

Decision No: [2011] NZREADT 36

Reference No: READT 065/10

IN THE MATTER

of s.111 of the Real Estate Agents Act 2008

BETWEEN

ROGER HANDISIDES

Appellant

AND

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC 10030)**

First Respondent

AND

PAUL CRUDEN

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

APPEARANCES

Appellant in person assisted by Ms G Dixon
Mr Michael Hodge for first respondent
Mr and Mrs Cruden in person

DECISION

Introduction

[1] Mr Handisides is a licensed real estate agent working with First National Golden Bay. Mr and Mrs Cruden saw an advertisement placed by Mr Handisides in the local newspaper GB Weekly on Friday 21 August 2009. It described a property for sale of "40.2 hectares with some flats but mostly tiger country". Mr and Mrs Cruden had been looking for a rural property and were interested in the advertisement. Mrs Cruden telephoned Mr Handisides and got directions to see the property. Mrs Cruden said that she and her husband visited the property in the morning of Saturday 22 August by themselves. They contacted Mr Handisides later that day and arranged to meet him at the property in the afternoon of 22 August. At this meeting they say that they received from Mr Handisides a copy of the flyer prepared by Mr Handisides, some photographs, information about the property from the Tasman

District Council, a small map with the boundaries marked on it, a copy of the Title and information about the power supply which could be generated from the stream.

[2] The advertisement is central to this case and reads “40 hectares of tiger country:

- *40.662 hectares just 10 kilometres of easy drive from Takaka;*
- *Non permitted hunters cottage on level two acre (approx) site with good access;*
- *Permanent stream capable of up to 8 kw per day power generation;*
- *Excellent hunting at your doorstep;*
- *Borders Kahurangi National Park;*
- *Covered in established native bush;*
- *Perfect for self sufficiency. Call Rodger Handisides.”*

[3] Mr and Mrs Cruden say that Mr Handisides discussed the property with them and pointed out the boundaries and a building site.

[4] On Sunday 23 of August the couple met Mr Handisides in his office. A draft agreement for sale and purchase was prepared which was typed on Monday morning, signed by Mr Cruden at that time and by Mrs Cruden later on Monday 24 August. The agreement was signed by the vendors by 27 August 2009. The agreement was conditional upon three items:

- [a] Approval by the vendors and purchasers’ solicitors as to form, content and title within 20 days;
- [b] Finance within 20 working days;
- [c] The vendors agreeing to remove all car bodies and rubbish and the purchaser being allowed unrestricted access to the property prior to this agreement becoming unconditional “*in order that they may establish the suitability of further building sites*”. Mr Handisides explained to the Tribunal that this last condition was inserted to protect the Crudens and to make sure that they were able to satisfy themselves as to the setbacks from the boundaries required by the Tasman District Council and as to the general suitability of building sites on the property.

[5] The dispute in this case centres around the information that was given to Mr and Mrs Cruden by Mr Handisides as to the area available as a building site and where Mr Handisides indicated that the boundaries of the property were to be found.

[6] The focus of the dispute is in an area on the south eastern boundary of the property [see exhibit 5]. The dispute centres around whether or not Mr Handisides told the Crudens that the hunters’ cottage and the area known as the “*skid site*” were

inside or outside the boundaries of the property. There are also disputes about when and to whom Mr Handisides showed the property.

[7] Mr Handisides said that he had obtained information from Mr Gillespie, the owner of the property, as to the location of the boundaries of the property. He says that Mr Gillespie told him that the hunters' cottage was on the property and the boundary was within six or seven metres of the hut and ran past the hut up into the bush. The topographical map showed a white dot in the apex of the area between the eastern and southern boundary. Mr Handisides says that he assumed that the white dot he marked with an X on exhibit 5 was the hut within the boundary of the property. Mr Handisides said when they looked at the property the only part that was flat was the bottom couple of acres, and the rest required *"tramping boots, a reasonable level of fitness, some suitable tramping or hunting gear and footwear suitable for crossing the creek"*. He said that anyone wanting to build would need to go across the creek and build on the *"flats"* just over the creek or further up. Mr Handisides said that the flats over on the other side of the creek was level and would be a great place to build. He marked these areas with a circle and circle with a cross on exhibit 5. These are the areas that he said he was referring to in the advertisement as the *"level two acre site"*.

