

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 100

READT 005/13

IN THE MATTER OF

a charge laid under s.91 of the Real Estate Agents Act 2008

BETWEEN

**REAL ESTATE AGENTS
AUTHORITY (CAC 20004)**

AND

GEORGE GOODHEW

Defendant

READT 013/13

IN THE MATTER OF

an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

GEORGE GOODHEW

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 20004)**

First Respondent

AND

MARK SCOTT

Second Respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Ms C Sandelin – Member
Ms N Dangen – Member

COUNSEL

Mr D James for Mr Goodhew
Mr L J Clancy for Real Estate Agents Authority

HEARD at WHANGAREI on 15 October 2013

Background

[1] In early 2013, as a result of a complaint by Mr Scott the Complaints Assessment Committee determined that a charge should be laid against Mr Goodhew. The details of this charge are as follows:

[Real Estate Agents Authority ...] charges Mr Goodhew with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 in that he engaged in conduct that constitutes a wilful or reckless contravention of Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care Rules 2009).

Particulars

- (a) The defendant advertised a property at 272 State Highway 12, Omapere as having "*beach access across Omapere stream*" when there was no access from the property to the beach across the stream as the land in front of the stream towards the beach was private Maori land.
- (b) The defendant advised the complainant that the land in front of the stream towards the beach was a reserve when he:
 - (i) Knew it was private Maori land; or
 - (ii) Later learned it was private Maori land and did not correct his earlier advice to the complainant.
- (c) The defendant advised the complainant that there were no claims or concerns by Maori in terms of Wahi Tapu or sites of significance which could require the complainant to consult with local Maori when he:
 - (i) Knew that there were claims or concerns by Maori in terms of Wahi Tapu or sites of significance; or
 - (ii) Later learned that there were claims or concerns by Maori in terms of Wahi Tapu or sites of significance and did not correct his earlier advice to the complainant.
- (d) The defendant advised the complainant that there were no Resource Consent issues with the property and that there was a space for a modest dwelling when it is not possible to build on the land without a Resource Consent.

[2] Mr Goodhew denied this charge and appealed the decision of the Complaints Assessment Committee to lay a charge against him.

The Evidence

[3] The case concerns the sale of a property at 272, State Highway 12, Omapere in the Far North. The property was being sold as a mortgagee sale and Mr Goodhew was the agent for the vendor bank.

[4] Mr Scott, the complainant, was a witness for the Real Estate Agents Authority. He told the Tribunal that he had seen an advertisement for the property when he drove past it on 1 May 2011 and saw a 'For Sale' sign. When he got back to Auckland he telephoned Mr Goodhew to find out more about it. Mr Scott said he asked Mr Goodhew if the property included the land across the stream. The property is bordered on the western side by the Omapere stream. In front of the property and the stream is a block of Maori freehold land known as Omapere B. Omapere B has beach access. Mr Goodhew said that the land being sold had access across the stream (to the beach) and that the land across the stream was a reserve. Mr Scott said he wanted to retain the view from the property across the sand dunes and to have access to the beach.

[5] On 3 May 2011 Mr Goodhew sent Mr Scott photographs of the property showing the view from an elevated point on the property to the beach, a map and the flyer that had been prepared for the mortgagee auction. The flyer had a copy of the photograph and the following pieces of information:

- 1488 square metre section.
- Beach access across Omapere stream.
- Site offers adequate but restricted building platform.
- Section has access to sewerage, town water, power and telecommunications.

[6] Mr Scott received this information and arranged to meet Mr Goodhew at the property on or about 15 May 2011. At that face to face meeting Mr Goodhew repeated the advice that the land on the opposite bank over the stream was reserve land. Mr Scott said he also asked Mr Goodhew if there were any concerns affecting the property with local Maori and "*Mr Goodhew told me that there were no issues*". Mr Scott wanted to know why no one had bought the land. He was told by Mr Goodhew that there was nothing he knew which prevented any sale. Mr Goodhew also told Mr Scott that there were no planning issues affecting the property and the only planning limitation was that any building needed to be 12 metres from the centre of the road.

