BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 73

READT 028/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**SIMON AND JADE ORSBORN**
	Appellant
	Applicant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20006)**
	First respondent
AND	**WARWICK COLLIER and JVL PRESTIGE REALTY LTD**
	Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr G Denley - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF DECISION 7th December 2012

REPRESENTATION

Mr B A Stewart, counsel for the appellants
Mr L J Clancy and Ms J M Pridgeon, counsel for first respondent
Mr A Darroch, counsel for second respondents

DECISION OF THE TRIBUNAL

The Issues

[1] Simon and Jade Orsborn ("the appellants) appeal against the 23 April 2012 decision of Complaints Assessment Committee 20006 imposing a penalty on the second respondents for unsatisfactory conduct. That penalty decision related to the way the second respondents acted as estate agents on the sale to the appellants of a property at 139 Kawakawa Road, Feilding.

[2] The Committee found that advertising in respect of the property included misleading material and, for that reason, made findings of unsatisfactory conduct against the licensee, Warwick Collier, and against the agency JVL Prestige Limited

(the second respondents). The Committee considered what, if any, orders should be made under s.93 of the Real Estate Agents Act 2008 consequent to those findings. It held that the second respondents' conduct was at the lower end of the scale of unsatisfactory conduct and made orders for censure against them both; and no further penalty was imposed.

[3] The appellants appeal the penalty decision and seek:

[a] An apology from both the licensee and the agency;

[b] Payment of $49,385.00 made up of:

[i] $25,000 as compensation for misrepresentation as to the current rateable value of the property;

[ii] $24,385.00 as compensation for misrepresentation as to the area of the property.

[c] An order that the licensee and the agency pay the appellants' costs in respect of the investigation and prosecution of the complaint both before the Committee and us.

[4] In response, the second respondents submit that the Committee's decision should be upheld.

The Basic Facts

[5] On 13 May 2011, the vendors of the property signed a sole agency agreement with the agency for the sale of the property.

[6] The licensee prepared advertising material for the sale of the property. Before the Committee, the licensee stated that he had sourced some information from RPNZ, which showed that the property had a rateable value of $435,000. However, the vendors insisted that the rateable was $460,000 and produced a 1 April 2011 rates invoice from Manawatu District Council to confirm the higher capital value and a land area of 3.8512 hectares.

[7] A brochure and newspaper advertising was prepared describing the land size of the property as 9.5 acres (3.8512 hectares) with a rateable valuation of $460,000.

[8] At the time of listing the property, the vendors also advised the licensee that there was to be a *"boundary adjustment"* to include the front paddock of the property in the land belonging to 147 Kawakawa Road, which the vendors also owned. The application to the local Council for this boundary adjustment was made on 26 May 2011, but not approved until 16 June 2011.

[9] The appellants accept that, at all relevant times prior to their purchasing the property, they knew that a boundary adjustment was taking place. The licensee had informed all prospective purchasers of this.

[10] On 20 June 2011, a copy of the Conditions of Sale of Real Estate by Auction was provided to the appellants and all interested parties. Importantly, it described the land area as being 3.471 hectares (more or less), noted that it was *"subject to*

survey being Lot 2 of the proposed subdivision plan annexed", and noted that a new certificate of title was to be issued.

[11] On 27 June 2011, the licensee and the sales manager of the agency met with the appellants to go over the Conditions of Sale of Real Estate by Auction and suggested that they seek legal advice on the documents. They understood that the appellants did, in fact, seek legal advice.

[12] On 29 June 2011, the appellants purchased the property at auction for $420,000, after the auctioneer had pointed out the reference in the Terms and Conditions of Sale to the boundary adjustment.

[13] The appellants say that when they made their purchase, they relied on the advertising material, which stated the land area as being 9.5 acres (3.8512 hectares) and the rateable valuation as $460,000. They say that after the auction, but immediately prior to settlement, they realised that the land area they had purchased was actually 8.54 acres (3.471 hectares) and that the rateable value of the property was $435,000.