[8] Mr Handisides gave a different version of the process by which he met the Crudens. He said he did not hear from Mrs Cruden in response to the advertisement but after another First National agent had been approached by Mrs Cruden who told her that she wanted to purchase the property sight unseen and asked the other agent to fill out an agreement for sale and purchase. He then called Mrs Cruden. He says he saw Mrs Cruden on Sunday at Takaka (i.e. the office). He says she and he travelled in a convoy together to see the property. Mr Handisides says that Mrs Cruden told him that her husband did not need to see the property and that she would make any decisions about the purchase. He says that on arrival at the property they parked up the right of way by the hunters' cottage. He says he pointed out the boundaries of the property and told Mrs Cruden that the building site would require to be set back a minimum 10 metres from the Paper Road site. He says he showed her where he believed the Paper Road to be. He says that he told her that she would need to obtain a survey for the south east boundary, if she intended to build in the vicinity of the hunters' cottage area.

[9] Mr Handisides says that the next day Mrs Cruden arrived with her husband at his office (Monday) and wanted him to draft an agreement for sale and purchase. He says he made it clear to them that he had serious doubts as to the suitability of the building site around the hut. He says that he suggested the condition as to access to the property to look for other building sites to protect them.

[10] All the parties agree that the following Saturday, 29 August they met on the site to look again at the boundary. Mr Handisides says he met them on the site known as the skid site which he says he knew to be on the property of the neighbour Lynn Tregida. He said that they talked standing on Ms Tregida's property looking across towards the property the Crudens were purchasing. Mr Handisides suggested it might be possible for Ms Tregida to sell them a portion of her land to improve the boundary line on the south-eastern boundary. He stressed that the skid site was not part of their land. Mr and Mrs Crudens' version of this meeting was different. Mr Cruden said that he had been considering the matter since signing the agreement and wanted to again clarify what they had received, not because he had any doubts,

but just because he wanted to work out where the creeks were etc. He says that he got exhibit 5 from the Tasman District Council and took it with him to the meeting. This was a blown up aerial map with the boundaries super imposed upon it. It is dated 28 August.

[11] He says that the parties used the blown up map to try and establish where the boundaries were. Both he and Mrs Cruden were certain that Mr Handisides pointed to some pine trees to the rear of the skid site saying that this was the boundary. They agree that Mr Handisides told them that the skid site was within their property.

[12] A subsequent meeting was held on the property with Mr Gillespie after the sale was unconditional. At this meeting in September 2009 Mr Gillespie apparently showed the parties the correct boundaries which did not involve the skid site. The Crudens were very unhappy at this discovery. They however still believed that the hunters' cottage was within their property.

[13] After the completion of the sale the Crudens did extensive clearing work around the hunters' cottage and flattened and landscaped the area. They had a survey done and discovered that in fact the hunters' cottage itself was not on the property but was on the Paper Road. The Paper Road which ran between the Crudens' property and the neighbour's was in fact not able to be purchased (as Mr Handisides had suggested), there was no flat building land on the roadside of the creek and the skid site was outside the boundary completely. Instead the Crudens have followed an old logging road over the creek to a site approximately 500 metres above the hunters' cottage and have cleared land and constructed their property on this site. This has required extensive work.

[14] The Crudens complained to the REAA in early 2010. They claimed that Mr Handisides misled them as to what they purchased. They claimed that the advertisement said that there was a cottage on a two acre building site. They claimed that the cottage was not on their land and the two acres was realistically less than a quarter of an acre, which was unbuildable. They claimed that Mr Handisides told them it would cost \$20,000 to obtain a survey and it was not important to do this as no one would care where the boundaries were in this area anyway.