[7] The next day Mr Scott spoke to another real estate agent at Bayleys about a different property in Omapere. He received information from her about erosion management. This agent suggested that he contact the Far North District Council to talk to them about the erosion of the Omapere foreshore. Mr Scott did this, discovered that Resource Consent was needed to build on the land and e-mailed Mr Goodhew and told him this. Mr Goodhew responded "*oops I wasn't aware of this*".

[8] Mr Scott eventually made a conditional offer to purchase the property in June which enabled him to do further due diligence. Prior to the contract being confirmed Mr Scott received a phone call from a Ms Ross. She had been contacted as an affected party by the Far North District Council as a result of the resource consent application. She expressed concerns to Mr Scott over his proposal [to build] and explained to him that Omapere B was freehold Maori land. Mr Scott eventually obtained Resource Consent and confirmed the purchase. He was adamant that he only found out that the land that Mr Goodhew had referred to as reserve was not reserve after the signing of the agreement. He told the Tribunal that there was no beach access across Omapere stream and that the access is much more difficult. He says that the nearest beach access across publicly owned land is 200 metres north of the property along the State Highway.

[9] Mr Scott was also worried about the claims made on Omapere B by the descendents of Rangitira Moetara. Mr Scott was concerned about this because Mr Goodhew had not advised him that Omapere B was privately owned or that there were significant issues of Wahi Tapu with the Omapere stream. The Omapere stream is an area of significance to local Maori because it was a place where the canoes were beached and also where the dead were taken by canoe on their way to their burial. For these reasons Mr Scott said he felt very strongly that he should complain about the conduct of Mr Goodhew.

[10] When questioned about whether the access to the beach was his primary concern Mr Scott acknowledged that this was not his primary concern but, said the flyer was factually incorrect as he could not pass over the stream to get to the beach. He was asked about whether or not it was apparent to him that he would have had to have made an application to the local body for building consent. He agreed that he had made his own enquiries. He reiterated under cross examination that it was wrong to call Omapere B a reserve. When asked whether in fact no one could build on it he did not agree. He suggested for example the owners could plant a forest. This would block the view. He said that while there may not now be any actual issues of concern the point of issue here was that Mr Goodhew had lied to him when he first saw the property. He said that Mr Goodhew should have answered honestly. He also reiterated that his question about "*Maori concerns about the land*" was wider than just the actual property itself.

Evidence of Mr Gallagher

[11] Mr Gallagher's evidence was unchallenged. He told the Tribunal the steps he took to complete the investigation and collate evidence.

Donna Washbrooke

[12] The Tribunal also heard oral evidence from Donna Washbrooke the sister of Sheena Ross, [who spoke to Mr Scott] a local Omapere resident. Ms Washbrook said that she had approached Mr Goodhew when he was erecting or removing the advertising sign. She said that she told Mr Goodhew that the Omapere stream was Wahi Tapu. She said that she hoped that he made buyers aware of that but Mr Goodhew did not respond to this statement. She told the Tribunal that she later

spoke to Mr Scott and advised him about the Omapere stream and the ownership of the Omapere B land.

Mr Goodhew

[13] Mr Goodhew gave evidence. He told the Tribunal that he remained of the view that the land at Omapere B was a reserve and he relied upon the information he had obtained from a local Kaumatua Mr John Klaricich. He explained that the message intended by mortgagee auction flyer was that the Omapere stream runs through the property and on the other side of the stream is a beach. He said that there are a number of ways to get to the beach and did not accept that the particular in the flyer "*beach access across Omapere stream*" was misleading.

