

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision No. [2012] NZREADT 67

Reference Nos. READT 3/12 and 4/12

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

BETWEEN **JOHN EVANS**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 10054)**

Respondent

AND **GRAEME ORR**

Second respondent

AND BETWEEN **GRAEME ORR**

Second appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 10054)**

First respondent

AND **JOHN EVANS**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD at AUCKLAND on 27 September 2012

DATE OF DECISION 31 October 2012

COUNSEL

Mr J Evans on his own behalf
Mr G S N Orr on his own behalf
Ms J M Pridgeon, counsel for the Authority

DECISION OF THE TRIBUNAL

The Prime Issue

[1] Did Mr Orr's conduct, as a real estate salesperson selling 106A Wharf Road, Waiheke, to the complainant/purchaser (Mr Evans the appellant) amount to either unsatisfactory conduct or misconduct under the Real Estate Agents Act 2008 (the Act)? In fact, the Vertical Refreshment Company, of which Mr Evans is a shareholder and director, purchased the property.

[2] Mr Evans asserts that there has been "*misconduct*" by Mr Orr rather than "*unsatisfactory conduct*" as found by the Authority; but Mr Orr counter-appeals against there being any finding of guilt against him.

[3] By consent, both appeals were heard by us together on 27 September 2012.

[4] On the day of Mr and Mrs Evans taking possession of the property, an adjoining neighbour (Mr S Ivory) advised Mr Evans that there were boundary encroachment issues. Mr Ivory further advised that there had been a relevant boundary peg in place but he felt it had been kicked away during the viewings of the property. Mr Ivory had wanted to ensure that Mr (and Mrs) Evans knew that land which might seem part of their property was, in fact, part of a right of way serving them both and another neighbour also. Obviously, he was concerned they might block it by parking on it, and the vendor (Ms Stenzel) had always been careful not to block it.

[5] Mr Evans asserts that Mr Orr incorrectly indicated the boundary of the property to him. Mr Orr states that he urged Mr Evans to obtain a LIM report on two occasions, and also that he should retain a surveyor to check the boundary. He also states that the vendor never told him about the boundary issue and that he did not kick over any boundary pegs.

Issues on Appeal

[6] The factual findings of the Committee are challenged as to the representations made about the location of the boundaries. The issue is whether the Committee was correct to find unsatisfactory conduct by the licensee, or whether a charge of misconduct should have been laid with us, or whether there can be no finding of guilt against the licensee.

[7] As indicated above, there are two appeals before us:

[a] Mr Graeme Orr, appeals against a decision of Complaints Assessment Committee 10054 finding he engaged in unsatisfactory conduct pursuant to s.89(2)(b) of the Act. At the time of the complaint, Mr Orr held a certificate of approval as a salesperson under the Real Estate Agents Act 1976. He now holds an agents licence which has been voluntarily suspended, and has returned to his previous occupation as an architect;

[b] Mr Evans also appeals against the Committee's decision on the basis that the Committee should have referred a charge of misconduct to us.

[8] Before the Committee, Mr Evans' complaint alleged that Mr Orr engaged in "misleading, deceptive and unsatisfactory conduct" in respect of "representations made with regards to the legal boundary of the property, removal of a boundary peg and failure to advise of well known boundary dispute with regards to the property".

[9] At the time of the relevant conduct, Mr Orr was not a licensed real estate agent; but an approved salesperson working under the effective control of a licensed real estate agent, Lyn Jordan (Ms Jordan), of Lyn Jordan Real Estate Ltd trading as Harcourts, Waiheke.

The Committee's Decision

[10] The Committee set out the facts and noted that enquiries had been made with other well-known Waiheke based real estate agents regarding any knowledge of such a boundary dispute, but noted that none were aware of it.

[11] The Committee also noted that an agent from Bayley's Real Estate, who was also marketing the property at the time of the alleged conduct of Mr Orr stated that Ms Stenzel had never mentioned anything specific about the boundary to him.

[12] The Committee was satisfied that no boundary dispute existed prior to Ms Stenzel selling the property to Mr Evans, and that there was no compelling evidence that Mr Evans removed boundary pegs. The Committee then stated:

"[5.12] It seems that while the Licensee failed to comprehend the significance of the information provided to him by the property owner in relation to the encroachments and positioning of the garage in relation to the boundary, there is no evidence of any wilful withholding of Information.

[5.13] The Committee finds that the Licensee made an error in hazarding a guess as to the true position of the boundary in question and those actions led the Complainant to mistakenly assume the boundary was where it "appeared to be."

