

[2013] NZREADT 63

READT 101/12

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **MR M**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC20004)**

First Respondent

AND **ALLAN AND NOELINE LEWIN**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mr McAnally and Ms Hojabri for the appellant (Keegan Alexander, Solicitors)
Mr Hodge and Ms Locke for First Respondent
No appearance for Second Respondent

Introduction

[1] This is an appeal from a decision to the CAC to find Mr M guilty of unsatisfactory conduct. The parties agreed on a Statement of Essential Facts in this case. The appellant is the licensee of X X Real Estate in Whangarei. In November 2011 X X Real Estate was the agent for the vendor of a property at X X Street, Whangarei. The issue in this case arises out of a land covenant on the title of X X Street and the extent of the agent's responsibility to inquire into the land covenant so the agent knows what he/she is selling.

[2] The parties have reached an agreement on the agreed Statement of Essential Facts and this is set out below:

1. *The parties are agreed that the essential facts for the purposes of this appeal are these:*

- (a) *On 15 September 2011 the trustees of the IF & CS Crawford Family Trust entered into an agreement with X X Real Estate whereby the latter was granted a sole agency to attempt a sale of the trustees' residential property at X X Street, Whangarei: BOD 73-74;*
- (b) *The listing and selling agent employed by X X Real Estate was Laurel Watson. The appellant is the principal officer of that Company;*
- (c) *Upon execution of the listing agreement Ms Watson obtained a copy of the certificate of title of X X Street, Whangarei, and recognised the entry of a number of encumbrances upon that title including the covenant recorded in transfer document numbered 5291844.8: BOD 63-65, 108-111;*
- (d) *Ms Watson did not obtain a copy of document 5291844.8 and was not advised by the vendors of its content;*
- (e) *The marketing of the property at X X Street did not refer to the existence of the covenant or its content;*
- (f) *Ms Watson did indicate to prospective purchasers interested in the property that there was a covenant on the title and that legal advice should be taken in respect of it: BOD 27;*
- (g) *The property at X X Street was inspected by prospective purchasers Mr Abdul-Wahhib and Ms Abdul-Baki on 1 November 2012 and they expressed interest in purchasing the property on 3 November 2012. A draft sale and purchase agreement was prepared that day and Ms Watson accompanied the prospective purchasers to their solicitors and, while there, drew to the solicitor's attention the certificate of title and the covenant registered thereon: BOD 24, 112 and 113;*
- (h) *A conditional sale and purchase agreement between the vendors and Mr Abdul-Wahhib and Ms Abdul-Baki was entered into on 8 November 2011: BOD 96-106;*
- (i) *On 23 November 2011 the second respondents' solicitor wrote to X X Real Estate and drew its attention to the provisions of the covenant and, in particular, schedule B thereof: BOD 12;*
- (j) *The vendors and the purchasers agreed that the transaction would proceed subject to a \$5,000 reduction in the purchase price and the addition of a condition that the agreement would be at an end if any attempt was made to injunct the sale: BOD 83-85;*
- (k) *The sale to Mr Abdul-Wahhib and Ms Abdul-Baki settled on 16 December 2011;*
- (l) *Neither of Mr Abdul-Wahhib and Ms Abdul-Baki are aged 55 or more and they have a child who was three years old at the material times; and*
- (m) *In February 2012 the second respondents, who are the owners of an adjoining property complained to the Real Estate Agents Authority: BOD 1-5.*

The Issues

[3] The agent [in accordance with company policy] obtained a copy of the title, identified that there were a number of easements on the property and a land covenant but did not consider to inquire what it contained and what the consequences of it might be or ask the vendor about its terms. The agent did draw the covenant's existence to the attention of the purchaser's solicitor and ensured that they receive legal advice prior to signing the agreement.

[4] The Tribunal have seen a copy of the covenant which is contained in a transfer created by the initial developer. The covenant says that the vendor may not dispose of any of the property to any person or persons unless that person is 55 years of age or over. The covenant also goes on to say that only one of the purchasing parties needs to be that age. The purchasers were under 55.

[5] The development had been established as a retirement complex, although it was not clearly marked as such.

[6] After the sale was completed the neighbours in the retirement complex complained to the Real Estate Agents Authority saying that they did not want persons under 55 living in the complex. In reaching its decision the Complaints Assessment Committee considered that if the licensee had obtained a copy of the covenant they would have been aware of the 55 year age restriction and it would have been likely that the marketing and promotion of the property would have been different. Further it considered that the prospective purchasers would have been aware of the implications of the covenant and would have been able to make an informed decision. The Committee considered that the conduct breached rules 5.1, 6.4 and 6.3 of the Client Care Rules and on the balance of probabilities determined that Mr M, the appellant and Ms Watson (the agent) had engaged in unsatisfactory conduct. A small fine of \$750 was imposed upon Mr M.

[7] Mr M appealed. The appellant's position is that there is no obligation on licensees to inform themselves as to the effect and implications of encumbrances on titles or give any advice to any person in respect of these covenants; as that is the work of lawyers. Mr McAnally acknowledged that if a positive representation had been made about the covenant or about any aspect of the land then the agent is responsible to ensure that the statement is true but he submits that the decision of the Tribunal in *L B and Q B v the Real Estate Agents Authority*¹ cannot be read to impose a higher standard than that set out above.