[14] He said that when Mr Scott was looking at the land he did ask a number of questions. He said that Mr Scott was a customer in the sense of considering the purchase of a property, but his company's client was the bank. He said therefore he answered Mr Scott's questions from the point of view of a person who knew the area well. He said he had known and spoken to persons of mana about the land called Omapere B and that his answer that this land was a reserve was correct because that was the language that local Maori used when speaking about their land. He continued to believe that it is not likely that anything will ever be built on the land which would affect Mr Scott's property.

[15] He says that when Mr Scott asked him the question about local Maori he thought Mr Scott was referring to the property at 272 State Highway 12 and he says that there is no Maori claim against Mr Scott's property.

[16] Mr Goodhew denied that he provided any advice on Resource Management issues. He said he was not equipped by training or expertise to provide any such advice and he simply provided Mr Scott with what information he had relating to where one could build on the property. He also said he understood that Mr Scott would make his own enquiries before presenting and finally completing the sale.

[17] Mr Goodhew was cross examined by Mr Clancy. Under cross examination Mr Goodhew said that he should have described Omapere B as Maori reserve land but he continued to assert that the issues relating to the Wahi Tapu claim in respect of the stream had no relevance to the property. He told Mr Clancy that prior to the mortgagee sale he obtained a copy of the title, he read it, he did an appraisal on the property, he contacted Mr Klaricich asking whether there were any pending Maori claims and were told that there were none which affected the property. He acknowledged that he did not check whether the land was in fact reserve land but he said he trusted Mr Klaricich's opinion as he had great mana. He did not accept that the land was not a reserve. Mr Goodhew acknowledged having had a conversation with Ms Washbrook on the site but said that it was after the contract had been signed (but not made unconditional). He did not talk to Mr Scott about this as he regarded Mr Klaricich as a higher authority about the ownership of the land. Mr Goodhew marked on the plan where he considered access could be obtained to the beach. This was from a tip at the top of Mr Scott's land and/or along a walkway further along the road and then over the Public Reserve. However the access from the tip of Mr Scott's land was not passable. The walkway was also blocked off but

Mr Goodhew said that even though the walkway was currently blocked off one could still access it.

[18] The Tribunal then heard from Mr Klaricich who gave evidence that Omapere B is Maori land and it has cultural significance. He told the Tribunal that the Omapere stream is a place of Wahi Tapu for Maori. He told the Tribunal that many of the sites of cultural significance to Maori are called reserve although they have Maori owners. He could not recall whether he said or not he had a conversation with Mr Goodhew about the land in question and whether he told him it was a reserve or not.

Submissions

[19] The Real Estate Agents Authority made a number of points in their closing submissions:

- A. They identified that the charge required the Tribunal to find that Mr Goodhew wilfully or recklessly breached Rule 6.4 of the Act. Mr Clancy submitted that the key issues for the Tribunal are:
- B. Did Mr Goodhew as a matter of fact mislead the complainant or provide false information or withhold information that should have been provided and if so was that done wilfully or recklessly?

[20] Mr Clancy submitted that if the answers to the questions above were 'yes' then the charge under Section 73 had been made out. If the answers were 'yes' to A but 'no' to B then he submitted that a finding of unsatisfactory conduct would be appropriate. Mr Clancy submitted that it was clearly identifiable to Mr Goodhew that the complainant would be misled by the representations made by him. He submitted in relation to the particulars as follows:

Particular A:

Beach access across the Omapere stream.

[21] This representation as set out in the flyer is clearly misleading. It is not possible to access the beach by crossing the Omapere stream. He submitted that the licensee's contention that the representation was accurate because it is possible to access the Local Purpose Reserve across a small strip of land at the extreme north west of the property and access the beach that way by hugging the northern bank of the stream is unconvincing. Mr Klaricich confirmed in his first statement that there was never any access to the beach from the property across the stream. The Real Estate Agents Authority submitted that Mr Goodhew must have foreseen the possibility that the flyer could mislead but made the representation regardless of this, which Mr Clancy submitted was a reckless breach of Rule 6.4. This representation is closely linked to his submission to the description of the land in Omapere B as a reserve which was clearly incorrect, both in terms of the beach access and in the definition of reserve.

