Decision no: [2012] NZREADT 44

Reference no: READT 075/11

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **EMMA DONKIN**

Appellant

AND **REAL ESTATE AGENTS AUTHORITY (CAC 10057)**

First Respondent

AND **STEPHEN MORTON-JONES**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mr Rae for the appellant
Mr Clancy for the First Respondent
Mr Morton-Jones in person

HEARD at AUCKLAND on 20 July 2012

DECISION

Introduction

[1] In June 2010 Mr and Mrs Morton-Jones entered into an agreement to purchase a residential property at 5 Oteha Valley Road, Torbay. Barfoot and Thompson marketed the property. The agents concerned were Ms Shepherd and her assistant Miss Van der Merwe. The property had a separate one bedroom basement flat. The property had been advertised by Barfoot and Thompson's as *"legal home and income"*. Mr Morton-Jones complained that the salespersons confirmed that the property was a fully permitted legal home and income when it was not. After entering into the agreement [which was conditional upon a LIM report and finance] Mr and Mrs Morton-Jones discovered that the home and income was not a legal home and income. Finance was accordingly not available to them. The agreement was cancelled.

[2] After the cancellation of the agreement Mr Morton-Jones wrote to Barfoot and Thompson and asked them to compensate him and his wife for the wasted costs that they had suffered. These were $1,249.92 for the solicitor's fee, builder's report and LIM report. Ms Donkin, the general manager of Barfoot and Thompson, Mairangi Bay responded and offered them $200. Mr and Mrs Morton-Jones rejected this offer, returned the cheque and received no further correspondence from Barfoot and Thompson. Accordingly they complained to the Real Estate Agents Authority who carried out an investigation. On 12 May 2011 the Complaints Assessment Committee found that Ms Donkin, the manager at Barfoot and Thompson was guilty of unsatisfactory conduct. The Committee commented at paragraph 4.5:

> "*General practice by agents in marketing a property is for the agents to request the vendor to provide a LIM. It is then the licensee's responsibility to confirm details contained in the LIM prior to advertising any such details. In this case, that of the property being a home and income. It is therefore not sufficient for the licensee to rely on information concerning consents obtained for the property from the vendor and the Terralink Property Guru alone in order to make the assumption that the property was a home and income".*

[3] In the penalty decision in July 2011 the CAC ordered Ms Donkin to apologise. This was done first by Mr Rae and then by letter from Ms Donkin (but both were written by Mr Rae). The CAC also ordered that $1,294.92 be paid to the complainants.

[4] The Tribunal note that in this appeal Mrs Donkin is not seeking return of the $1,294.02 paid to Mr and Mrs Morton-Jones. She accepts (or Barfoot and Thompson do) that this was properly payable. Rather she seeks to have the finding of unsatisfactory conduct overturned. The apology has been provided. Mr Morton-Jones to the Tribunal read out the apology received. It was not one which was calculated to make any complainant feel that the licensee was genuinely sorry. Rather it said words to the effect that *"we have been ordered to provide an apology by the Complaints Assessment Committee and accordingly apologise"*. Mr Rae made the comment that this letter was his responsibility and that it was difficult when the matter was under appeal to provide an apology. We note that it is entirely possible to apologise for distress which occurred as a result of an agent's actions without dealing with the question of responsibility for the failure and also in a way that makes the complainant feel that the agency has taken on board the concerns of the complainant. However these comments are not necessary to resolve this dispute.

[5] However this appeal raises two issues.

(i) What is the obligation of agents when considering information given to them by a vendor that the property is a home and income?

In this case it is accepted that the agents concerned obtained information from Terralink which appeared to confirm that this was a "*home and income"*. They did not obtain a LIM and they did not, (as Ms Donkin says was office practice) obtain rating information which would have shown whether the unit was separately rated or not.

The Tribunal are required to determine the limits of the agent's obligations in this respect.

(ii) *The second question for the determination is whether or not Ms Donkin as the branch manager and having a supervisory role over her staff has breached her supervisory role under s 50 of the Real Estate Agents Act.*

[6] Submissions were received from both the REAA and Ms Donkin on the decision of this Tribunal in *LB v the Real Estate Agents Authority*, [2011] NZ READT 39. In that case property was advertised as a home and income but a covenant on the title made it clear that the property could only be used as a residence for one household unit. The Tribunal said it considered that a licensee upon taking instructions on the sale of property should search the title or have some competent person search it for the licensee and should be familiar with the information shown on the title. The Tribunal held that the licensee should be familiar with and able to explain clearly and simply the effect that covenants and restrictions which might affect the rights of the purchaser (on the title).