The Committee's Decision

[14] The Committee took note of the following:

[a] The Manawatu District Council rates invoice for the property covering the period 1 July 2010 to 30 June 2011 was based on the capital value of the property being $460,000 and the land area being 3.8152 hectares. This valuation was carried out in August 2007;

[b] The capital value of the property, prior to being subdivided, was reassessed by the Manawatu District Council in August 2010. This put the value of the property at $435,000, effective from 1 July 2011. This was based on a land area of 3.8512 hectares. Importantly, the change in value was not reflected in the rates calculations until July 2012. The rates calculation is what the licensee based the advertising material on;

[c] The property which the appellants bought, with a land area of 3.4782 hectares, had not been rated at the time of the Committee's investigation. However, Manawatu District Council's valuers provided a 1 August 2011 valuation notice to the Committee which showed a capital value of $425,000 and a land area of 3.4782 hectares;

[d] A new Certificate of Title was issued for the property on 25 July 2011, which is after the appellants bought the property, showing the land area as *"3.4782 hectares more or less"*.

The Committee's Assessment of the Licensee's Conduct

[15] The Committee was of the view that the licensee's conduct breached Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules) so that it amounted to unsatisfactory conduct pursuant to s.72(b) of the Act. We now set out both Rule 6.4 and s.72 of the Act as follows:

*"**6 Standards of professional conduct***
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.

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."

[16] The Committee's view was based on a number of reasons including that, at the time of signing the listing for the property, the licensee was aware from his own investigations that the rating valuation quoted by the vendors and that given by RPNZ were at odds. However, he ignored this and marketed the property in accordance with the vendors' instructions without further investigation. The Committee also thought that the licensee should have taken extra care with descriptions of the land area because he knew that a subdivision was taking place and that these descriptions were likely to change.

[17] The Committee was of the view that the licensee did not intend to mislead but failed to sufficiently highlight particulars of the transaction likely to change as a result of the subdivision; and it was not unreasonable for the appellants to rely on the advertising material.

[18] Nevertheless, the Committee considered that the appellants also had to take some responsibility for the confusion. They had sought legal advice prior to the auction; were told about the subdivision from the outset; were given a copy of the auction documentation well in advance of the auction (which stated a number of things that should have put them on notice); and were told of the boundary adjustment at the commencement of the auction by the auctioneer. The Committee also noted that their final purchase price was still less than the 2010 capital valuation.

The Committee's Assessment of the Agency's Conduct

[19] The Committee found that JVL Prestige Realty Ltd was in breach of its supervisory obligations under s.50(2)(b) of the Act; that it should have been aware that the listing information was subject to change through the boundary adjustment; and it should have taken extra care to ensure that prospective purchasers were not misled. Section 50 of the Act reads as follows:

"50 Salespersons must be supervised
(1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.

*(2) In this section **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—*

(a) that the work is performed competently; and

(b) that the work complies with the requirements of this Act."

[20] As indicated above, the Committee opined that while there was a breach, it was at the lower end of the scale and simply censured both second respondents.

The Stance of the Appellants

[21] The appellants emphasised that they purchased the property at auction on 29 June 2011 relying on the advertising brochure prepared by the second respondents showing the rateable value of the property as $460,000 and land area 9.5 acres. They discovered after the auction that the area purchased was 8.59 acres and that the rateable value of the 9.5 acre area as at time of production of the brochure was $435,000 and not $460,000 as shown on the brochure i.e. the rateable value of $435,000 related to an area of 9.516 acres. They emphasise that, at the time of listing the property, the vendor had advised the licensee that the vendor would retain the front paddock which was to be subdivided off and that the vendor and both second respondents knew that the subdivision would occur and yet the second respondents prepared a brochure showing the area of land being sold as 9.5 acres.

[22] It is also put for the appellants that the revaluation of the Manawatu district effective as at 1 August 2010 would have been known to any real estate agent selling real estate in that area.

[23] The appellants explained their method of calculating their claim of $24,385,000 (based on area apportionment) for compensation for the reduced area of land they were sold. They claim a further $25,000 on the basis of the correct rateable value at time of sale being $435,000 and not $460,000.