[13] The Committee was satisfied that the requirements of s.172 of the Act were made out and determined that Mr Orr had engaged in unsatisfactory conduct. The Committee determined that it could not make Orders against Mr Orr as the conduct occurred under the 1976 Act and Mr Orr was only a salesperson under that Act.

Background Evidence

[14] Mr Evans' main complaint relates to Mr Orr's alleged misrepresentation regarding the legal boundary of the property. His complaint form stated that, prior to purchasing the property, Mr Orr pointed out the legal boundary of the property and relying on that advice Mr Evans purchased the property.

[15] Mr Evans also stated that, on the day of possession, a neighbour, Shayne Ivory, advised that there was a boundary "dispute" and that part of a deck on Mr Evans' house, and its steps, and part of Mr Evans' garden, encroached upon his property.

Mr Evans' complaint form states that Mr Ivory told him that a boundary peg had been kicked under the deck and, for this reason, was not visible during Mr Evans' previous visits to the property. He also stated that Mr Ivory later told him that the vendor, Ms Frances Stenzel, informed Mr Ivory that she had told Mr Orr about the boundary issue. Mr Evans added that, subsequent to purchasing the property, he found out that the boundary "*dispute*" was well known by real estate agents on Waiheke Island.

[16] In the course of his evidence Mr Evans had emphasised that he asked Mr Orr on two occasions precisely where the relevant boundary ran. He said that Mr Orr responded that he would check his files and, at a later meeting at the property, gave Mr Evans a general indication of where the boundary ran but did not in any way indicate the possibility of any encroachment.

[17] Mr Orr conceded that he had indicated to Mr Evans where he considered the boundary to be. However, he stated that he provided Mr Evans with a Property Guru aerial photograph, showed him approximately where the boundary ran, and was careful to point out the Property Guru disclaimer that boundary indications could be up to three metres out. For this reason, he said he told Mr Evans to employ a registered surveyor to verify the exact location of the boundary. He said that Mr Evans vehemently rejected the suggestion that he commission his own survey. Mr Orr said he also recommended on two occasions that Mr Evans obtain a LIM report.

[18] Mr Orr stated that Ms Stenzel never shared any information regarding the boundary with him. He said that the first he knew of any boundary issue was when Mr Ivory came and spoke to both him and Mr Evans on possession day. He denies hiding a boundary peg. Mr Orr also said that he had raised with Mr Ivory directly Mr Ivory's suggestion that he (Mr Orr) knew about the boundary dispute and withheld that information prior to the sale. In response, Mr Ivory denied having a "*boundary dispute*" with anyone.

[19] Mr Orr's response is supported by the said agent Ms Jordan. Among other things, she confirms that Ms Stenzel did not mention any boundary issues to Mr Orr or herself; and the first they both heard of the boundary issue was from Mr Ivory on the day of possession. She put it that, in this respect, Ms Stenzel was not honest with them.

[20] Mr Ivory had been abroad prior to Mrs and Mrs Evans taking possession. He confirmed telling both Messrs Evans and Orr about where the boundary actually lay on the day of possession. He said that there was never a "*dispute*" about the boundary with Ms Stenzel; and he told Mr Evans so that he would understand where the boundary lay and not compromise access to Mr Ivory's property. He said that two reasonable neighbours could get by with the boundary as it was, i.e. without any issue. He denied telling Mr Evans that Mr Orr knew of the boundary dispute prior to selling it. He confirmed that Ms Stenzel knew where the boundary was, that it had been pegged out, and that the pegs were there for all to see. Mr Ivory also denied telling Mr Evans that Mr Orr had kicked out and hidden the pegs under the deck.

[21] Mr Ivory also mentioned that he had proposed a cost-free solution to Mr Evans but that he found Mr Evans very difficult to deal with and, he said, that Mr Evans would not co-operate. In the course of evidence, it was put that the encroaching part of the deck and stairs could easily have been sawn off.

[22] Ms Stenzel said she was aware of where the boundary lay and that there was never any "dispute" between her and Mr Ivory. She said that, when selling her property, she distinctly remembers pointing out to Mr Orr "that the boundary line ran from a certain point through a tree, through part of the deck, and beyond". She said she told Mr Orr that the boundary had been re-surveyed and pegged when she built her garage. She stated that Mr Orr *"did not look too closely at any of the pegs"* and *"did not walk over while she was talking to him to look at the pegs she pointed out"*.

[23] She confirmed that she did not think it was an issue at the time as there had never been a boundary *"dispute"* with any of her neighbours. Correspondence between Ms Stenzel's solicitors and Mr Evans' solicitors repeats Ms Stenzel's assertion that she told Mr Orr about the boundary issues.