[15] The Complaints Assessment Committee's investigator met with the various parties and in November 2010 the Complaints Assessment Committee issued a decision. In that decision the Complaints Assessment Committee summarised the complaint as follows:

- Mr Handisides told them that non permitted cottage was on part of their property and on a near level two acre building site;
- Mr Handisides told them the property line was on the left hand side of the road entry leading into the cottage and then it was in line with the grass road going up to the skid site on the neighbour's property;
- They would actually own the creek and that the water from the creek was on their land.

[16] The Complaints Assessment Committee focused on the fact that the advertisement incorrectly described a level building site of about two acres when no

such area existed. The Complaints Assessment Committee also found that the agent should have given the purchasers a copy of a valuation dated 19 January 2001 especially with the handwritten note from the vendor saying a full survey was undertaken and pegs located prior to 1997. The Committee found that Mr Handisides' performance was unsatisfactory conduct and was in breach of s.72(a) of the Act. They found that because of the operation of the transition principles and the provisions of the Real Estate Agents Act 1976 no penalty orders could be made against Mr Handisides in respect of the finding of unsatisfactory conduct. Mr Handisides appealed this decision. He has interim name suppression.

The Issues

[17] The issues are as follows:

- [a] Was the advertisement misleading? If so, was there a valid excuse for this?
- [b] Where did Mr Handisides indicate to the Crudens the boundaries were to be found?
- [c] Should the Crudens have been given a copy of the 2001 valuation?

Issue 1: Was the advertisement misleading

[18] Yes: The advertisement was misleading. There was no *"flat approximately two acre building site "near to the hunter's cottage"*". Mr Handisides in his evidence accepted that in retrospect the advertisement might have been misleading. He said however that the building sites that he was referring to were the *"flat areas over the creek"*.

[19] Ms Dixon for Mr Handisides said that he had taken sufficient steps to verify the information that had been passed on to him by Mr Gillespie as he researched the title and boundaries with the Council.

[20] It is clear that anyone reading this advertisement would think that the level two acre building site with good access was at or near the hunters' cottage. Building sites across the creek could not be described as good access as a bridge would need to be constructed in order to access them. This is clearly misleading.

[21] Mr Hodge submitted that the advertisement was wrong but that if all reasonable steps were taken to verify the accuracy of this information then Mr Handisides might have a defence. Secondly, it might also be a defence if it was made clear to the purchasers that Mr Handisides was just passing on information received from the vendor.

[22] In Mr Hodge's submission the evidence of Mr Handisides that the level two acre sites were over the creek could not fairly be said to be good access and in his submission the issue of verification thus fell away.

[23] There was no evidence that Mr Handisides told the Crudens that he was just passing on information from Mr Gillespie. He seems to have been adamant as to the location of the boundaries.

[24] We therefore determine that Mr Handisides' advertisement was misleading. We find that this behaviour is unsatisfactory conduct. This is defined in paragraph 34 below.

Issue 2 - Boundaries

[25] In order to resolve this issue we must make some factual findings as to the dates and times of meetings. We accept the evidence of Mr and Mrs Cruden that they met with Mr Handisides on the afternoon of 22 August and again on 23 August to prepare the agreement. We think it is unlikely that Mrs Cruden would have viewed the property herself without her husband and that they would have made a decision to purchase it without Mr Cruden viewing the property. We also find that the Crudens were led to believe that the boundary included some or part of the skid site to the left of the hunters' cottage from the road – (see photographs 9, 10, 11 and 13 of exhibit A).