Particular B:

Was it known that the land in front of the stream towards the beach was a reserve?

[22] Mr Goodhew, Mr Clancy submitted, accepted that he always said that the land was a reserve and did not use the word 'Maori'. Mr Clancy submitted that Mr Goodhew himself said that Mr Klaricich had told him the land was going to be made into a Maori reserve but he did not check this.

Particular C:

Concerns by Maori in terms of Wahi Tapu or Cultural Significance

[23] In respect of the particulars regarding Maori claims or concerns; Mr Scott's evidence on this was to be preferred over that of Mr Goodhew. It was not, Mr Clancy submitted, reasonable to suppose that the enquiry was directed only at the land being purchased but rather was a wider enquiry about land in the surrounding area. Mr Clancy submitted that fairness required that Mr Goodhew passed on some of the information that he knew regarding the issues surrounding the land so that Mr Scott could make up his own mind.

Particular D

Resource Consent

[24] Mr Clancy submitted that a licensee is not required to be an expert in planning but Mr Goodhew made a positive representation that the only issue in respect of this property was a restriction on where the building could be placed. Mr Clancy submitted that this was misleading.

Mr James' submissions

[25] Mr James submitted that nothing that Mr Goodhew said to Mr Scott "*constitutes misleading or false information in any material sense*" and that Maori land can have the qualities "*with or without the formal designation of reserve or reservation*".

[26] He submitted that Mr Scott resolved the issues complained of prior to making the agreement unconditional.

[27] He submitted that the case should never have been brought. He referred to the definition of reckless or wilful in criminal cases and submitted that these are "*unfounded allegations of misconduct*".

Particular A

[28] Mr James submits that the complainant is not concerned about this allegation. He says further that once one views the property it is clear that the beach cannot be accessed directly over the stream. The written material makes it clear that the stream prevents direct beach access. While the flyer's reference to beach access is "rather truncated and ambiguous" as soon as additional material is reviewed and the property viewed, then there is no question of its meaning.

Particular B

[29] Mr James submits there is no evidence to support the view that Omapere B will be built upon. Omapere B can fairly be called a reserve. He gives a list of the

reasons why this is so at paragraph 14 of his submissions. Thus he submits Rule 6.4 is not breached as the customer was not misled nor did Mr Goodhew provide false information.

Particular C

[30] Mr James submitted that the Tribunal must carefully examine the prosecution's submissions. He said it could not be the case that agents must tell customers that a neighbouring property is owned by Maori. This would be "an error of denigration and discrimination". He recommended that the Tribunal recognise Mr Klaricich as an expert in Maori interests. Mr Klaricich confirmed that the stream beside the land was not Wahi Tapu. Mr James submitted there were no Maori concerns with this land, and there being no Maori concerns there was nothing to notify.

Particular D

[31] Mr James submitted that Mr Goodhew had no role as Mr Scott's planning adviser and it was inevitable that a building consent would also require resource consent. He submitted that there was no case to answer on this point.

[32] Mr James sought to have all charges dismissed and asked for the Tribunal to comment on whether costs could be exercised in favour of the defendants.

Discussion

[33] The Tribunal will deal with the charge and then consider what other further orders (if any) need to be made in respect of the appeal.

[34] The Tribunal must determine whether the Authority has proved on the balance of probabilities that both parts of s 73 are made out in respect of each particular. Once each particular has been considered then the Tribunal will need to determine whether or not there has been any cumulative breach of s 73. If the Tribunal find that some aspects of the rules have not been complied with, but there is no element of recklessness or wilfulness then the Tribunal may consider whether a finding under s 72 of unsatisfactory conduct is required.

