BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 71

READT 129/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**JOHN ELDER**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC10062)**
	Respondent
AND	**WARREN BARKER**
	Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at TIMARU on 25 March 2013 and CHRISTCHURCH on 3 July 2013

DATE OF DECISION 21 August 2013

COUNSEL

The appellant on his own behalf
Mr R M A McCoubrey, and Miss S G J Locke, counsel for the Authority
The second respondent on his own behalf

DECISION OF THE TRIBUNAL

The Issue

[1] The Authority's Committee 10062, decided to take no further action against the second respondent licensee (Mr W Barker) in terms of the appellant's complaint that a small laundry room should have been part of an apartment bought by the appellant in December 2009/January 2010. That apartment had been a unit of the former Caroline Bay Motels, Timaru. The complaint was held on the papers in the usual way. The appellant purchaser appealed the Committee's decision to us and we conducted a full hearing in the usual way.

[2] This appeal centres around the licensee's conduct and representations in relation to whether the small laundry (AU03 as marked on the relevant plan) was part of Unit K (which later became PU13) or whether it was common property or belonged to four other apartments in the complex. We shall refer to the unit as Unit K.

[3] The licensee worked for Blackham Boote Real Estate Ltd in Timaru which is part of the Harcourts group.

[4] Essentially, the licensee is alleged to have misrepresented to the complainant appellant that a small laundry facility in a block of motels, which has been converted by a developer company into a block of apartments, belongs to the unit purchased by the appellant, when it does not. The property was originally the Caroline Bay Motel at Timaru and a company called Alexander Management Ltd was, at material times, in the process of developing the motels into individual residential units.

[5] From the outset, the licensee was provided with a copy of the proposed unit plan being used for the necessary resource consent application and which depicted the location of each unit in the complex.

[6] The appellant, as purchaser of Unit K, contends that at the time he entered into an agreement for sale and purchase of Unit K, he understood he would own the small laundry and he bought the unit on that basis. However, the licensee contends that he made it clear to the appellant from the outset that the small laundry was common property.

[7] Very simply put, this case must have arisen because of confusion caused by the developer (or its advisers) in some of their references to both the said small laundry and to the large former motel laundry which became the laundry to Unit K, and is at the rear of Unit K. An issue is whether the licensee can be connected to any such confusion.

More Factual background

[8] In December 2009 the appellant was interested in buying the manager's unit of the former Caroline Bay Motels (Unit K). That incorporated a large laundry previously used in operating the motels as distinct from the small laundry abutting Unit K.

[9] On 23 December 2009 the licensee showed the appellant through some of the units. The vendor then took him through Unit K because the licensee had other people to meet at that particular time.

[10] On 24 December 2009 the appellant met with the licensee and made an offer to purchase Unit K. There was a discussion about the small laundry room adjacent to Unit K but the parties dispute the contents of that discussion.

[11] The appellant paid the deposit for Unit K on 26 January 2010.

[12] On 24 March 2010 the vendor’s surveyors wrote to the licensee enclosing copies of the proposed final subdivisional plan regarding the former motel units and noted "Unit K has been amended to include the large laundry area to the rear. This leaves AU03 as a common laundry area for the single bedroom units (3 square metres)." On that plan, AU03 (the small laundry) was separated from Unit K but the plan did not state that it was common property. However, a Unit Schedule showed AU03 as having multiple certificates of title which suggests common property status.

[13] The appellant's solicitor confirmed the purchase contract as unconditional on 31 March 2010.

[14] There was a "misleading" (as described by the Committee's decision of 9 December 2011) 6 May 2010 fax from the vendor's solicitor in response to the 5 May 2010 appellant letter seeking clarification of the ownership status of AU 03. That letter included:

> "*So here are my queries and comments, as I understand the situation, for correction if necessary.*
>
> *(1) The room currently used for the coin-operated laundry is part of the property of unit K.*
>
> *(2) The owner of unit K (to be myself) has no legal or moral requirement to provide the service of this laundry.*
>
> *(3) Potential buyers of the single bed-room units should be so informed."*

[15] The *"misleading"* reply of 6 May 2010 stated:

> *"6th May 2010*
>
> *Attention Jacqui Wilkinson.*
>
> *In response to Mr John Elders letter.*
>
> *I believe Mr Elder agreed verbally with the agent Mr Warren Barker on viewing his Unit that he would make available the coin-operated washing machine/dryer to the eventual buyers of the 4 studio units. Indeed it was specified in his contract that the chattels included these machines.*
>
> *Unfortunately there is no room for the installation of washing machines in the studio units.*
>
> *The agent will make any incoming purchasers aware of Mr Elders concerns.*
>
> *1)Yes, the laundry is part of his Unit K.*
>
> *2) No legal requirements to provide this laundry.*
>
> *3)Yes they will be informed.*
>
> *Agreed that he may negotiate any arrangement here with new purchasers of the studios.*
>
> *Is it really a matter for the Body Corporate in the future?*
>
> *Alexander Management Ltd.*
>
> *P.H.Alexander.*

[16] On 8 June 2010, the Timaru District Council approved the subdivision plan.

[17] In mid-August 2010 the licensee became aware that the appellant had removed walls in Unit K.

[18] On 30 August 2010, titles in relation to the subdivision were issued. The four one-bedroom studio units (PU1-4) had noted on their title: " ... 1/4 share of Accessory Unit AU03 Deposited Plan 430037."

[19] On 9 October 2010 the appellant paid the remainder of the purchase price for Unit K (or PU13).

[20] The appellant states that it was not until 28 October 2010 that he was finally shown the titles for the four one bedroom units on his level of the complex; and it was then that he realised AU03 (the small laundry) did not belong to PU13 (i.e. to his apartment K). He then realised, from being shown those titles, that AU03 was common property to the four one bedroom studio units. He asserts that, until then, he was of the firm belief that AU03 was part of his unit and so would belong to him.

[21] On 12 November 2010, the appellant removed everything from that small laundry and locked and bolted the room.

[22] On 8 February 2011 the vendor served the appellant with a trespass notice regarding AU03.

[23] On 22 February 2011, the appellant was served with a notice of hearing before the Disputes Tribunal, in Christchurch, regarding the vendor seeking to recover from the appellant the cost of reinstating the door to the small laundry. We understand that, since then, there has been litigation and settlement conferences which have resulted in the appellant purchasing the small laundry from the vendor. In this appeal to us, the appellant seeks to recover from the licensee that purchase price plus various so-called consequential expenses, mainly legal fees.

The Committees Decision

[24] The complaint before the Committee centred around the licensee's conduct and representations in relation to whether the small laundry belonged to Unit K or was common property.

[25] The appellant asserts that, at the time he entered into the agreement for sale and purchase of Unit K, he understood that he would own the small laundry; and it was on this basis that he entered into that agreement. In his Complaint Form to the Authority, the appellant submitted that the contract was broken without his knowledge and *"in circumstances and actions in which Warren Barker had an intimate role in a case of misrepresentation and fraud"*. The appellant also submitted that the licensee *"wilfully made a false and fraudulent declaration both verbally and in writing that he had made it clear to me at the time of signing the contract that the small room was not part of unit"*.

[26] The licensee contended that, at all stages, he made it clear to the appellant that the small laundry was common property, and he confirmed that to us.

[27] The Committee decided to take no further action, and in summary:

[a] Did not find any compelling evidence that the licensee misled or misrepresented the Complainant regarding the ownership status of the small laundry;

[b] Found that the licensee included in the sale and purchase agreement all additional clauses necessary to protect the purchaser when resource consent and title were pending;

[c] Accepted that the Complainant had formed the view that the small laundry was part of the property he was buying;

[d] Accepted that the preliminary plan was far from explicit as to the status of both the large and small laundries adjacent to Unit K, but did not find anything in the licensee's conduct to suggest that he misrepresented the auxiliary nature of the small laundry;

[e] Considered that, given the draft nature of the plan and subdivision, the Complainant and his solicitor should have been on notice to take extra care when reviewing the next stage of plans;

[f] Accepted that the vendor's reply of 6 May 2010 regarding the small laundry was misleading but could not find any evidence linking the licensee to this error, and noting that, in any event, the agreement for sale and purchase was then already unconditional so the Complainant had limited remedies; and

[g] Found no compelling evidence that the licensee knew about and concealed the changes from the preliminary plan to the final plan.

