory professional conduct.

4. By undertaking the conduct described the Property Agent had:
 - (a) failed to act in the best interests of the client, the owner, contrary to clause 16(b) of the Code; and
 - (b) grossly contravened his fiduciary obligations to the owner contrary to clause 17(d) of the former Code; and
 - (c) failed to act honestly contrary to clause 17(e) of the former Code.

Discussion and findings of the Tribunal

The Tribunal found upon the evidence that as at 3 September or at latest 6 September, all the matters necessary to constitute an instruction to sell had occurred, with the sole exception of a formal written instruction.

The Tribunal also found that the evidence established that in all dealings with the Complainant and the Complainant's partner and all actions up until the time of his decision to inspect the Property with a view to making an offer to purchase the Property, the Property Agent was acting in his capacity as a property agent employed by the Real Estate Agency. Further, all the information obtained by the Property Agent at the appraisal in the February was obtained in his capacity as an employee of the Real Estate Agency.

In those circumstances, the Tribunal was satisfied that in all respects but the written engagement document, the Property Agent had been engaged and instructed to sell the Property. The written engagement was simply a formality, albeit one without which the Property Agent would not have been entitled to receive payment for his services. However, there were defences available under Section 22(5) 22(7) or 22(8) of the former Act that the Property Agent could rely on as discussed in headings below.

Written approval before entering into negotiations and after full disclosure of all relevant facts by the Property Agent

The Tribunal determined that there was no written disclosure to the Complainant of a material and significant aspect, which was that the Property Agent saved \$15,000 through the direct purchase compared to if he purchased it through the Real Estate Agency or otherwise on the open market.

Further there was no written disclosure to the Complainant or the Complainant's partner of the facts which might be thought to be most relevant to whether to accept the offer or not or the way in which the offer was reached by deduction of the commission and marketing fees from the Complainant's minimum acceptable price, or comparable property prices in the area.

Acting honestly and reasonably

The Tribunal found that evidence showed that the Property Agent requested the Complainant and the Complainant's partner not to talk to anyone about the offer and that the Property Agent advised that his offer would save time and effort having open homes and avoid the uncertainty surrounding going to market. The Tribunal considered that the probable motive of the Property Agent in making these statements, was to conceal his actions from his employer, the Real Estate Agency business.

The evidence also indicated that the Property Agent failed to disclose to his employer, the Real Estate Agency he was acting consistently in all respects with the role of a property agent which then changed from that role to that of purchaser, when he indicated he was considering making an offer, and then made the offer.

This arrangement, including the failure to disclose it, had the effect of depriving the Property Agent's employer of a commission to which they would have been entitled, had the Property Agent continued to act in the role of a property agent and a sale eventuated.

The only beneficiary of this arrangement was to the Property Agent who made savings which were not shared in any way with the Complainant. The overriding view of the Tribunal was it was not satisfied that in all respects during the transaction that the Property Agent was acting honestly and reasonably.

Were the owners substantially in as good a position as if the Agent did not buy the Property?

The Tribunal noted that the Property was not exposed to what was an increasingly buoyant market at the time, so there was a possibility of loss of a better price and net return to the Complainant. However, whether a different outcome may have prevailed cannot be measured and therefore the Tribunal was not satisfied that the Complainant was in substantially as good a position.

Unsatisfactory professional conduct generally and the Code - clause 16(b) – acting in the client’s best interests.

The Tribunal observed the relationship between the Complainant and the Property Agent is a fiduciary one and failing to act in the best interests of a client is a breach of that fiduciary relationship.

The key issue for the Tribunal was whether the Property Agent by deducting the commission and marketing amounts from his Contract offer was a gross breach of fiduciary duty and dishonest as there had been no work carried out to justify any commission, and there had been no work carried out or money spent on marketing and acting in the interests of the Complainant would have required the Property Agent to consider providing to the Complainant some of the benefit of that deduction, by increasing the purchase price.

However, the Tribunal having regard to the Property Agent’s oral disclosure to the owner of the way in which the offer price was reached, did not find that the deduction of those items was dishonest or a gross breach of fiduciary duty towards the Complainant.

Professional misconduct, and clauses 17(d) and 17(e) of the Code - gross contraventions of fiduciary obligations and failing to act honestly or fraudulently.

The Tribunal had to consider whether the Property Agent in deducting the "commission" and the "marketing" amount from the sum of the minimum acceptable price, the Property Agent had grossly breached his fiduciary duty and had failed to act honestly and that this conduct fell short of the standard of competence and diligence that a reasonable member of the public is entitled to expect from a reasonably competent property agent.

The Tribunal was not satisfied that the Property Agent behaved dishonestly towards the Complainant in using the information obtained whilst acting as the Complainant’s property agent.

However, the Tribunal was satisfied that the Property Agent’s actions in bypassing his employer, the Real Estate Agency were deliberate and that failure to advise his employer of his actions as an employee setting up the marketing of the Property, followed by the change of stance to acting solely on his own behalf, was dishonest. The Property Agent obtained knowledge of the Property solely through his employment and whilst acting as a representative of his employer.

However, in determining what action should be taken, the Tribunal considered the purpose of the former Act, which was essentially the protection of the public, rather than employers. The dishonest conduct towards a member of the public would probably have been professional misconduct, however in the circumstances the Tribunal did not consider this aspect constituted professional misconduct but was satisfied that it constituted unsatisfactory professional conduct.

Overall Findings of the Tribunal

In summary, the Tribunal found the Property Agent’s conduct constituted unsatisfactory professional conduct in the following respects:

- i. In acquiring an interest in the Property which he had been instructed to sell, the Property Agent contravened Section 22(1) of the former Act. He had not established any of the defences provided under that Section.
- ii. Failing to act in the best interests of his client contrary to clause 16(b) of the former Code: the Property Agent did not act in the best interests of his client, in depriving the owner of the opportunity to have the price for the Property tested on the market. Whether this led to any monetary loss by the owner cannot be established, but the opportunity was lost.
- iii. Failing to act honestly, an example of professional misconduct given by clause 17(e) of the Code: The Tribunal finds that in the overall transaction, which included acting dishonestly towards his employer, the Property Agent was guilty of unsatisfactory professional conduct.

Orders and actions taken by the Tribunal

1. The Property Agent was ordered to undertake an ethics course identified by the Board that being “CPPREP5003 Manage ethical practice in the property industry”. This training must be undertaken within one year of the date of this decision and is to be paid by the Property Agent.
2. The Property Agent was fined the sum of \$15,000.00 to be paid within 6 months of the date of the decision.

The Tribunal ordered pursuant to Section 111 of the Act that the Property Agent pay costs in the sum of \$23,842.61 to the Property Agents Board.