

Decision No: [2013] NZREADT 108

Reference No: READT 024/13

IN THE MATTER OF

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

BETWEEN

**REAL ESTATE AGENTS
AUTHORITY (CAC20005)**

Prosecutor

AND

GLENN AUSTIN

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

HEARD at ROTORUA on 4 & 5 November 2013

APPEARANCES

Mr L Clancy for the Real Estate Agents Authority
Mr S Waalkens, Counsel for the defendant

Introduction

[1] This case involves a house in Lynmore in Rotorua. The complainants, Mr and Mrs White, went to an Open Home for the property at 24 Kahuranga Drive, Lynmore, Rotorua on 24 July 2011. Mr Austin was the agent who was responsible for selling the property. The property was to be auctioned on 28 July 2011. Mr and Mrs White saw the property and at the time of their inspection were given a Builder's Report, a copy of the LIM and spoke to Mr Austin about the property.

[2] Prior to the auction Mr and Mrs White say that Mr Austin told them that the property was a "good property" and that he failed to disclose to them anything about any previous Building Report on the property, the previous sale on the property which had fallen over because of the Building Report, any weathertightness problems, or the fact that because the house was monolithically clad, constructed between 1994 and 1998, it could potentially be a leaky home. Mr and Mrs White say that Mr Austin did not tell them that there had been repairs by the vendor to a pergola, a downpipe and that

the house had been painted. Mr and Mrs White duly bought the property from the vendors, the Robinsons, after the property had been passed in at auction with Mr and Mrs White being the highest bidder. A sale was concluded on 28 July 2011 at \$420,000.

[3] After Mr and Mrs White had signed the agreement to purchase the property Mrs White's boss commented to her that the property looked a leaky home Mrs White was very surprised and distressed and contacted Mr Austin. Mr Austin assured them that there were no problems but the Whites began to be concerned. They asked for a pre-settlement thermal imaging of the property. The vendors initially agreed then declined to allow them to undertake the test but agreed that they would be able to undertake an inspection of the property. Subsequent to the inspection Mr and Mrs White settled and later discovered by a Thermal Imaging Report that the property had some "wet" areas. Mr and Mrs White have fixed these.

[4] Harcourts, Rotorua ('The Best 2010 Limited') is owned by Mr Austin. Prior to his purchase of the business but while Mr Austin worked for the previous owner as a salesperson, another salesperson with Harcourts had listed the property for sale. This was an agent by the name of Michelle Matthews. Ms Matthews had listed the Robinsons' house for sale in October 2012 with a listing price of \$460,000.

[5] While Ms Matthews was salesperson a Mr and Mrs Maynard had made an offer on the property which was conditional upon finance, acceptance of a Building Report and viewing the Council file. The Maynards obtained their own Building Report and subsequently cancelled the Agreement for Sale and Purchase because of the issues the report identified with the property. Ms Matthews' evidence was that she told the Robinsons that they had to fix the property and take the property off the market to do that, or alternatively make full disclosure of the issues and sell the property at a lesser price. The Robinsons decided to take the property off the market in November 2010 and to carry out the repairs. Ms Matthews said that she told the team at Harcourts during the weekly sales meetings that the property had been removed from the market because of leaky home problems.

[6] The Tribunal heard evidence was that Mr Austin did not attend all of the sales meetings and that his personal assistant Joe Mack would often attend in his place. Ms Mack's evidence was that she did not attend all of the meetings. Neither Mr Austin nor Ms Mack say that they knew that the property had been taken off the market to carry out the repairs identified in the Maynard report. However in February 2011 Mr and Mrs Robinson contacted Ms Matthews again and said that they would now like to sell the property, having had the repairs effected. They were unwilling to disclose the earlier report, only wanting to disclose the updated report that they had obtained following the remedial work. Ms Matthews advised them to contact Mr Austin to discuss marketing. The Robinsons did contact Mr Austin and discussed with him listing and selling the property for them at auction.