Particular A – The Flyer

We find that the Complaints Assessment Committee has established that there was no beach access across Omapere stream from 272 State Highway 12. As a result of this finding we find that the flyer was misleading. We specifically discount Mr Goodhew's argument that anyone could see that direct access across high banks of the stream was not possible and that subsequent material and a site inspection made this clear. The flyer clearly says "*access to the beach across the stream*". This is not factually correct. An agent must take care to ensure that promotional material is accurate. This was not and we find that Mr Goodhew breached Rule 6.4 in the preparation of this advertisement. We find that this conduct was misleading and he was careless. We do not consider that Mr Goodhew was wilful, rather simply careless.

Particular B – Maori Land

We find that the defendant did advise the complainant that the land in Omapere B was reserve land. Mr Goodhew accepts that he knew that it was Maori land and that his information from Mr Klaricich was that it was going to be made into a reserve but he had not checked it. Again we find that this was careless or negligent behaviour rather than wilful or reckless. We do not consider that the fact that the land was just like a reserve is sufficient. An agent must not mislead. Mr Goodhew should have accurately described the land or said I believe it is reserve but you should double check this. He did not. He also acknowledges that he spoke to Ms Washbrook but discounted what she said because he believed Mr Klaricich's word over that of Ms Washbrook. We find therefore that Mr Goodhew breached Rule 6.4.

Particular C – No Claims in terms of Wahi Tapu or Cultural Significance

We do not find that the Real Estate Agents Authority has established this particular for the balance of probabilities. We consider it is arguable that this question could have been intended by Mr Scott to have meant the wider Omapere area, but heard by Mr Goodhew to mean only the land which was being sold. We do not accept Mr James' submission that the particular is discriminatory. Rather the question is – have the Real Estate Agents Authority proved the question was asked and incorrectly answered? We find that they did not prove this.

Particular D – Resource Consent

The particular relating to Resource Consent has not been established on the balance of probabilities. Mr Scott acknowledged that he knew that he would have to discuss with the Council any construction on the land. He knew that there were likely to be issues concerning where and how he could build. We consider that this must have involved an understanding that this would have involved Resource Consent, especially in a coastal area. We therefore do not consider that it is likely that he was misled or confused about the discussion concerning the building platform.

Conclusion

[35] We find on the balance of probabilities therefore that the Real Estate Agents Authority has established two of the four particulars. We consider that the totality of the charge has been made out but not under s 73. We consider that Mr Goodhew was careless or indifferent about whether or not the information that he was passing on was accurate or not. He has obviously been in practice for some time and he struck the Tribunal as being somewhat impatient and dismissive of the complaint brought by Mr Scott and reiterated that the information that he had given to Mr Scott was accurate, even when faced with the irresistible conclusion that it was in fact wrong. An agent has a duty to be completely frank and honest with purchasers. Mr Goodhew was not dishonest or wilfully reckless or reckless about the information he gave Mr Scott – he was just careless about the need for accuracy and focused on whether Mr Scott was in fact misled rather than his own conduct. However in the Tribunal's opinion this is not conduct which constitutes misconduct but rather conduct which warrants a finding under s 72 of unsatisfactory conduct.

Conclusion

[36] The Tribunal therefore make the following findings:

- (i) Mr Goodhew is found guilty of unsatisfactory conduct in respect of his conduct towards Mr Scott.
- (ii) The appeal is dismissed.
- (iii) The Tribunal invite submissions from Mr Goodhew and the Real Estate Agents Authority as to the appropriate penalty to impose on Mr Goodhew in accordance with the following timetable:
 - The Real Estate Agents Authority to submit its submissions on penalty within 14 days of the date of this order.
 - Mr Goodhew to make any response 14 days thereafter.
 - The Real Estate Agents Authority to have a further three days to make any further submissions strictly in reply.

[37] The Tribunal draws the parties' attentions to s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 18th day of November 2013

Ms K Davenport QC
Chairperson

Ms C Sandelin
Member

Ms N Dangen
Member