[24] Ms Stanzel emphasised that she felt that Mr Orr did not pay much attention when she pointed out the particular boundary between her property and that of Mr Ivory. She told him she had built on a garage in January 2004 and then had that boundary surveyed and pegged. That showed that her deck encroached about a metre over the boundary (but it seems more on the plans provided to us). Her house had been built in the 1980s. She stressed that Mr Orr told her there was no need for him to view any boundary peg.

[25] Messrs Evans and Ivory have had a boundary *"dispute"* since Mr Evans purchased the property. As a result, Mr Evans had difficulty leasing the property to tenants and has entered into a formal boundary adjustment agreement with Mr Ivory.

The Stance of Mr Orr

[26] In a typed form of evidence-in-chief, Mr Orr stated that Ms Stenzel never told him at any stage of there being any boundary issues at the property. He said that he did indicate to Mr Evans where he thought the boundary went, but told Mr Evans that he should get a registered surveyor to verify this and that might cost up to about \$3,000. Mr Evans' response was an emphatic *"No"*. Mr Orr seemed to be suggesting that Ms Stenzel's evidence is *"dishonest"*.

[27] Mr Evans' offer was conditional on a LIM report. Mr Orr emphasised that he had emailed Mr Evans twice to have him fulfil this condition but Mr Evans chose not to. Mr Orr felt that Mr Evans' lawyer should have ensured that a LIM was obtained for, if that had happened stated Mr Orr, *"we wouldn't be going through this process"*. Mr Orr put it that he would have been stupid to try and conceal a boundary issue and then make a LIM report a condition of the contract and chase the purchaser to fulfil that condition.

[28] He asserted that he knew nothing whatsoever of any boundary issues and again stated that, if he had had something to hide, it would not have been prudent for him to have made obtaining a LIM report a condition of the purchase contract. He completed his evidence-in-chief as follows: *"At the time of sale, it was not required of real estate sales-people to establish where the boundaries were. The purchaser's problems arose from him deciding to (a) not employ a registered surveyor (on my recommendation) and (b) to not purchase a LIM from counsel at a mere cost of \$260."*

[29] Mr Orr also gave oral evidence to us and was carefully cross-examined.

[30] He again was adamant that Ms Stenzel had never told him, at any stage, of there being any boundary issue and he generally covered matters as set out above.

[31] As photographs of the property show, well-grown trees cover the relevant side of the property and a driveway to its garage. The driveway is shared between neighbours.

[32] It was clarified that the boundary overhang or encroachment is quite a small part of a two level deck and its stairs to the driveway, and a small part of garden seems to also encroach on the neighbour's property. It seems that the deck encroachment could quite easily be sawn off. However, Mr Evans has negotiated a significant purchase of land from Mr Ivory including the encroachment area and, it seems, further land to facilitate his carparking. The purchase price was about \$30,000 with legal and survey fees totalling a further \$12,000.

[33] Among other things, Mr Orr emphasised that although he was a real estate agent at the time and holds a degree in architecture and has quite some architectural experience, he is not a surveyor. He asserts that he could not have been expected to have realised that there was an encroachment or boundary issue between the vendor (Ms Stenzel) and the neighbour Mr Ivory.

[34] It seems that the boundary and shared driveway situation between the properties of Messrs Ivory and Evans is somewhat constricted because 106A Wharf Road was cut off Mr Ivory's property many years after its house had been built.

Evidence of Ms Stenzel

[35] We have had the benefit of comprehensive evidence and cross-examination of Ms Stenzel whom we considered to be very credible and clear. She was subpoenaed by Mr Evans.

[36] Essentially, she is adamant that, when she instructed Mr Orr, she outlined to him by pointing gestures where the relevant boundary was. She particularly offered to show him a boundary peg which would have led to him understanding the encroachment in issue. It seems that she did not spell out to Mr Orr that there was an encroachment because it had not been an issue between her and the neighbour, Mr Ivory, in any way. It had simply not bothered either of them (Ms Stenzel and Mr Ivory) until upon purchasing the property, Mr Evans allegedly parked on the shared driveway. That so incensed Mr Ivory that he objected to the encroachment which had not bothered him until then.

[37] Inter alia, Ms Stenzel said that when she signed the agency or listing agreement for Mr Orr, she pointed out the boundaries of the property and, particularly, emphasised the limited parking area available to her. This was because she did not want agents parking on common areas or on land owned by her neighbour, Mr Ivory, as she knew that annoyed Mr Ivory. She said that she particularly wanted to show the relevant boundary peg to Mr Orr but he said there was no need to do that. As a consequence, she did not show Mr Orr any of the boundary pegs of the property.