[7] Mr Austin's evidence was that he had received a call from Mr Robinson in late November 2010 asking what to do about the repairs. He had also advised that the property should be repaired and taken off the market, or alternatively sold with complete disclosure of the defects. The Robinsons elected to do the repairs, as has

been said, Mr Austin said they contacted him again in around the first quarter of 2011 to discuss selling the property through him. At this time they provided him with an updated Building Report which confirmed that there were no issues with the property but did not expressly refer to the earlier report. Mr Austin said that he did not get a copy of the earlier report but he asked the Robinsons what repairs had been carried out. He said that he did this when he completed the listing. He was told that the repairs included correcting a downpipe at the rear of the property that had apparently been installed upside down allowing for water ingress, moving a pergola so that it was not flush against the house to prevent water ingress and repainting the property.

[8] Mr Austin said that he considered that the repairs were relatively minor and he said under cross examination that he had asked the Robinsons for the earlier report but was told they did not have it. He said the Robinsons told him that there were no leaky home issues when they signed their Listing Agreement. They gave him a copy of the House Inspection Company report dated 4 May 2011 and told Mr Austin that this was the same inspector that had prepared the previous inspection report. Mr Austin says he read it. He said it did not identify any weathertightness issues or any matter of real concern. He noted that it did not refer to the previous report but did not think anything of it. In cross examination Mr Clancy put to him the fact that there was only one paragraph in this report devoted to the interior, whereas in the Maynard report the same author had devoted approximately a page and a half to the description of the interior. Mr Austin did not think anything of this. He told the Tribunal that he did not consider that he needed to tell Mr and Mrs White, or any other buyer, about the earlier Building Report or the fact that the sale had previously fallen through because of the Building Report. He now acknowledges that he should have told Mr and Mrs White about the existence of an earlier Agreement for Sale and Purchase and the reason why it had collapsed.

[9] Mr Clancy questioned Mr Austin about many of the problems that had been identified with the house, namely a monolithic cladding, the fact that he knew that the pergola had been changed because of water ingress, the fact that the downpipe had let water into the property and the need to re-paint the property. Mr Austin acknowledged he knew those things but still did not feel that he needed to tell the Whites. He knew also that Hardietec cladding was connected with leaky homes and that there had been a previous sale which had collapsed because of the sale.

[10] Mr Clancy asked Mr Austin whether he accepted that all of these things meant that there was a high risk that the property could be a leaky home. Mr Austin did not accept this. He was asked whether he rang the building inspector to check and his answer was "no", an agent can't speak to either a valuer or a building inspector. However Mr Clancy pointed out that he had discussed the property with a valuer. Mr Austin said that for whatever reason he did not speak to the building inspector. He said he was very happy with the report and its content.

[11] Mr Waalkens accepted that Mr Austin did not disclose the building report and the existence of the earlier contract and that he acknowledges now that he should have. The issue in his submission was whether the non disclosure was wilful or reckless. He submitted it was neither, he submitted that Mr Austin neither had the information or appreciated at the time that the information should have been disclosed or that there

was a potential leaky home issue. Mr Waalkens also submitted that the real fault lay with others in the Harcourts office, in particular Mr Umbers, in not conveying to Mr Austin what he knew or had learned from the sales team about the property.

[12] The Tribunal have considered this submission regardless of what Mr Umbers or Mr Austin's PA knew Mr Austin himself acknowledges that he knew the sale on the property had collapsed because of the building defects and that they had been repaired. The only area of difference seems to have been in Ms Matthews asserting that she told Ms Mack that the Building Report (or reports) needed to be disclosed to any potential purchasers. Ms Mack cannot remember this part of the conversation with Ms Matthews.

The Issues

[13] *The Charge that Mr Austin faces is a charge of misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008. Mr Austin is charged that he recklessly contravened one or more provisions of Rule 6.2, 6.3, 6.4 or 6.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rule 2009. These Rules provide as follows:*

Rule 6.2 provides:

"A licensee must act in good faith and deal fairly with all parties engaged in the transaction".

Rule 6.3 provides:

"A licensee must not engage in any conduct likely to bring the industry into disrepute".

Rule 6.4 provides:

"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".

Rule 6.5 provides:

"A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely, on the basis of the licensee's knowledge and experience of a real estate market,

- (i) That the land may be subject to hidden or underlying defects the licensee must either–*
 - (a) Obtain confirmation from the client that the land in question is not subject to a defect; or*
 - (b) Ensure that a customer is informed of any significant potential risks so that the customer can seek expert advice if a customer so chooses".*

[14] The Charge provides that Mr Austin failed to disclose the following:

- (a) He failed to advise the purchasers that due to its age and construction materials the property might be at risk of weathertightness problems. And/or
- (b) He failed to advise the purchasers that a previous conditional Agreement for Sale and Purchase of the property had failed to settle due to an unfavourable Builder's Report. And/or
- (c) He failed to advise the purchasers that the previous Builder's Report had identified potential weathertightness problems with the property.

