BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 38

READT 32/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**SARAH RILEY AND JULIEN ARNOUX**
	Appellants
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10047)**
	First respondent
AND	**GLENN CARPENTER AND BERNICE QUIN**
	Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at AUCKLAND on 3 April 2013

DATE OF DECISION 13 May 2013

APPEARANCES

Ms S Riley as an appellant
Ms J MacGibbon, counsel for the Authority
Mr N N Kearney, counsel for second respondents

DECISION OF THE TRIBUNAL

The Issues

[1] Did the licensees fail to tell the appellant purchasers about an adjoining neighbour's plan to subdivide?

[2] In January 2012, Complaints Assessment Committee 10047 considered such a complaint (detailed below) by Sarah Riley and her partner Julien Arnoux ("the appellants") against Glenn Carpenter and Bernice Quin ("the licensees") the second respondents to this appeal. The Committee determined to take no further action on the complaint.

[3] For the purposes of this appeal, the appellants (as purchasers of a Birkdale property) argue that the licensees knew about an adjoining neighbour's plans to subdivide and did not tell them as prospective purchasers; and they would not have purchased the property if they had known about the plans for subdivision. Other issues of complaint were raised before the Committee by the appellants but those are not now being pursued before us.

The Basic Facts

[4] The licences work for Acme Realty Ltd, trading as Ray White Birkenhead. On 15 April 2011 the appellants purchased a property at 49a Salisbury Road, Birkdale (the property) which was listed with Ray White.

[5] The appellants state that an adjoining neighbour (Lance Greenwood), mentioned when they moved into the property that he was subdividing his next door property. He further stated that he had previously told the licensee Glen Carpenter about the subdivision and that he had disclosed plans to the vendors of the property well before their property was put on the market. Mr Greenwood had then stated that he never mentioned anything about the property to Bernice Quin.

[6] The licensees both say that they did not know about the subdivision. The appellants say that when looking at the property from the outset, they directly asked Bernice Quin *"Do you know if there will be anything built there, or any subdivisions etc"*. Bernice Quin responded with *"not that I'm aware of"*. This does not appear to be in dispute. Glenn Carpenter states that the appellants did not ask him about any possible subdivision.

[7] Bernice Quin states that she provided the appellants with a Local Council file and a LIM report for the property and that the appellants were told that the licensees were not aware of any plans to subdivide but that it was worth checking with the Council if they were concerned.

[8] Mr Greenwood stated to the Committee that the vendors of the property were well aware that there were subdivision plans in existence. However, there is an email from the vendors to the licensees stating that they were unaware of the subdivision and that they did not inform the licensees of any subdivision. The vendors state that they were only aware of Mr Greenwood's intention to build a retaining wall but nothing further and that they did not sign anything for him. Lance Greenwood confirmed to the Committee that the vendors did not sign anything.

Our Narrative From the Evidence

[9] The appellants purchased the said residential property after it failed to sell at auction. An attraction to them was its very appealing view from the lounge of open land and trees. However, within a week of the appellants settling the purchase and taking possession of the property, the next door neighbour (Mr Greenwood) brought in heavy machinery and demolished most trees and effected earthworks in the course of subdividing a rear section of this property so that a kitset type of house could be, and has been, place square in the middle of the view from the appellants' lounge.

[10] The issue is whether, in the course of their dealings with the two appellants, the licensees were asked by the appellants both whether that adjoining property (belonging to Mr Greenwood) was subdivisible and whether the agents knew that to

be likely. The licensees say that the only question put to them by the appellants, at any material time, was whether the adjoining neighbour had any plans to subdivide to which they responded they did not know. They also added that the appellants, as prospective purchasers, could check out that issue with the local Council.

[11] However it transpires that, even by that time, most neighbours in the area knew that Mr Greenwood planned the subdivision. It is puzzling that, apparently, the vendors to the appellants did not, nor did, apparently, either of the second respondent real estate agents.