[8] Mr Hodge for the Authority submits that in fact L B and subsequent decisions of the Tribunal do impose an obligation on a licensee to do more than simply obtain a copy of the title. Mr Hodge submitted that L B decision did not create an expectation that licensees should be able to interpret complex titles or provide an in-depth analysis of planning regulations or other Council requirements. However he submits that the case confirms that licensees must conduct sufficient research before making representations to purchasers that might be incorrect or omit important details. He says that the obligation can be summed up as "*know your product before the sale and do the appropriate due diligence.*" Mr Hodge submitted that when there are issues with a title an agent should do due diligence. He submitted that in this particular case the agent needed to obtain legal advice on the covenant so that all parties knew what they were dealing with. He said that legal advice should be obtained, not once the property was being purchased but prior to that time as the effect and implications of the covenant would need to be explained to any potential purchaser. He emphasised the due diligence analogy to show that an agent needed to understand the 'product', flaws and all.

¹ [2011] NZ READT 39

[9] The Tribunal has not gone into any detail about the enforceability or otherwise of the covenant because that is not the issue in this case but there were doubts raised after the agreement was signed about whether or not the covenant was enforceable.

[10] Mr Hodge submitted however that the conduct of the agency was not extremely culpable and that they had done a great deal in obtaining a copy of the title – reading it, recognising there were some “issues” with it and ensuring that legal advice was obtained before a contract was signed. He submitted that the steps that were taken were good but not good enough.

[11] Both parties discussed the L B case and Donkin v the Real Estate Agents Authority², a subsequent decision. In that case the Tribunal clarified that the agents are not expected to be lawyers.

[12] The Tribunal recognise that the facts that are the subject of this case arose at about the time or slightly before the Tribunal gave its decision in L B and before the Donkin decision. Both decisions have received significant publicity and all real estate agents now are being educated upon the need to understand what is on a title.

[13] However the Tribunal considers that that the obligation of an agent is to go further than simply recognising that there are issues with the title and drawing it to purchasers and their solicitors’ attention. As Mr Hodge has submitted issues such as those raised in this covenant need to be known prior to the property being marketed because the terms of the covenant could significantly affect the way that the property can be sold and subsequently used. In this case clearly a covenant which appeared to restrict the sale to persons over the age of 55 is a significant restriction/barrier which ought to be drawn to the purchasers’ attention before they decide to purchase.

[14] The Tribunal reiterates that real estate agents are not expected to be lawyers. However the title contains extremely useful information which needs to be understood by the agent prior to the property being sold. If the agent cannot understand the implications or meaning of encumbrances, caveats, covenants or other restrictions on the title then they should ask their vendor to provide the legal advice which will clarify these things for any potential purchaser. Alternatively if appropriate they can obtain that legal interpretation themselves. However since an agent acts as an agent for the vendor the most appropriate source of information must be the vendor themselves or their solicitor. As Wilde J said in *Altmarloch Joint Venture Limited v Moorhouse & Others*³ at paragraph 252:

“Bayleys ought to have included accurate and complete information about the water permits in its sales information brochure, carefully checking that information with the Moorhouses and/or G W (the vendor’s solicitors) before issuing the brochure. I find Bayleys was negligent in not doing that.”

² [2012] NZ READT 44

³ HC Blenheim CIV 2005 4006-000091, 3 July 2008

[15] This is a statement concerning civil liability of agents but it is helpful to understand that the Tribunal are not imposing upon agents extraordinary requirements. The Real Estate Agents Act 2008 has placed positive obligations on agents to be open, honest, accountable and to ensure that nobody is misled or deceived at the time the property is being sold. As the Tribunal has said on numerous occasions one of the purposes of the Act is to protect the members of the public when they are making what can often be the biggest purchase of their lives.

[16] Accordingly the Tribunal thinks that the appropriate steps for any agent to take are as follows:

- (i) When a property is listed or appraised the agent should obtain a copy of the title.
- (ii) At about the time the agency agreement is signed and before any marketing/sale of the property commences the agent should review the title and to seek clarification from the vendor [or if appropriate their solicitor] about anything unusual on the title. This requires the agent having to read the title and actively ask about issues on the title.
- (iii) The agent should then discuss the title with the vendor so that any marketing of the property does reflect this information. This is in keeping with the Real Estate Agents Client Care Rules (Rule 6.4) and with the statements made by this Tribunal in *L B* and *Donkin*.

[17] The Tribunal intend this decision to be more educative than punitive. As Mr Hodge acknowledged the agency did many things that were correct. However in this area of developing law the Tribunal find that they did not go far enough or did not start far enough back, i.e before they prepared their marketing programme. The licensee should have advised that the covenant be searched and understood by the agent. This conduct was unsatisfactory conduct as found by the Complaints Assessment Committee.

[18] However given that the facts of this decision arose at about the time the Tribunal was deciding *L B* and before the Tribunal made the decision in *Donkin* we consider that it is appropriate that while the unsatisfactory conduct finding remain against Mr M he should receive suppression of his name and any information that might identify him or the agency. The decision should be primarily educative.

[19] The Tribunal make this order pursuant to s 108 upon the grounds:

1. It is appropriate in this case that Mr M's private interests outweigh the public interests and openness of justice. The Tribunal's decisions in this area having been developing agents understanding of the law and it is therefore appropriate that Mr M's name be suppressed but the educative needs of the profession met by publishing an anonymised decision.

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

DATED at AUCKLAND this 25th day of July 2013

Ms K Davenport QC
Chairperson

Mr G Denley
Member

Ms N Dangen
Member