[15] Mr Austin acknowledges that he did not take these steps. The issues for the Tribunal is therefore:

- (i) Which Rule, if any, did Mr Austin breach? and
- (ii) Was his breach of the Rules reckless or wilful so as to lead to a finding of misconduct under s 73? or
- (iii) Does the conduct complained of amount to a breach of s 72 "*unsatisfactory conduct*"?

Discussion

[16] The Complaints Assessment Committee must prove the Charge on the balance of probabilities.

[17] From the evidence that we have heard, in failing to disclose that the house was constructed of a material which might leak and in the previous collapsed sale that Mr Austin is in breach of Rule 6.4 and Rule 6.5. Was this breach wilful or reckless? Mr Waalkens argues that there is absolutely no evidence to state that it was and that Mr Austin has been straightforward in his assertions and evidence. He submitted that other witnesses also supported that submission. Mr Clancy submits that Mr Austin's conduct was such as to establish that he was wilful or reckless in his actions. He cites a decision of *Zaitman v the Law Institute of Victoria*¹ where there was a discussion about the meaning of recklessness where the Court said:

"It is implicit in what I have just said that,

- (i) *The solicitor who does not know any act and contravention must be shown to have foreseen that what he was doing might amount to a relevant contravention. There is no need to go further and establish that the solicitor foresaw the contravention as 'probable'. It is enough that he foresaw it as 'possible' and then went ahead without checking ... [i]t. It will be enough if the solicitor ... is shown to have been aware of the possibility that what he was doing or failing to do might be a contravention and then to have proceeded with reckless indifference as to whether it was or not."*

¹ [1994] VicSC 778 at 52

[18] The Tribunal have considered Mr Austin's conduct very carefully. There is no doubt that he seems to have been indifferent or unconcerned as to the significance or importance of the known previous report and the potential for the property to be leaky. The transcript of his office discussion with Mr Umbers on 26 January 2012 is illuminating. Mr Austin says that he knew about the issues but considered that as long as he told everybody who came to the house to get a Building Report then he had discharged his duty. He also claimed to have told every attendee of the property about the repairs which had been done on the property. The Whites deny that they knew that there had been any repairs carried out on the property. They were not challenged in this evidence. Accordingly the Tribunal conclude that Mr Austin did not tell them this information.

[19] The Tribunal have carefully considered whether they think that Mr Austin's arrogance, and what comes across as lack of training, might mean that he was reckless or wilful in withholding this information from any potential purchaser. The Tribunal considers that the evidence comes close to establishing that he was reckless. However because the evidence shows that he did not give the Building Report that he did receive from the vendors sufficient thought, we cannot conclude that his actions were wilful or reckless on the balance of probabilities. We consider that he was careless and that he was not properly trained in understanding his obligations as an agent to disclose all material information, not just the information that he thought was material to the issues.

[20] Therefore we conclude that the Charge has not been proved at the level of misconduct.

[21] However we do consider that the Charge has been proved at the level of unsatisfactory conduct under s 72. We consider that there was a clear breach of the Rule 6.4 and 6.5 and that on the basis of previous decisions and comments by the Tribunal, such as in *B v the Complaints Assessment Committee*² that the obligation is on the agent to be proactive in ensuring that potential purchasers have all necessary information.

[22] The purchase of a house is one of the biggest financial transactions that most ordinary New Zealanders will ever undertake. They should be able to be certain that the information that they are given about the house by the agent represents a complete picture of the property and not just selectively the best information which is available about the property.

[23] We therefore find that Mr Austin's conduct breaches s 72 of the Act.

Penalty

[24] The Tribunal request submissions on penalty. The CAC to file their submissions within 14 days of the judgment being received. Mr Austin to file his submissions 14 days after receipt of the CAC submissions. The CAC shall have a right of reply (strictly in reply) 5 days thereafter.

² [2011] NZREADT 19

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

DATED at AUCKLAND this 6th day of December 2013

Ms K Davenport QC
Chairperson

Ms N Dangen
Member

Mr G Denley
Member