

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 102

READT 068/12

IN THE MATTER OF

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

BETWEEN

PHILIP DAVIS

AND

HANOK SHIN

AND

BARFOOT & THOMPSON LIMITED

Appellants

AND

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

First Respondent

AND

SUNNY LIU

Second Respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Ms N Dangen – Member
Mr G Denley – Member

APPEARANCES

Mr T Rea with Mrs C Eric for the appellant
Mr M Hodge for First Respondent
Ms S Liu for Second Respondent

HEARD at AUCKLAND on 6 September 2013

Background

[1] Ms Liu was the successful purchaser of an apartment at 1010/85 Wakefield Street, Auckland City. She had been told about the apartment by a Ms Du, a salesperson at Barfoot & Thompson, Mount Roskill. Ms Du went on to the Intralink at Barfoot & Thompson and found out what she could about the apartment. She registered Ms Liu as a buyer of the apartment on 9 August 2011 and gave her the LIM

and a flyer for the property and the Terralink information that she was able to access. She says she left a message with Mr Shin's office for him to call.

[2] The property was being sold at mortgagee sale. There were outstanding Body Corporate levies of \$15,767.16 which became Ms Liu's responsibility as a successful purchaser. Ms Liu was not informed of this. Ms Liu had not seen the apartment and when she went to the auction on 12 August she was unaware of the levy. She was also unaware of another potential problem with the property which had been raised in the Body Corporate minutes which had been provided by the mortgagee's solicitors and had been sent out to the prospective purchasers in the pre-contract disclosure. This was that any owner could only live in the apartment for a maximum of three months.

[3] Mr Shin had e-mailed interested parties about the Body Corporate levy on 9 August 2011. He did not e-mail Ms Liu as her interest had only been lodged or was lodged just after his e-mail. At the auction the auctioneer announced that it was the purchaser's responsibility to clear any Body Corporate levies if there were any, but did not specifically address the fact that there were \$15,767.16 in outstanding levies. The Condition of Sale contained a clause which said that the vendors would not make payment of any outstanding levies. There was a 'No Warranties by Vendor' provision in the agreement.

[4] Ms Liu bought the property at auction and discovered before settlement that she would have to pay the extra \$15,767.16 on completion. Ms Liu subsequently discovered after completion of the purchase that there was also the 90 day occupation restriction.

[5] The Tribunal has seen a copy of the flyer prepared for the sale. It advertised the property as being "*suitable for students and other inner city dwellers*" but makes no reference to the fact that there is a 90 day maximum occupation and says as follows:

"Fantastic location at the top of the rise, just a very short stroll to the Universities, down to Queen Street and check out the views too. Just great for uni students, city dwellers and investors in the very popular Waldoff Tetra building. is this one bedroom, high level apartment with two bathrooms and enjoying a wide, sunny northerly aspect overlooking the city, Skytower and even beyond to the North Shore. An excellent city lifestyle/investment opportunity here."

[6] Ms Liu made a complaint to the Real Estate Agents Authority. The Complaints Assessment Committee considered the matter and on 8 June 2012 found the agents, Mr Shin and Mr Davis, guilty of unsatisfactory conduct and found that they were in breach of Rules 5.1, 6.2, 6.3 and 6.4 because of the misleading advertisement which did not deal with the accommodation restrictions. In addition the Committee found that Mr Shin and Mr Davis had breached s 72(a) and s 72(d) of the Real Estate Agents Act 2008. Ms Du was also found to have breached Rules 5.1, 6.2 and 6.3. She has not appealed this decision.

[7] The Committee found that the advertisement was completely misleading as it was hard to find that anyone would find an apartment with limited occupation "*satisfactory let alone great*".

[8] The Committee also found Barfoot & Thompson Limited had fallen short of its supervisory obligations and were responsible for the fact that the information concerning the Body Corporate arrears was not available on their intranet so that all

selling agents could access it and for the fact that there were the actual unpaid levies which were not made absolutely clear at the auction (rather than just a reference to the vendors being liable if there were any outstanding levies).

[9] In their penalty decision the Complaints Assessment Committee found that each licensee should pay a fine of \$6,000. The agency was required to pay a fine of \$5,000.

The Appeal

[10] Mr Davis, Mr Shin and Barfoot & Thompson Limited appeal the Complaints Assessment Committee's decision.

[11] Both Mr Shin and Mr Davis gave evidence, together with Mr Smith, the agents' manager. Their evidence where relevant is referred to in the Tribunal's decision and in the preceding paragraph. An expert Mr Kirkpatrick (a lawyer) was also called. He said that he could find no evidence on the Council file that the 'limited occupation right' had in fact been imposed by the Council as part of its resource consent and that it was almost impossible to find any reference to it on the Council file, including the LIM. He concluded that there was no lawful restriction which could impose a limitation on Ms Liu's right to occupy the apartment full time. Ms Liu also gave evidence.