The Stance of the Second Respondents

[24] The second respondents submit that the CAC decision as to penalty should be upheld on the basis that although the initial brochure described the land as comprising 9.5 acres, the appellants and other interested purchasers were informed about the subdivision on several occasions. It is put that the appellants purchased at auction after being informed in the days prior to the auction of the subdivision and the correct size of the property and that was set out in the conditions of sale by auction and they took legal advice also. There was reference to the rateable value of $460,000 having been provided to JVL Realty by the vendors supported by a rates demand. It was noted that the appellants purchased for less than the actual rateable value of $435,000 and there is no substantive evidence that they have suffered any loss.

[25] The local body subdivisional consent was granted on 16 June 2011. It was emphasised that the fact of the subdivision and the correct size of the land was announced again by the auctioneer prior to the auction commencing on 29 June 2011.

[26] The second defendants acknowledged that the advertising material was incorrect and that it would have been prudent to either delay the sale process or to provide further and more comprehensive information. They put it that the fact of subdivision was conveyed to each interested party and that the correct land size was in place on the conditions of sale by auction; and that the appellants were advised to and did seek legal advice on the conditions prior to purchase.

[27] The second respondents acknowledge that the rating information provided to them by the vendors was incorrect but submit that they, the second respondents, did not intend to mislead and had only advertised the property at $460,000 because the vendors had provided confirmation in a credible form, namely that of a rate demand.

[28] The second respondents emphasise that the CAC found they had no intent to mislead or deceive and that their breach was at the lower end of the scale. They also submit that there is no evidence that the appellants have acquired a property worth less than what they paid for, and that they purchase for less than the correct rateable value of $435,000 and there is no other market valuation to the contrary.

[29] The second defendants accept that their actions could have been improved but submit that the appellants were informed and knew about the correct size of the land being sold before they went to the auction; that the information about rateable value was conveyed by the second defendants to the appellants directly from the vendors and on the basis of a valid rates demand with which the second defendants had been provided by the vendors.

Discussion

[30] Frankly, if we consider these issues on the papers, as the parties invited us to do, we could only agree with the reasoning of the Committee.

[31] Section 111 of the Act provides a right of appeal to us for any person affected by a determination of a Committee. This includes a determination as to penalty under s.93. The appeal to us is by way of rehearing and, after hearing the appeal, we may confirm, reverse, or modify the determination of the Committee.

[32] In *M v B* [2010] NZSC 112, [2011] 2 NZLR 1, the Supreme Court clarified principles articulated by the Court in the earlier case of *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. The Court confirmed that appellate courts will adopt a different approach on appeals from discretionary decisions to that taken on general appeals and put it:

> *"[32] ... 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."

[33] Determinations as to penalty under s.93 of the Act involve the exercise of a discretion. Accordingly, the narrower approach identified in *K v B* is appropriate on appeal against penalty. We have previously held that we will adopt that approach on appeals from other discretionary decisions made by Complaints Assessment Committees. For example, in *Smith v CAC 10027* [2010] NZREADT 13 we considered an appeal from the exercise of the discretionary power to take no further action on a complaint at an early stage under s.80(2) and held:

"[13] When considering appeals from decisions in which the Committee has exercised its discretion under ss 80 or 172, the Committee submits the Tribunal should adopt the narrower approach contemplated by the Supreme Court in Kacem v Bashir, in other words, appeals to the Tribunal from decisions made in the exercise of a Committee's discretion can only succeed if the appellant can show that the Committee either made an error of law or principle, failed to take into account a relevant consideration, took into account irrelevant considerations, or was plainly wrong.

[14] The Tribunal accepts that the decision of the Committee is a discretionary one and it should therefore follow Kacem v Bashir."

[34] The appellants seek a number of orders as outlined above:

[35] The appellants purchased the property at auction on 29 June 2011 for $420,000. They say that, at the time, they believed the capital value of the property was $460,000.

[36] Manawatu District Council documentation placed the capital value of the property at $460,000 from 1 July 2010 to 30 June 2011; but this was on the basis of the larger land area of 3.8152 hectares. In August 2010, the Manawatu District Council had reassessed the capital value of the property on the basis of the larger land area of 3.8152 hectares, and placed it at $435,000. This valuation was to be effective from 1 July 2011, that is, after the appellants purchased the property.

[37] The property which the appellants purchased, with a land area of 3.4782 hectares, had not been valued at the time they purchased it. However, Manawatu District Council's valuers provided a valuation notice to the Committee, dated 1 August 2011, showing a capital value of $425,000 for the land area of 3.4782 hectares.