Oral Evidence

[12] Before us evidence was given by the appellants Ms S Riley and her partner Mr J Arnoux and by each of the second respondent licensees. All witnesses were carefully cross-examined.

Evidence from Ms Riley

[13] Ms Riley is an experienced purchaser and vendor of residential property. She said that she asked the licensees a number of times about the subdivisional rules in the area and expressed the hope the no one could build out the beautiful view from the property's lounge. She expected the agents to know local zoning rules.

[14] She said she had asked both the second respondents more than once if they knew of any plans for the adjoining property to be subdivided and whether it could be subdivided. The response to Ms Riley was *"no not that we are aware of"*.

[15] Ms Riley said she asked those questions each time she viewed the property and received the same answer from either or both the second respondents. The appellants therefore purchased the property thinking there could be no subdivision on that adjoining land and were shocked when a subdivision commenced soon after they had moved into the property.

[16] Ms Riley is convinced that both the vendors and the licensees knew that the adjoining owner, Mr Greenwood, intended to very soon implement the subdivision.

[17] Ms Riley emphasised that she and her partner had needed to build a *"huge"* fence to obtain privacy at a cost in excess of $4,000 and put it that their property had lost its street appeal and lost value. There is no evidence before us as to loss of value.

[18] The stance for the licensees is that the question from Ms Riley was simply whether the agents knew of any plans of the adjoining owner to subdivide and that neither Ms Riley nor Mr Arnoux asked about local subdivisions rules.

[19] The appellants do not now recall the licensee Ms Quin having advised them to check out the subdivisional possibility issue with the local Council. The appellants insist that they asked the licensees two or three times whether the neighbour had plans to subdivide, but Ms Quin insists that the question was only asked of her once.

[20] There seemed to be no dispute that, before material times, the adjoining owner, Mr L Greenwood, had told all neighbours of his subdivisional plans even though he did not need their consent.

Evidence from Ms Quin

[21] The licensee Ms Quin asserted that she was merely asked by Ms Riley if the adjoining owner had plans to subdivide, and that question was asked on only one occasion, and Ms Quin responded *"not that I am aware of but if it's important to you and you are concerned, you should go to the local Council and investigate further"*. Ms Quin insisted that Ms Riley did not ask her about the zoning in the area or zoning rules and said that, even if she had, she would still have said *"go to the Council"*.

[22] Ms Quin said that she had no conversation with Mr Greenwood about his subdivision until after the appellants had purchased the property and, indeed, had not spoken to him at all over material times. She also said that the vendors, her principals, did not tell her about the subdivision. She said that, if they had, she would certainly have disclosed it to all interested purchasers because she understands her obligations under the law.

[23] We inferred that the licensees both had quite some good idea of the zoning rules in the area but they assert they were not asked that particular question and never thought to refer further to zoning requirements in response to Ms Riley's question about the possibility of a subdivision taking place.

[24] Ms Riley considers that the agents (the licensees) should have given her advice on zoning but the agents take the view to the appellant purchasers that: *"You guys should have done your due diligence better"*. The appellants take the view that the second respondents are real estate agents and should have supplied better information to them.

Evidence from Mr Carpenter

[25] The second respondent agent Mr Carpenter gave fairly similar evidence to that from Ms Quin. He is also a very experienced real estate agent. He said he had no communications with the vendors about the subdivision although he had been dealing with them for 18 to 24 months prior to their putting the property on the market.

[26] He said that he had two brief conversations with Mr Greenwood over material times but the prospective subdivision was never raised. He said he did not meet Ms Riley until settlement day and he was never asked about local zoning rules or whether Mr Greenwood had any plan to subdivide. He said if he had been asked those questions he would have responded that he was not aware of any subdivision plan and that the appellant purchasers should take professional advice on that issue.

[27] He asserted that, had he known of Mr Greenwood's subdivisional plan, he would have disclosed it as he understood that to be an obligation upon him under the law. He said he had not known that the subdivision was taking place until another Ray White agent listed the balance (with the house) of Mr Greenwood's property for sale a week or two after settlement of the said purchase by the appellants.