[38] She seemed to be saying that, from her description of where the boundary went, Mr Orr should have understood that part of the deck encroached and that when the purchaser asked the line of the boundary from him he should have checked the position out better.

[39] In cross examination, Mr Orr pressed Ms Stenzel that they had never had a discussion about any boundary and that their discussions focused on the owner of the property not being permitted to park on the shared access road to the property. Ms Stenzel put it to Mr Orr that his memory was failing him and that the whole point of her explaining to him where the boundary lay was to clarify the parking situation, and that Mr Orr had a printout which showed the encroachment.

DISCUSSION

[40] As stated above, the issues on appeal relate to conduct which occurred under the 1976 Act. The factual findings of the Committee are challenged as to the representations made about the location of the boundaries. Mr Evans asserts that Mr Orr knew about the boundary issue and deliberately withheld this information from him. Mr Orr asserts that he did not know anything about the boundary issue and that he advised Mr Evans to obtain a LIM report and employ a surveyor to confirm the boundaries of the property.

[41] The issue is whether the Committee was correct to find unsatisfactory conduct, whether a charge of misconduct should have been laid with the Tribunal, or whether the Committee should have determined to take no further action.

Statutory context

[42] Section 172 of the 2008 Act applies to allegations about a licensee's conduct which occurred before the 2008 Act came into force and provides:

“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."

[43] The effect of s.172 is to create a three step process in respect of allegations about a licensee's conduct which occurred prior to 17 November 2009:

- [a] Could the licensee have been complained about or charged under the 1976 Act in respect of the conduct?
- [b] If so, does the conduct amount to unsatisfactory conduct or misconduct under ss.72 or 73 of the 2008 Act?
- [c] If so, only orders which could have been made against the licensee under the 1976 Act in respect of the conduct may be made.

[44] Mr Orr was approved under the 1976 Act at the time of the conduct alleged. He has not been "dealt with" under the 1976 Act for that conduct. The conduct in issue could have been the subject of a complaint under the 1976 Act. The question then is whether the conduct amounts to unsatisfactory conduct under the 2008 Act (or whether a prima facie case of misconduct is established).

[45] Sections 72 and 73 are key provisions in the complaints and disciplinary regime created by the 2008 Act. Section 72 defines unsatisfactory conduct by a licensee and s.73 defines misconduct by a licensee.

[46] Among other things, a wilful or reckless breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules) constitutes misconduct (s.73(c)(iii)), a breach of the Rules constitutes unsatisfactory conduct (s.72(b)(i)). Those Rules "... set minimum standards that licensees must observe and are a reference point for discipline", Rule 3.3. Relevant provisions include:

- [a] Rule 6.2: A licensee must act in good faith and deal fairly with all parties engaged in a transaction;
- [b] Rule 6.4: A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.

[47] These rules clearly set out obligations owed to all parties to a transaction, vendor or purchaser.

[48] If Mr Orr was told by Ms Stenzel that the boundary was not where it would appear to be from a physical inspection of the property, then he had a duty to pass that information on to Mr Evans. We are satisfied that Mr Evans enquired about the boundary; and Mr Orr indicated where he "*thought the boundary went*" which was incorrect.

[49] If we find that Mr Orr was aware of the boundary issue but failed to pass that on to Mr Evans, it must follow that his conduct was in breach of r.6.4 and/or 6.2.

[50] Whether that breach should lead to a finding of unsatisfactory conduct or referral of a charge of misconduct to the Tribunal will depend on whether we conclude that the breach was unintentional or, prima facie, wilful or reckless.

[51] A wilful or reckless breach of the Rules is misconduct under s.73(c)(iii). A breach of the Rules simpliciter is unsatisfactory conduct under s.72(b) which creates strict liability in this regard, reflecting Parliament's view about the importance of compliance with the Rules (as well as the Act and regulations made under the Act).

[52] A Committee of the Authority has a wide discretion whether to inquire into, or inquire further into, a complaint or allegation under the Act. However if, having held a hearing on the papers under s.90, a Committee is satisfied on the balance of probabilities that an agent has breached the Rules, then a finding of unsatisfactory conduct must follow pursuant to s.72(b).

[53] A defence of total absence of fault may be available to an agent. It is submitted for the Authority that this does not assist Mr Orr.

[54] Whether or not Mr Orr was aware of the boundary issue, and whether or not any failure to disclose the issue to Mr Evans was wilful or reckless, are questions for us.