Appellant's grounds of appeal and outcome sought

[28] In attachments to his 20 December 2011 Notice of Appeal, the appellant includes the following in his grounds of appeal:

[a] The Committee's comments indicate that it has mistakenly treated his complaint as though it applied only to what was said or done at the time of the contract;

[b] The Committee made no comment about the sloppy work of the licensee at the viewing (presumably of Unit K) and signing of the contract;

[c] The Committee brushed aside the significance of the 6 May 2010 fax and the vendor company’s changing the contract as an error in law, apparently accepting the vendors excuse which is repeated by the licensee. The appellant must be referring to the vendor seeming to have thought that the appellant had been referring to the large laundry incorporated into Unit K.

[29] Helpfully, the appellant also put it that "[w]hether or not the 'small laundry room' was an integral part of unit K is at the centre of my complaint."

[30] The appellant also raises again that the licensee has wilfully made a "false and fraudulent declaration" verbally and in writing in asserting that he made it clear to the appellant that the small laundry was not part of Unit K at the time the agreement for sale and purchase was signed.

[31] The appellant seeks that:

[a] The licensee revoke and retract his declaration.

[b] The licensee be formally reprimanded.

[c] The licensee provide an explanation or excuse for his conduct.

[d] Compensation."

Licensee's response

[32] The licensee asserts:

[a] On 24 December 2009 the appellant called at his office to make an offer on Unit K after having viewed the manager's accommodation and office with the vendor the previous day. The licensee was not present at that 23 December 2009 viewing.

[b] There was discussion between the licensee and the appellant relating to AU03 (the small laundry) and the licensee made it *"quite clear ... that this laundry was a common area and to be used for other units in this complex."*

[c] Two washing machines were added to the chattels because the appellant thought it a good idea that he receive the income from the machines, given their power was sourced from his unit K.

[d] The machines were endorsed as not belonging to the previous owners. There was also a washing machine in the large laundry at the rear of Unit K.

[e] The agreement for sale and purchase had attached to it the unit plan being used for the resource consent application, and this unit plan was endorsed by the appellant and vendor.

[f] The agreement for sale and purchase was conditional on several clauses, relevantly:

[i] Conditions relating to the vendor subdividing (clause 15).

[ii] The appellant being satisfied in all respects with the body corporate rules (clause 19).

[iii] The appellant's solicitor being satisfied with the contents of the agreement within ten working days of 24 December 2009.

[g] The appellant's solicitor partly confirmed the sale on 16 February 2010 and the contract went unconditional on 31 March 2010.

[h] The plans for Council approval were received on 24 March 2010 from the surveyors. The licensee presumes that the appellant's solicitor received this documentation prior to 31 March 2010.

[i] Changes on the plan relating to car parking and unit nomenclature were forwarded to the appellant's solicitor.

[j] In early 2010 the licensee and the appellant discussed the matter of the small laundry. This was because the appellant was aware that the licensee was marketing the four studio units in the complex and advising prospective purchasers that the coin-operated washing machines in the small laundry would be made available as a communal laundry area.

[k] The 5 May 2010 letter from the appellant to his solicitor, Gary Clarke, seeking to clarify the ownership status and use obligations (if any) of the small laundry, plus Mr Clarke's forwarding of this to the vendor's solicitor on 5 May 2010, would have flowed from this discussion.

[l] In mid-August 2010 the appellant began making alterations to Unit K which did not have the required consent (presumably, of the new body corporate). The licensee showed the appellant the unit title plan and pointed out that the small laundry was not his to alter. The appellant became "very agitated" and sought to change the subject, and said it was "in the hands of his solicitor and that he did not blame me."

[m] Later in August 2010, the licensee and the vendor spoke to the appellant about the small laundry but the appellant accused the vendor of altering the plan and said he would see him in Court. The licensee considered that the appellant was being very unreasonable towards the vendor and says that, again, the appellant told the licensee that he did not blame him. The licensee said he would put that in writing, but never did.

[n] Settlement occurred in mid-October 2010.

[o] The licensee is "amazed" that "after this time" the appellant has reported him to the Authority.

[p] The plan attached to the agreement for sale and purchase was clearly shown as a preliminary plan and subject to final survey; and only depicted the location each unit.

[q] The licensee is not aware of the contract having been altered.

[r] The licensee advised the appellant that AU03 (the small laundry) was a common area when the agreement for sale and purchase was signed and on two further occasions prior to settlement.

[s] The licensee did not sign or endorse anything on the contract.