[28] Mr Carpenter also covered that, for some time, Mr Greenwood had been adamant that he had told Mr Carpenter at material times about the proposed subdivision but eventually, apparently, Mr Greenwood acknowledged that he had been confused in thinking that. In any case it appears that if Mr Greenwood did give

that information to Mr Carpenter, it was after the appellants had purchased their property.

[29] Mr Carpenter acknowledged that it was surprising the vendors had not told him or Ms Riley about the proposed subdivision of Mr Greenwood because they must have known. He asserted *"They certainly didn't tell me"*. He said it was not his practice to meet with neighbours of a property he was endeavouring to sell for principals.

[30] Mr Carpenter also seemed to be saying that, until the hearing before us, the stance of the appellants was that they had asked the licensee whether the adjoining neighbour had any plans to subdivide but, before us, the appellants have added that they had also asked in the same breath whether the zoning regulations in the area permitted Mr Greenwood to so subdivide. Mr Carpenter said he understands the zoning requirements in the area and could and would have answered had he been asked that question by the appellant purchasers.

[31] Before us, Ms Riley then put it to Mr Carpenter *"why didn't you give that answer (about the area being 4B zoning) as I did ask you that question"?* Mr Carpenter responded that he was only asked whether he was aware of any plans of the adjoining owner to subdivide, not about the subdivisional rules in the area, and had responded that, if it concerned the appellants, they should go to the local Council. Mr Carpenter's attitude seemed to be that the appellants should have done their due diligence better.

The Statute

[32] Section 72 of the Real Estate Agents Act 2008 defines 'unsatisfactory conduct' as follows:

> *"**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."*

The Committee's Decision

[33] The Committee held an oral hearing pursuant to s.90(1) of the Real Estate Agents Act 2008 ("the Act") and made a determination under s.89(2)(c) of the Act. Section 111 provides a right of appeal to us for any person affected by a determination of a Complaints Assessment Committee, including any determination under s.89. The appeal before us is by way of rehearing.

[34] In a hearing on 25 January 2012, the Committee heard evidence from the appellants, Lance Greenwood, and the licensees about the above issue and about other issues not now pursued by the appellants. The appellants were permitted to file further final submissions after the hearing. Pursuant to s.89(2)(c) of the Act the

Committee determined that no further action was to be taken in regards to the complaint.

[35] The Committee detailed its finding that s.72 had not been breached by the licensees. Further, it was not satisfied that the appellants had established their case to the required standard of proof in relation to the subdivision issue. The Committee accepted that the appellants would not have bought the property had they known about the subdivision and that the subdivision had exercised a significant impact on their lives.

[36] The Committee concluded that it could not form the view that there was any basis for a finding of unsatisfactory conduct.

Issues on Appeal

[37] We need to determine whether the licensees did know that there was going to be a subdivision next door and withheld information from the purchasers.

[38] The Real Estate Agents Act (Professor Conduct and Client Care) Rules 2009 (Rules) guard against conduct which might undermine the integrity of the industry. 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."*

[39] We considered the duties imposed by rules 6.4 (and 6.5) in *Wright v CAC 10056 and Woods* [2011] NZREADT 21 and held that the obligation to disclose information is a wide ranging one:

> *{41] The emphasis in Rule 6.4 and 6.5 is on the conduct of licensee. The Rules provide that a licensee must ensure that they are open and honest with a purchaser so that they are not misled in their decision to make an offer to purchase a property. There does not need to be any reliance by the purchaser on the statements (or lack of statements) by the agent and it is clear that a duty of utmost good faith is required from the agent."*

[40] We need to determine whether the Committee was wrong to decide the licensees did not know about the subdivision on the neighbouring property.

The Stance of the Parties

[41] Essentially, the appellants submit that both the licensees knew of the proposed subdivision at material times and were evasive when questioned about subdivision rules in the area by Ms Riley.