[12] The Tribunal also heard that the intranet, which was then being introduced to Barfoot & Thompson, was not at that time particularly reliable and did not necessarily provide access to all of the marketing and property materials which the agency distributed to interested buyers.

Discussion

[13] The issues are therefore:

The Issues

Issue 1

Does the evidence support findings of unsatisfactory conduct against the appellants?

Issue 2

Do the appellants have any obligation to ensure that the advertisement for the apartment reflected the truth of the Body Corporate position? Is there in fact a 90 day restriction?

Issue 3

Was it unsatisfactory conduct for Barfoot & Thompson to not have all the available information on its intranet system and not to make it clear at auction that there were outstanding Body Corporate levies?

Submissions

[14] Counsel for the appellants submits as follows:

- The advertisement and auction orders of details of sale were not misleading and were factually correct as:

- (a) “There is no short term accommodation restriction limiting occupation to 90 days or otherwise”.
- (b) “The temporary student accommodation restriction is invalid”.
- Mr Rea submitted that the evidence showed that accommodation restrictions are unusual and agents are not commonly aware of existence of these. There was nothing in this case to put the agents on notice (nothing on the title, nothing on the LIM) and even the mortgagee’s solicitor was unaware of the restrictions. Further Mr Rea submitted that even enquiring with the Body Corporate would not have produced the necessary answer.
 - In his reply submissions of 18 October 2013 Mr Rea submits that there was no assumption of risk in the advertisement, rather any misrepresentation was inadvertent and by omission based on lack of knowledge of the unusual and unlawful restriction on accommodation.

[15] Further he submitted that the fact that the Body Corporate minutes were attached to the Pre-contract Disclosure document was not in itself culpable as Mr Davis and Mr Shin only reviewed the minutes briefly in order to note the specific information, such as leaky buildings and did not check or note the restriction on accommodation. Mr Rea submitted that under cross examination Mr Shin said that he saw the reference to the accommodation but did not think it was important and just “*skipped it*”. In re-examination he said he had never heard of the 90 day restriction but had heard of a student restriction. Mr Rea submitted that even if Mr Davis and Mr Shin had seen the reference then they would have been unlikely to have ascertained the correct position by making enquiries with the Body Corporate and the Council. He submitted there was no express positive representation in this matter except an inadvertent positive representation that there was no restriction on the type of occupation that this apartment could be used for.

[16] Mr Rea distinguished the case of *LB v Donkin* on the grounds that in this case the agents did not make any express positive representation. Mr Rea submitted that if the agents in this case were held to have been engaged in misleading or deceptive conduct then it would be requiring them to discharge their obligations to an unacceptably high standard. He submitted that the correct position could not be obtained by checking the title encumbrances or a LIM report and that the agents took all property steps prior to advertising the property.

[17] He submitted that the breach needed to be considered in context, which was of a mortgagee sale where the property was expressly sold on the basis that prospective purchasers had a duty to enquire.

[18] Mr Rea concluded by submitting that in the absence of a covenant against the title it would be unreasonable for Mr Davis or Mr Shin to have been aware and to inform others of the accommodation restriction. He concluded therefore that the agents were not liable.

[19] On behalf of Barfoot & Thompson Mr Rea submitted that there was no breach of Section 50, by Barfoot & Thompson not having the information on the “*My Info*” intranet.

[20] He submitted that there is no confusion regarding Barfoot & Thompson's My Info system. At the time of the sale this was a new system and it was not to be solely relied upon, but rather was implemented to complement the existing system which was that licensees were to contact the listing salesperson for information.

[21] Mr Rea submitted that Ms Du was aware of the fact that she should have been contacting Mr Shin and/or Mr Davis and the culpability properly rests with her.

The outstanding Body Corporate levies

With respect to this issue Mr Rea submitted that it was sufficient for the auctioneer to refer to the particulars of sale. He submitted that all those other persons attending the auction had the information (about the levies) because Mr Shin had sent them the information and it was Ms Du's obligation (and Ms Liu's) to ensure that she fully informed her purchaser or Ms Liu fully informed herself. He submitted that there is no obligation on the auctioneer to raise the exact amount of the levies but it is sufficient to say that there may be levies which would need to be payable by the purchaser.

[22] The Real Estate Agents Authority submits that in fact there was an obligation on the appellants to ascertain the exact nature of the property that they were selling and whether there were any restrictions on accommodation and to advise a purchaser accordingly. They should have made this enquiry from the vendor bank's solicitors.

[23] In respect of the unpaid levies they submit that there was a positive obligation on Barfoot & Thompson to make sure that everybody in the room was fully aware of what was outstanding and to alert them all to that information.