[55] If we are not satisfied that Mr Orr was made aware of the boundary issue, the question remains whether his conduct was unsatisfactory in erroneously indicating where he thought the boundary was, - albeit subject to a suggestion that a survey be obtained.

[56] If we conclude that Mr Evans was in fact misled, even if this was unintentional, it would be open for us to find that a breach of r.6.4 occurred and make a finding of unsatisfactory conduct.

Available orders

[57] It is not disputed that the appeal relates to conduct which occurred before the 2008 Act came into force on 17 November 2009. Pursuant to s.172 of the Act, the only orders that can be made against Mr Orr following a finding of unsatisfactory conduct are those that were available under the 1976 Act *Complaints Assessment Committee v Downtown Apartments Limited (in liq)* [2010] NZREADT 06 at [39]-[44]. Accordingly, no orders may be made by the Tribunal against Mr Orr by way of compensation.

[58] If we consider that a charge of misconduct could have been referred to us by the Committee, we should only interfere with the Committee's decision not to refer a charge on appeal if satisfied that the Committee made an error of law or principle, took into account irrelevant considerations, failed to take account of relevant considerations or if the decision is plainly wrong; *Dunn v Real Estate Agents Authority* (CAC 10043) [2012] NZREADT 56.

Our Conclusions

[59] This has been a very stressful situation for Mr Orr as licensee and Mr (and Mrs) Evans as purchasers. It arose both because the licensee did not take an opportunity provided by the vendor to clarify the site of a particular boundary on this residential property, and the vendor did not realise the significance to a purchaser of the need for

such clarity as she had a harmonious relationship with Mr Ivory the neighbour affected by the encroachment.

[60] A crucial point of time in this case was when, in the course of instructing the licensee about the sale of her property, Ms Stenzel (the vendor) spelt out a particular rather jagged side boundary of the property being marketed, but did not realise that the licensee was unlikely to realise that the vendor's description showed that an outside deck (and part of its stairs down to the driveway shared by her with two neighbours) encroached on the land of the neighbour Mr Ivory. The vendor had offered to show a particular boundary peg to the licensee. That would have almost certainly alerted the licensee to the encroachment, but he declined the opportunity as no boundary concern had been flagged from his overall assessment of his instructions.

[61] In fact, this matter may not have become so inflamed but for the purchaser seeming to annoy the neighbour, Mr Ivory, over parking issues. Indeed, the agent, Mr Orr, had focused on ascertaining and explaining to Mr and Mrs Evans the parking issues and saw that as the problem being outlined to him by the vendor, rather than the collateral issue of the encroachment.

[62] As indicated, we found Ms Stenzel to be a thoroughly honest witness but she did not seem to have spelt out the encroachment issue to Mr Orr. He also seems honest but was rather casual over assessing Ms Stenzel's explanation to him as to where the boundary ran. It is that particular conversation being at cross-purposes, to quite some extent, which led to this dispute. One can understand that Ms Stenzel would not have seen the encroachment as an issue because it had not been a matter of concern between her and Mr Ivory.

[63] It seems to us that the encroachment could have been remedied much more cheaply than for the sum expended by Mr and Mrs Evans; although they were probably wise to have that expenditure also give them further land to resolve the parking issue.

[64] Strictly speaking, Mr (and Mrs) Evans asked Mr Orr, then a salesperson, to explain the lie of the boundary but he did not adequately ascertain nor clarify that situation. He ought to have taken up Ms Stenzel's offer to look at the boundary peg. Indeed, any agent taking instructions to sell a property should check for boundary pegs if reasonably practicable. There can be no suggestion of Mr Orr having sought to mislead Mr and Mrs Evans or anyone else. It is curious that he does not seem to recall Ms Stenzel outlining to him the lie of the particular boundary.

[65] We recall Mr Orr remarking that, at material times (under the previous legislation), there was no requirement for a real estate agent to establish the lie of boundaries. That is not our view. We consider it to have always been elementary that an agent do his or her best to ascertain what he or she has been instructed to market. This includes taking reasonable and prudent steps to ascertain the boundaries of the property. Certainly, if asked by a prospective customer, the agent must endeavour to answer accurately, or advise lack of knowledge or certainty so that a surveyor can be consulted.

[66] We again emphasise that there is no suggestion of any dishonesty on the part of Mr Orr. However, we confirm the view of the Committee that, in all the circumstances of this case, Mr Orr is guilty of unsatisfactory conduct but there has been no misconduct under the Act on his part.

[67] Accordingly, both appeals are hereby dismissed.

[68] Pursuant to s 113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s 116 of the Act.

Judge P F Barber
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member