[38] There is no evidence that the appellants have suffered a loss in a strict sense as a result of their purchasing the property; i.e. there is no evidence that the property is worth less than the appellants paid for it. Rather, the appellants' claim for compensation is seemingly based on the licensee's and the agency's unsatisfactory conduct in misrepresenting the features of the property in their advertising.

[39] The Act was introduced specifically to better protect the interests of consumers in respect of real estate transactions. A key means of achieving that purpose was the creation of a wide range of discretionary orders available on findings of unsatisfactory conduct or misconduct, including orders for financial relief or compensation. Section 93 of the Act sets out the powers of Committee to make

orders if unsatisfactory conduct is found. Section 93(1)(f)(ii) allows Complaints Assessment Committees (or this Tribunal on appeal) to order that licensees provide financial relief to complainants from the consequences of their errors or omissions. If there had been misconduct, we have further compensatory power under s.110(2)(g).

[40] While any relief under s.93(1)(f)(ii) must be, on a plain reading of the section, limited to consequences flowing from the error or omission on the part of the licensee, a broad approach should be taken to identifying such consequences. We are not limited to focusing narrowly on loss or damage in terms of diminution of market value. We accepted this argument in *Barras v REAA and Quin* [2012] NZREADT 13 (apparently currently on appeal to the High Court).

[41] In an appropriate case, a consequence in respect of which financial relief may be ordered might include a complainant acquiring a property at a price higher than he or she would have paid for a licensee's error or omission, even where the market value of the property is nevertheless more than the purchase price. Whether or not such an order is appropriate will, however, depend on the circumstances of the particular case.

[42] In the present case, it is for the appellants to demonstrate that an error or omission on the part of the licensee and/or the agency led to a consequence in respect of which the Committee could have ordered financial relief and that the Committee erred in failing to order relief. Given that the power to make an award under s.93(1)(f)(ii) is a discretionary one, the principles applying to appeals from the exercise of discretion apply and we have referred to those above.

[43] It is for us to assess whether the Committee erred, in terms of the test in *K v B*, in deciding not to make an order for financial relief. Counsel for the Authority noted that, in its initial decision, the Committee found that the appellants had been advised about the subdivision from the outset, had sought legal advice, and that the auction documentation had clearly set out that the property was subject to a proposed subdivision plan. Accordingly, it is put, there was ample opportunity for the misrepresentations contained in the advertising to have been corrected.

[44] It is also put that, in those circumstances, we may conclude that it was reasonably open to the Committee to find that no orders beyond censure were required in this particular case.

[45] It is put for the Authority that, given this is an appeal from the exercise of a discretionary power, the onus is on the appellants to show that the Committee erred in terms of the test set out in *M v B*. That assessment is one for us but, it is also put, we may conclude that the Committee's decision was reasonably open to it in the particular circumstances of the case.

[46] It is a rather delicate situation for vendors to auction a property on the basis that it is the remainder after a subdivision yet to take place. It is a situation where, with the best will in the world and exercising integrity, real estate agents can be criticised for not clarifying the situation. In many ways, the real issue seems one of credibility of the appellants. Did they realise what they were buying or should they have? The second respondents seem to have conceded that their auction advertising was deficient, but evidence from and for them could be explanatory to some degree.

[47] We feel that we need to hear evidence from the appellants and the second respondents, such evidence to be tested by cross-examination, before we can try to come to a just conclusion. Accordingly, we direct the Registrar to arrange a Directions Hearing by telephone with the parties so that we can order a suitable timetable to a fixture.

[48] Having said all that, we repeat that it may be difficult for the appellants to obtain more redress than that granted by the Committee. On the face of it the second respondents have acted in a way which could have caused confusion on the part of the purchasers but it is puzzling that the purchasers did not realise they were bidding for the balance of the land after the cutting off of the paddock retained by the vendors. However, unless we assess the witnesses involved for credibility, we could only find that we have no reason to disagree with the CAC. Although this is not an appropriate appeal to hear on the papers, a full hearing may not lead to a different outcome.

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Judge P F Barber
Chairperson

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Ms J Robson
Member

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Mr G Denley
Member