[t] The licensee denies any fraud or misrepresentation in relation to the transaction.

The Statute

[33] 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."

Discussion

[34] Counsel for the Authority (Miss Locke) notes that it is the conduct of the licensee which is at issue, and that other parties seem to have contributed to the alleged misrepresentations and misunderstanding which arose. We are concerned with the conduct of the licensee referred to above.

[35] Miss Locke submits that, more specifically, we are not concerned with the conduct of the appellant's solicitor, or, more relevantly, of the vendor or the vendor's solicitor who sent the 6 May 2010 fax which clearly, but erroneously, stated that AU03 (the small laundry) was part of Unit K. The Committee accepted that this fax was misleading but could not find any evidence linking the licensee to the error.

[36] The appellant is insistent that when he was shown through some of the units on 23 December 2010, the previous owners showed him through Unit K including the small adjacent communal laundry room, and they explained how the washing and dryer machines in it operated. At the conclusion of that viewing the complainant decided he wanted to buy that particular unit and the next day he called into the licensee's office to make an offer on it (Unit K). As the Committee then put it:

"2.3 ... During this meeting the licensee states that there was quite a discussion about the small adjacent laundry area. The laundry had a coin operated washing machine and drier in it and the power for this laundry came from Unit K. The licensee said he made it quite clear to the complainant that this area was common to all units and had to be available for common use, particularly for the four studio units which did not have room for a separate washing machine. The licensee said he suggested that the complainant retain the coin-operated machines and receive the income from these to cover the costs of the power which would be charged to Unit K. The licensee said the complainant agreed that this would be a good idea and so the two appliances were added to the chattel list of the sale and purchase agreement. A copy of the proposed preliminary unit plan was attached to the sale and purchase agreement and signed by both the complainant and the vendor. The licensee also added further clauses to the sale and purchase agreement including clause 20 – that the agreement was subject to the purchaser's solicitor approval.

2.4 The complainant states that no such clarification regarding the small laundry area took place. The complainant says he was under the clear understanding that this small laundry area was part of Unit K and, on that basis, he entered into a sale and purchase agreement.

...

2.6 On 24 March 2010 the surveyors, Milward Finlay Robb, wrote to the licensee enclosing copies of the final proposed plan and pointing out "Unit K has been amended to include the large laundry area to the rear. This leaves AU03 as a common laundry area for the single bedroom units (3 square metres)." It is clear from this plan, date stamped 23 March 2010, that the laundry called AU03 is separated out from Unit K but does not clearly state on the plan that it is common property. However, in the attached Unit Schedule it is clear that AU03 has "multiple" certificates of title, inferring its common property status.

[37] We received similar evidence from the appellant and the licensee as had been adduced to the Committee. The documents and plans provided to us show that the little laundry room AU03 was never part of Unit K.

[38] In mid August 2010, the licensee became aware that the appellant had removed walls in his unit (Unit K or PU13) next to the laundry and had replaced them with a door. The licensee said he called to see the complainant about this issue with copy of the plan, and pointed out to the complainant that the laundry area was clearly common property for all units so that it was not the appellant's to alter. In fact, Titles in relation to the subdivision of these units were issued on 30 August 2010 clearly show that all the four one bedroom studio units had a quarter share of the accessory unit AU03.

[39] We understand, as did the Committee, that the representations in issue were made to the appellant by the licensee at their meeting on 24 December 2009 over the form of offer the appellant made for Unit K. The appellant also asserts that the subdivision plan of the motel units into apartments was amended by the vendor without the appellant's knowledge or consent; so that the titles issued did not reflect the preliminary plan shown to him at the time he signed his offer to purchaser Unit K. We do not find that to be so. The appellant asserts that the licensee knew of all this and either concealed it from the appellant or was negligent in failing to draw his attention to it. In terms of the evidence adduced to us, we do not accept those assertions.

[40] Although we have heard much more evidence than was adduced or available to the Committee, there is still a clear conflict of evidence as to whether there was such a misrepresentation by the licensee prior to the appellant submitting his offer to purchase Unit K. We consider that the allegations of the appellant are not proved against the licensee on the balance of probability.