[24] The Real Estate Agents Authority submit that the Tribunal should uphold the decision of the Complaints Assessment Committee. They submit as follows:

- That after Messrs Davis and Shin obtained the pre-contract disclosure statement they were aware of the Body Corporate's Annual General Meeting and had a copy of the minutes. These minutes contained a reference to the accommodation restriction. They submit that irrespective of whether or not the information contained in the minute was wrong the licensees continued to advertise the property without any change and without any other checks. Mr Davis accepted under cross examination that they should have noted the point and amended their marketing information accordingly.
- In respect of the outstanding levies the Real Estate Agents Authority submits that there was complete confusion within Barfoot & Thompson about what information would be contained on their "*My Information*" system. Mr Hodge submitted that they were fundamental matters of practice and procedure and were systems issues for which Barfoot & Thompson as corporate licensee must take responsibility.

[25] Ms Liu submits that Mr Shin has failed in his duty of care and he should have advised the persons who attended at the auction that there were outstanding levies and the amount, prior to or at the auction. She submits that the 90 day short term accommodation restriction exists and that she has been told this by the Body Corporate manager. Ms Liu submits "*If I get caught living there more than 90 days, I will be*

executed" (sic). The Tribunal assume that she means "*evicted*". She submits that the auctioneer should have verbally advised her of the Body Corporate levies owing, especially when English was her second language, as with many of the attendees. She submitted that all of the registered buyers should have been given the information that Mr Shin sent out, not just those who attended the Open Home. She submitted that the Barfoot & Thompson advertisement was misleading, that there was a failure of a duty of care and that the salespeople did not act in good faith.

Discussion

The Accommodation Restriction – Issues 1 & 2

[26] Having heard the evidence of Mr Kirkpatrick the Tribunal are not certain as to the legal status of the accommodation restriction. Ms Liu who lives in the building says that the Body Corporate insist that it is a real restriction. Mr Kirkpatrick cannot find anywhere where this has been recorded and enforced.

[27] The Tribunal cannot resolve this issue. However it can resolve the issue of whether or not this restriction or the possibility that there might be this restriction should have been brought to the attention of the buyers. We consider that an agent has an obligation under ss 5.1, 6.2 and 6.4 of the Client Care Rules 2009 not to mislead any potential purchaser. The fact that Mr Shin and Mr Davis acknowledged that the Body Corporate minutes were received by them and read means that notwithstanding the fact that they did not appreciate their significance they should still have been noted and the potential purchasers advised to seek legal advice on this point. As the Tribunal has said before agents are not expected to be lawyers but must recognise when there is some deviation from normal or some matter which ought to be drawn to the attention of a potential purchaser. Clearly an accommodation restriction should have been. The Tribunal acknowledge that the Body Corporate minutes did not make the difficulty very clear but nonetheless it was in the material which was sent out, and notwithstanding the fact that this was a mortgagee sale should have been drawn to the purchaser's attention. We consider that this failure is unsatisfactory conduct.

Barfoot & Thompson – intranet and outstanding levies – Issue 3

[28] It is certainly unfortunate that the intranet did not operate so that Ms Liu did not get the e-mails that Mr Shin sent out. However the Tribunal accept that in the start-up phase of the "*My Info*" computer programme there were likely to be teething problems. We do not consider that Barfoot & Thompson could be said to have been in breach of s 50, (a supervisory role) in failing to ensure that all information was available on the intranet for every potential purchaser. We conclude that the Complaints Assessment Committee rightly determined that the responsibility for this failure was with Ms Du.

[29] However in this case there were known to be significant outstanding levies that would be the responsibility of the ultimate purchaser, and thus significantly affect the ultimate price that they would pay. In these circumstances this should have been drawn to the attention of the attendees at the auction. The fact that the auctioneer mentioned the obligation to pay the levies without setting out the amount payable is in our view a failure by Barfoot & Thompson of their obligations to the attendees at the auction, and to properly supervise the auctioneer by requiring him to disclose the information.

[30] For the reasons set out above the Tribunal amend the decision of the Complaints Assessment Committee by upholding and modifying the decision against Mr Shin and Mr Davis as set out in para [27] and by modifying the finding (as set out in para [29]) against Barfoot & Thompson.

[31] The Tribunal consider that in the circumstances of this case the fines imposed upon the agents and the agency were too heavy. The reference to the accommodation restriction was relatively obscure and very unusual. Accordingly the Tribunal think that while the agents are culpable the level of their culpability is reasonably modest. Accordingly the Tribunal amend the decision of the Complaints Assessment Committee on penalty dated 11 September 2012 by substituting an order that Mr Shin and Mr Davis pay a fine of \$1,000 each.

[32] In respect of Barfoot & Thompson the Tribunal substitute a fine of \$3,500, considering again that the fine was too heavy.

[33] The Tribunal draw to the parties' attention s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 19th day of November 2013

Ms K Davenport QC
Chairperson

Ms N Dangen
Member

Mr G Denley
Member