[26] In making this decision the Tribunal have had to assess the evidence of Mr Handisides, Mr and Mrs Cruden, and Mr and Mrs Crudens' witness Lynn Cameron. We found the evidence of Mr and Mrs Cruden to be more reliable than Mr Handisides. Mr Cruden in particular impressed with his careful approach to the purchase. Both he and Mrs Cruden described visiting the property and driving down the left hand driveway (see photograph 9). The right hand driveway side (photograph 11) led to the hut. The left hand side took them to the skid site, a flat area behind the hut. It is the flat area between the two driveways that the Crudens believed comprised the flat building site. Given the advertisement was handed to the Crudens it is entirely believable that they thought that the skid site was in fact the flat two acre site referred to by Mr Handisides in the advertisement.

[27] We find that Mr Handisides showed the property to the Crudens on Saturday 22 August in the afternoon and they went to visit the property again on 29 August 2009.

[28] At both of these meetings the boundaries were discussed. We accept the evidence of the Crudens (supported to some extent by Mr Handisides' own evidence) that Mr Handisides was definite about the position of the boundaries. Mr Gillespie, said that Mr Handisides was familiar with the property. Mr Handisides was ultimately wrong in his explanation as neither the cottage nor the flat area were within the boundaries.

[29] It is common ground that the issue of a survey was discussed at one meeting. Mr Handisides agrees that he said it would cost about \$20,000 to have a survey but his version is that he suggested that a survey of the southern boundary alone would be needed because the other boundaries were really not important when considering where a property could be built. The Crudens' evidence is that Mr Handisides mentioned that a survey would cost \$20,000 and said "*but who cares in this area*". Mr Handisides also claims that he gave the Crudens a copy of the email of the

neighbour Lynn Tregida dated 21 August 2008 (page 42 of the bundle of documents) in which Ms Tregida says that water lines ran down her property, and she did not want to sell this part. The Crudens claim that they did not see this email because if they had it would have alerted them to the fact that the water pipes (on the left hand driveway) were not on their property and thus the skid site also might not be.

[30] We find that a survey was discussed. We do not find that clause 18 in the agreement for sale and purchase (unrestricted access to the property to establish the suitability of further building sites) did offer any protection to the Crudens. If there had been real concern about the boundaries then the agreement should have been subject to confirmation that the boundary was as described or subject to survey or something similar. The Crudens themselves simply thought this clause gave them the right to unrestricted access to the property until settlement.

[31] From this we conclude that the Crudens were misled about the boundaries and not alerted to any need to get a survey. We find that this behaviour is also unsatisfactory conduct (which is defined below).

Other Issues: Valuation

[32] The issue also arose as to whether or not the valuation undertaken in 2001 should have been provided to the purchasers. The reason for this was on the last page of the valuation (page 21 of the bundle of documents) there is a handwritten notation by Mr Gillespie which says: *“This is not correct. A full survey was undertaken and the pegs located prior to 1997”*. This is a reference to the disclaimer in the valuation that a survey of the property had not been undertaken. The Crudens claim that had they seen this it would have alerted them to the survey and to ask for more information.

[33] The Tribunal does not place much emphasis on this failure by Mr Handisides. The 2001 valuation was for much less than the listing price. The note by Mr Gillespie was not such that it was imperative that the purchasers be informed of the survey but it should have alerted Mr Handisides to the need for some caution. However the reality is that the advertisement itself created an expectation in the Crudens’ mind that the boundary was where they say that they were told it was. This was misleading and the existence of the valuation does not add to or detract from this. We make no finding on this point.

The Law

[34] Section 72 reads:

“72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*

- (c) *is incompetent or negligent; or*
- (d) *would reasonably be regarded by agents of good standing as being unacceptable.”*

[35] The Tribunal must consider if Mr Handisides’ conduct breaches s.72. For the reasons set out above we find it does in particular s.72(a), (c) and (d):

Real Estate Agents Act 1976

[36] The charge relates to the defendant’s conduct prior to the commencement of the 2008 Act on 17 November 2009. Section 172 of the 2008 Act therefore applies and provides as follows:

“172 Allegations about conduct before commencement of this section

- (1) *A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—*
 - (a) *at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and*
 - (b) *the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.*
- (2) *If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the **Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.*** [emphasis added].