[41] In these respects the Committee, very helpfully, put the position as follows:

"4.4 As to the alleged misrepresentation by the licensee prior to the complainant entering into the contract, there is a clear conflict of evidence. The licensee states that during this pre-signing discussion on 24 December 2009, he made it clear to the complainant that AU03 was required as communal property in order to provide a laundry facility for the

studio units that were too small to have a washing machine in them. The licensee states that they discussed the fact that the power for AU03 still came from PU13 and in order to cover the costs of the electricity the licensee could buy the coin-operated laundry machines and collect the money from these to cover his costs. The licensee states that, as a result of this conversation, these coin-operated machines were added as chattels to the sale and purchase agreement.

4.5 In contrast, the complainant disputes that the conversation took this form. The complainant says that adding the coin-operated machines to the contract supports his contention that AU03 was part of the property he thought he was buying, because they were chattels contained in an area of the property that he was purchasing, as is common practice with listing chattels. The complainant also points to the fact that there is nothing recorded in the contract regarding his apparent acceptance of running the communal laundry from AU03 – he says this further confirms that such an understanding was not reached and submits that the fact it was raised as a discussion point confirms his contention that he was going to be the owner of AU03. The complainant goes on to say that his understanding was confirmed in the fax dated 6 May 2010 from the vendor to the complainant, stating that AU03 was part of Unit K/PU13.

[42] Understandably, the Committee did not find any compelling evidence to support the contention that the licensee misled or misrepresented any matter to the appellant regarding ownership of the small laundry (Unit AU03); but the Committee accepted that the appellant had formed the view that AU03 was part of his unit. We can agree with the Committee that the preliminary plan is somewhat unclear as to the status of both the large and the small laundry adjacent to Unit K, but the issue is whether the licensee's conduct was deficient in any way and, in particular, did he as alleged by the appellant misrepresent the auxiliary nature of the small laundry to the appellant. In any case, we interpret the preliminary plan as incorporating the large laundry into Unit K and as clearly excluding the small laundry from Unit K.

[43] It is submitted for the Authority that the central factual issues for our determination include:

[a] The legal status of the small laundry at the time the appellant entered into the agreement for sale and purchase of Unit K, namely, whether it belonged to the owner of Unit K or was common property between the four studio units. Also, whether this legal status changed.

We consider that the appellant was not told that the small laundry was being acquired by him and the plans did not show that; and that concept was never changed.

[b] Whether the licensee took steps to ascertain the ownership status of the small laundry which was a central aspect of the sale and was further a "live" issue at material times. Factors included the arrangements needed to be later effected by the appellant in relation to the owners of the studio units using the washing machines in the small laundry which he thought he owned.

The appellant may have been confused in that the power for those machines came from his Unit K, but we cannot find any deficiency in the conduct of the licensee at material times.

[c] The licensee's knowledge in relation to ownership of the small laundry before and at the time the appellant entered into the agreement for sale and purchase.

We have no reason to disbelieve the licensee's evidence that he explained to the appellant that the small laundry was not to be part of Unit K.

[d] The representations made, and which ought to have been made by the licensee to the appellant in relation to the small laundry and whether it belonged to the owner of Unit K or was common property before and at the time he entered into the agreement for sale and purchase.

We have found that there were no proven misrepresentations by the licensee to the appellant.

[e] Whether the licensee knew of the erroneous statements in the 6 May 2010 fax and, if he did, whether he took any steps to correct them. By this stage, the agreement for sale and purchase was unconditional.

We find that the licensee probably comprehended that error from the developer in August 2010. The appellant settled the purchase in October 2010

[44] Counsel for the Authority submits that it was open to the Committee to conclude that no further action be taken. She referred to the following rules in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009:

"5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

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

6.4 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."

[45] A breach of any of these rules would prima facie result in a finding of unsatisfactory conduct under s 72(b) of the Act; but the Committee did not consider there was unsatisfactory conduct by the licensee. Nor do we

[46] We consider the Committee's decision to be thorough and well reasoned and we agree with the conclusions of the Committee. Accordingly we dismiss this appeal.

[47] We observe that the appellant is a most intelligent and erudite retired school teacher of English. The confusing ways of commerce in developing a motel complex into strata-title apartment complex must have been novel to him and, perhaps, could have been better handled by the developer – vendor company. However we are concerned with the conduct of the licensee.

[48] 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.

_____
Judge P F Barber
Chairperson

_____
Mr J Gaukrodger
Member

_____
Mr G Denley
Member