[7] Subsequently the Law Society has made submissions to the Real Estate Agents Authority regarding a review of its rules and has commented (*inter alia*) that this decision could create obligations on real estate agents which meant that they were duplicating work which properly falls within the province of the purchaser's lawyers.

[8] We do not share this anxiety. We consider that case and others in the High Court directed towards the consumer protection aspect of s 3 of the Real Estate Agents Act 2008. In our view the issue is simply that when advertising includes a positive representation such as in this case, that the property is a legal home and income, then the agent must ensure that either:

(a) they have made proper enquiries to ensure the property is a legal home and income; or

(b) they make it clear to any purchaser that this is a statement from the vendor and will need to be independently verified by the purchaser; or

(c) they clearly inform a purchaser that there may be issues regarding this and they need to obtain independent legal advice.

[9] The point is that an agent should make sure before a positive representation is made that they have at least taken some precautions to check the veracity of the representation. We think that *LB* goes no further than this. We do not expect that land agents will have the ability of a solicitor to determine acceptable risks and problems with titles and/or covenants and/or LIM reports but clearly purchasers rely upon an agent when making representations as to the state of the property. The agent's job is to ensure that the purchaser is not misled. In this particular case if the agent had bothered to obtain a LIM or had called the Council to ask, or even obtained a rates report then there would have been no misrepresentation. The difficulty here was that without checking further the agent accepted the vendor's words and made no effort to alert

anyone of any potential risk in accepting this statement. We echo the comments made by Justice Wild in *Altimarloch Joint Venture Ltd v Moorhouse*, (HC Blenheim CIV-2005-406-91, 13 July 2008).

[10] It has been suggested to us by counsel for Barfoot and Thompson that we should be cognizant of the fact that the action happened prior to the Tribunal giving its decision in *LB* and therefore aware that industry standards had not at this time required any steps to be taken. We do not accept this. It is plain that from the commencement of the Act agents had an obligation to take care when making representations. How they take care depends upon the representation that is made. This is a reflection of Rule 6.4, 6.5 of the Real Estate Agents Client Care Rules. We do not think that the obligation is any more than this. Accordingly we find that the failure to take some steps to verify whether the property was the home and income or to take steps to warn the purchaser is behaviour capable of amounting to professional misconduct, either unsatisfactory conduct or misconduct depending on the nature of the concerns.

[11] We now turn to consider the liability of Ms Donkin. Ms Donkin gave evidence. She told the Tribunal that she managed the busy Mairangi Bay office. She said she was insistent that her staff be properly supervised. She said that she had told Ms Shepherd that she should contact the Council and obtain a rating demand. A rating demand for the property was produced to us which showed that the Council rated the property as Residential 1, i.e. 1 unit. Ms Donkin said had this been done then it would have alerted the agent to the fact that it was unlikely to be a legal home and income. She said that Ms Shepherd and her assistant Ms Van der Merwe did not take these steps. Neither Ms Shepherd or Ms Van der Merwe gave evidence. Ms Shepherd had written and provided some evidence to the Complaints Assessment Committee but Ms Donkin's evidence was that neither of these two agents were still in the industry. The question for this Tribunal is is there a breach of s 50 of the Real Estate Agents Act 2008?

[12] We need to make it clear that we do not consider that a simple assertion that staff have been told to act in a certain way and have not is a proper discharge of the obligation to supervise under s 50. More is required. Section 50 makes this perfectly clear. However we consider that Ms Donkin appears to have carried her supervisory role appropriately. She gave clear instructions to the staff about what was required and while she did not make a further enquiry of the salespersons we do not consider that this failure in this case is sufficient to amount to unsatisfactory conduct.

[13] Accordingly we uphold the appeal and reverse the decision of the Complaints Assessment Committee. We substitute our decision to take no further action on the complaint against Ms Donkin.

[14] It could and should have considered the complaints against the actual salespersons but as Mr Morton-Jones has made it clear that he is content to have the finding against Ms Donkin reversed and as neither of the salespersons are currently practising as agents we do not consider that it is necessary to refer the matter back to the CAC to consider the complaints against them.

[15] The Tribunal draws the parties' attention to the provisions of s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 31st day of July 2012

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Ms K Davenport
Chairperson

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Ms J Robson
Member

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Mr G Denley
Member