[42] The general stance of these agents is that they had no knowledge of any building work or subdivision to take place on the neighbouring land owned by Mr Greenwood and had no conversations with Mr Greenwood whatsoever on that issue prior to the purchase by the appellants of their residential property. They also assert that they were never asked by the appellants if the property owned by Mr Greenwood could be subdivided, only whether they knew of any plans to subdivide and they responded that the appellants were *"correctly and truthfully advised"* that

the licensees were unaware of any plans of Mr Greenwood to subdivide *"but that it was worth checking with the Council if that was a concern for them"*.

[43] Mr Kearney strongly submitted for the two agents that they had not misled the appellants in any way, nor had they tried to, nor were they asked about subdivisional rules in the area but only whether they knew whether the adjoining owner had any plans for subdivision.

[44] Ms MacGibbon, quite correctly, outlined various conflicts in evidence and relevant law and put it that the issues are factual matters involving credibility for us to decide.

[45] Of course, there was reference to the onus of proof reposing in the appellants to the standard of proof of the balance of probabilities.

[46] The issue was raised that, perhaps, a licensee should have some idea of local zoning rules.

[47] Ms Riley submitted that, in this case, the licensees fell short of providing the knowledge which the public are entitled to expect. Ms Riley went further and submitted that the licensees well knew of the subdivisional rules in the area but did not give this information to the appellant purchasers when the appellants had asked for it. The appellants also submit that Mr Carpenter must have been aware that Mr Greenwood's subdivision was pending at material times prior to the sale to the appellants.

Our Conclusions

[48] We do not think that real estate agents are required to research neighbouring zoning unless direct questions are put to them. Even then, if they cannot answer such questions, they need merely point the questioner in the right direction to obtain professional advice (unless the agents know the answer to the question).

[49] It concerns us that the questions asked by Ms Riley must have been meant to cover the wider issue of whether the adjoining owner could subdivide, rather than being confined to whether the agents knew of any plans about subdivision. It is also puzzling that neighbours in the area knew of the impending subdivision, that it was very much about to happen at material times, and that the vendors must have known this; but their agents, the licensees/second respondents, did not know.

[50] On the balance of probabilities, we cannot be satisfied that the decision of the Committee is incorrect. That is to say that, on the balance of probabilities, we cannot be satisfied that the second respondent agents, or either of them, were clearly asked about subdivisional rules in the area; nor that they should have inferred that as a question from the appellants. They were certainly asked whether they knew of any subdivisional plans of Mr Greenwood, but, on the balance of probabilities, we have no reason to believe that they did.

[51] Having said all that, we have misgivings that such a situation has occurred. We feel that the licensees could have been more proactive at answering the questions of the appellants who are credible and intelligent people, as are the licensees. We can understand the appellants feeling that the conduct of the agents was unsatisfactory to some extent; but the evidence is rather confusing as to who said what to whom at

material times, and is somewhat conflicting. Any failure on the part of the second respondent agents is at the very lower end of the scale.

[52] Had we found that the agents had deliberately or carelessly withheld the type of information in issue, there would have been a situation of misconduct and some type of fraud. That would have led to very serious consequences for the agents.

[53] Simply put, we cannot be satisfied on the balance of probabilities that either agent knew of the subdivision; or that either agent should have known of the subdivision; or that either agent could have been expected to realise that the appellant purchasers may have been asking them about local subdivisional rules. We might have expected someone of the intelligence and experience of the second respondent agents to have realised the latter issue, but we cannot be sure as to how that question was put to them.

[54] With hindsight, we observe that a dedicated real estate agent, upon being asked about subdivisional prospects on the adjoining property, should have herself or himself questioned the vendors about their knowledge and/or gone to the local Council themselves and/or passed on to the appellant purchasers whatever knowledge they had about zoning in the area.

[55] Nevertheless, it is not clear from the evidence how the issues were raised and dealt with between appellants and second respondents at material times.

[56] For the reasons we have set out above, this appeal is hereby dismissed.

[57] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

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Judge P F Barber
Chairperson

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Mr J Gaukrodger
Member

_____
Mr G Denley
Member