

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 12

READT 035/12

IN THE MATTER OF an appeal under s.112 of the Real Estate Agents Act 2008

BETWEEN **DENIS FETHERSTON**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC20005)**

First Respondent

AND **RICHARD MILNE**

Second Respondent

MEMBERS OF TRIBUNAL

Ms K Davenport – Chairperson
Mr J Gaukrodger – Member
Mr G Denley – Member

HEARD AT AUCKLAND 29 January 2013

DATE OF THIS DECISION: 8 February 2013

APPEARANCES

Mr M Hodge counsel for First Respondent
Appellant in person
Second respondent in person

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Fetherston brings this appeal on behalf of the Nameisah Trust. He is one of the trustees. Mr Fetherston first met Mr Milne in February 2010 when Mr Fetherston and his wife viewed a property at 225 Beach Road, Campbells Bay. Mr Milne was the agent engaged by the vendors to sell the property. An Agreement for Sale and Purchase was concluded between the vendors of this property (Mr and Mrs Wishart) and Mr Fetherston (or nominee) on 10 February 2010. The purchase price was \$1.65 million. The agreement was subsequently varied to increase the purchase price to \$1.675 million with the Fetherstons taking immediate possession. The settlement date became 31 March 2011. The contract was declared unconditional.

[2] The deposit was paid and, after deduction of commission, (and with the agreement of both the vendor and purchaser's solicitors) the balance paid to the vendor. The complainant and his wife took possession in April 2010. However the trust did not settle in March 2011 and requested a month's extension for settlement. The vendor did not grant this. Subsequently an order was brought for possession by the vendor. On 29 September 2011 the High Court granted the vendor possession of the property and cancelled the Agreement for Sale and Purchase.

[3] Mr Fetherston and his wife subsequently moved out of the property. In the course of the High Court proceedings against the vendor he made a complaint. He asserts that the property was a leaky home. He makes a similar complaint about Mr Milne. He says that Mr Milne should have disclosed that the property had weathertightness issues. In his Brief of Evidence he said the second respondent:

"Presented me with documentation about the property which was presented in a way designed to confuse and mislead me. ... The second respondent failed to disclose to me that the property had weathertightness issues."

[4] Mr Milne denies that there were weathertightness issues and says further that he provided Mr Fetherston with all the information that he had relating to the property, including a copy of Code Compliance Certificates showing repairs undertaken on the property in 2006 and for which the Code Compliance was issued in 2009.

The Issues

[5] The issue for the Tribunal is whether or not Mr Milne failed in his obligations to Mr Fetherston by breaching Clause 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. 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"*.

The Evidence

[6] The Tribunal has read all of the papers filed in this matter. Of note are the judgments of Justice Lang and Associate Judge Sargisson in High Court proceedings between the Trust (and Mr Fetherston) and the vendors. However the issues are not

the same as the issue in this case which concerns whether or not Mr Milne (the agent), has breached his professional obligations to Mr Fetherston (the purchaser). The question for the Tribunal therefore becomes did Mr Milne mislead Mr Fetherston, or provide false information or withhold information that by law or fairness should have been provided to a client? This involves an analysis of what information Mr Milne had and did or did not pass on to Mr Fetherston.

[7] Mr Milne's evidence is that he spoke to the vendors and was told by them that there were no weathertightness issues with the property. However they did tell him that they undertook remedial work when they extended the property, for which they receive a Code Compliance Certificate. Mr Milne said that the information that they conveyed to him was that there was a leak in an upstairs window when the wind was blowing in a certain direction. Out of an abundance of precaution they replaced the window and took other steps to make the property weathertight. Mr Milne says he told Mr Fetherston this information. He said that after listing the property the vendors gave to him the Code Compliance Certificate (dated 2009) for the remedial works which were undertaken on the property (in 2006) and he provided a copy of that to Mr Fetherston. He said he also drew to Mr Fetherston's attention the fact that the vendors had failed to obtain a Code Compliance Certificate for initial works that were carried out on the property. He told Mr Fetherston that they had applied for a 'safe and sanitary' order certificate for these works.