[37] In cases where the licensee who has been charged was licensed or approved under the 1976 Act at the time of the conduct (which the defendant was), and has not been dealt with under the 1976 Act in respect of the conduct (which the defendant has not), s.172 creates a three step process:

Step 1: Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

Step 3: If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made by this Tribunal.

[38] Looked at in the round, a charge relating to pre-17 November 2009 conduct falls to be determined in accordance with the disciplinary standards set out in ss.72 and 73 of the 2008 Act in the same way as a charge about post-17 November 2009 conduct (**Step 2**). However, there are two requirements under s.172 which limit its retrospective effect:

- [a] Complaints outside the jurisdiction of the 1976 Act are also outside the jurisdiction of s.172 (**Step 1**);
- [b] Only orders which could be made under the 1976 Act may be made under s.172 (**Step 3**).

[39] Each of the three steps, as they apply to this case, will be addressed in turn.

Step 1 – Could have been complained about or charged under 1976 Act

[40] Answer: Yes. Mr Handisides could have been the subject of a complaint.

Step 2 – Misconduct (Section 73 of the 2008 Act)

[41] The question under **Step 2** is whether unsatisfactory conduct is proved under the 2008 Act.

[42] For the reasons set out above we find it has been proved.

Step 3 – Orders under the 1976 Act

[43] The Licensing Board had the power to make orders under s.99 of the 1976 Act in respect of acts of dishonesty or such seriousness that a salesman could be suspended or removed. In these circumstances a fine of \$750 was also an option. For cases where the conduct was not so serious (the equivalent of s.72) no penalty was available. The result is that Mr Handisides can be found guilty but no penalty can be imposed. We agree with the Complaints Assessment Committee's findings on this point.

[44] We also need to consider our role as a body appellate. In *Kacem v Bashir* [2010] NZSC 112 the Supreme Court has clarified that the principles in *Austin, Nichols* apply to Courts exercising jurisdiction over general appeals from lower Courts, not appeals from decisions made in the exercise of a lower Court's discretion. The distinction between general appeals and appeals from discretionary decisions is set out at paragraph [32]:

“[32] But for present purposes, the important point arising from ‘Austin, Nichols’ is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal

against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. [emphasis added]

[45] We accept that we have the right to re-examine the facts on this appeal.

[46] Having analysed all the law and the facts set out above we find that Mr Handisides' conduct did amount to unsatisfactory conduct. An agent has an obligation to take care to ensure that any advertisement flyer is clear and not on the face of it misleading. The Crudens suffered significant loss as a result of this advertisement and their purchase of the property. It does not matter that they were anxious to buy the property, they still relied upon (and were entitled to rely upon) the advertisement which described the salient features of the property. The discussions with Mr Handisides reinforced his point. If we had been able to award compensation then we would have considered very carefully an application by the Crudens for compensation relating to the cost of gaining access to the building site that they eventually established. However we cannot award a penalty not available under the Real Estate Agents Act 1976. We accept the Complaints Assessment Committee's findings on this point.

[47] Section 111 of the Act reads:

“Appeal to Tribunal against determination by Committee

...

(3) *The appeal is by way of rehearing.*

(4) *After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.*

(5) *If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.”*

[48] The Tribunal therefore confirms the determination of the Committee. The Tribunal dismisses the appeal. The Tribunal discharges the interim order for non-publication of Mr Handisides' name. The Tribunal orders publication of Mr Handisides' name in accordance with s.108 of the Real Estate Agents Act 2008.

[49] The Tribunal draws to the parties' attention the appeal provisions in s.113 of the Act as follows:

"113 Notification by Tribunal

When the Tribunal determines a matter in a proceeding, the Tribunal must notify every person involved in the proceeding, the Authority, and the Registrar of the determination in writing, setting out the reasons for the decision and the right of appeal to the High Court."

DATED at WELLINGTON this 22nd day of November 2011

Ms K Davenport
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member