[8] Mr Milne says he told Mr Fetherston this at the time the agreement was signed and advised him to both obtain legal advice, (which was declined) and insert the condition into the agreement that a LIM would be required. This was accepted by Mr Fetherston. The initial agreement was conditional upon a LIM being obtained. It seems however that no LIM was obtained.

[9] In his evidence Mr Milne says (and this is the focus of Mr Fetherston's criticism) that he did know that:

"The property had undergone some alterations and additions to address weathertightness issues in 2006 under Building Consent BA-1227566. I provided the appellant with a copy of the Code Compliance Certificate issued in respect of these works. I had no reason to suspect the works carried out to the property in 2006 did not adequately address the weathertightness issues."

[10] Mr Milne also said that the report obtained by Mr Fetherston on the property for the purpose of the High Court litigation, (the Cove Kinloch Report dated 13 September 2011), does not show that the property is leaking. Mr Milne also referred to a report prepared by Citiline I R Limited. This is an independent weathertightness inspection report carried out in November 2011 by the vendors as they remarketed the property. This showed that there was no level of increased moisture in the property apart from the garage, where the vendors apparently reported that they had been waterblasting.

Mr Fetherston

[11] Mr Fetherston says that the paragraphs set out above show that Mr Milne was aware that there were weathertight issues with the property and should have made Mr Fetherston aware that it was a leaky home. He submits that Mr Milne concealed

the true reality of the property for him. Mr Fetherston submitted that Mr Milne should have been aware of the issues and alerted the purchasers to the exact problems with 225 Beach Road. He referred to the home next door and said that he and his wife initially felt the mould came from this house but later discovered that Number 225 was leaky. Mr Fetherston said that the issue for him was that he was misled by Mr Milne and that he was not aware of the history of the property and that it had been a leaky home. He advised the Tribunal that the Code Compliance Report given to him by Mr Milne was insufficient to warn anyone that there was a problem with the property or to enable him to determine what the defects were. Mr Fetherston said that the problem was that the defects were underlying and hidden within the property that he was not aware of. He continued to reiterate that the serious issue of the fact that the house was leaky was concealed from him.

Discussion

[12] The Tribunal have examined this issue very carefully and are mindful of an obligation on an agent to disclose all the information that they have which is relevant to the purchaser. However as Mr Hodge submitted, there has to be a balance between the obligations of the purchaser to 'check out' the property that they are purchasing and to obtain the necessary reports to satisfy themselves as to durability, weathertightness and building issues and the obligation on an agent who has an obligation to disclose anything that they fairly know about the property. The focus should be upon the conduct of the agent and must be an objective analysis of the issues said to be concealed. Mr Fetherston agrees that he did receive copies of the Code Compliance Certificate BA-1227566. He was silent as to whether he recalled Mr Milne telling him about the repairs to the upstairs window, which was said to have been leaking. He also acknowledges that Mr Milne advised him to get a LIM, which he initially agreed to do. He says however that the LIM did not disclose the extent of the problem.

[13] Having considered all of the material very carefully we conclude that Mr Milne did not breach his obligations to Mr Fetherston. We stress that each case is fact specific but in this case Mr Milne fairly disclosed to Mr Fetherston all of the information that he had about the property. Mr Fetherston chose not to obtain a LIM or legal advice before he purchased the property. Those are his decisions but he must then accept the consequences of those decisions, which appears to be that he was under-informed about what he claims to be the state of the property. However it does appear from the material which we have before us that there is limited evidence that this property is actually a leaky home. The independent tests carried out in November 2011 leave a real question to be determined about whether or not the property does leak. We can find no evidence of anything Mr Milne knew which he did not disclose to Mr Fetherston. The paragraph Mr Fetherston objects to does not illustrate that Mr Milne knew anything other than that disclosed in the Code Compliance Certificate. The Code Compliance Certificate clearly shows remedial work and recladding – hallmarks of a repair for leaks – the purchaser should have made his own enquiries and satisfied himself on this point. He did not choose to do so or to take legal advice.

[14] We therefore conclude that there has been no breach of any of the Client Care and Conduct Rules by Mr Milne. Accordingly we dismiss the appeal brought by Mr Fetherston.

[15] We draw the parties' attention to the appeal provisions to the High Court set out in s.116 of the Real Estate Agents Act 2008.

Ms K Davenport
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member