BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision no: [2013] NZREADT 9

Ref No: READT 063/11

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	DAVID CRICK Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY First Respondent
AND	MURRAY WOODLEY Second Respondent
BEFORE	JUDGE P F BARBER – Chairman MS J ROBSON – Member MR J GAUKRODGER – Member

Heard at Wellington: 22 March, 11 October, and 26 November 2012

Appearances: Professor D Crick on his own behalf as Appellant
Mr M J Hodge counsel for the Authority
Mr M Woodley on his own behalf as Second Respondent

Date of Decision: 23 January 2013

RESERVED DECISION OF THE TRIBUNAL

Introduction

[1] This is an appeal by David Crick (the Appellant and Complainant) as a property purchaser against a determination of Complaints Assessment Committee 10064 to take no further action against the Real Estate Agent Licensee, Murray Woodley. Mr Crick alleges that there has been unsatisfactory conduct by the licensee.

Grounds of Appeal

[2] The Appellant's Notice of Appeal and asserts:

(a) The Committee did not address the core issue which was that the Licensee failed to obtain a quote to rectify a problem (ponding/pooling on a flat roof) that was drawn to his attention. Instead, the Licensee obtained a quote to rectify a different issue that was not identified as a problem;

(b) There were inaccuracies in the Committee's decision; and

(c) Process issues of transparency are also raised.

Factual Background

[3] As purchaser, the Complainant signed an agreement for sale and purchase of a property in Porirua on 9 December 2010. There was a 23 December 2010 variation to the Agreement covering several points but relevantly reading "the flat roof will be repaired in terms of the quote agreed by both parties." It has no further details of the agreed work. Clause 17.3 of the Agreement provided that it was conditional upon the purchaser obtaining a builder's report and approving all aspects of the report to the purchaser's satisfaction. Settlement occurred on 31 January 2011.

[4] The complaint arises from the Licensee's alleged conduct between the purchaser signing the Agreement on 9 December 2010 and settlement on 31 January 2011. More specifically, it concerns negotiations relating to satisfying the Condition.

[5] The Complainant alleges that the Licensee deliberately arranged work to be done knowing it would not correct the true fault with the roof i.e. ponding of water. He alleges that the Licensee obtained a quote for work different to that needed to fix the ponding/pooling issue and that was to ensure that costs were kept to a level acceptable to the vendors in satisfying the Condition that the vendor pay for certain remedial work.

[6] The Complainant also alleged that the Licensee deliberately edited an email of 7 February 2011 to avoid detection of his behaviour.

[7] On 20 December 2010 there was a series of important emails from the Complainant to the Licensee regarding builders being appointed for both parties (i.e. vendors and purchaser) and ensuring that the same instructions were given to both; and from the Licensee to the vendors, copying in the Complainant, following the Licensee’s meeting with registered master builder Dan Albert.

[8] The latter 20 December 2010 email outlined the information given to the Licensee from the builder and covered: problems with the roof, recommended repair, estimated cost, timing of the repair work, and sought further instructions from the vendors. It also noted the Licensee's understanding that the Complainant was investigating an alternative quote.

[9] The Committee considered that it was “clear” that the 20 December 2010 email was intended by the parties to form the basis of the work to be completed.

[10] The necessary roofing work was due to begin in the week beginning 10 January 2011. During January 2011 there was further email correspondence between the Licensee and Complainant; but the Committee did not consider that relevant to the complaint except that it did "[illustrate] the service provided by [the Licensee] to [the Complainant] on a wide variety of issues."

[11] A further critical email was sent by the Complainant to the Licensee on 7 February. This relevantly stated that “the roof ... has not been fixed to a satisfactory level." The Complainant wrote "I will not send a picture but have taken one as evidence as there is still excessive and I mean excessive ‘ponding’." The Licensee suggested to the Complainant that he contact his solicitor or call the builder.

[12] In a 12.13pm email of 7 February 2011, the Licensee noted that "the "instructions" given to the builder were exactly as agreed to by both parties to the agreement" and then repeated the "recommended repair" section of the 20 December 2010 email. The Complainant also alleges that the 12.13pm email of 7 February 2011 was deliberately edited to remove description of the roofing problems.

[13] It seems that the Complainant consulted his solicitor who told him to contact the vendors, through the Licensee, to advise that the repairs were not undertaken in accordance with the Variation as they had not addressed the issue. The Licensee noted in an email to the Complainant that "you will recall that we discussed the need for you to sign the agreed amendments directly with your solicitor." The Licensee further notes that he had never seen the wording of the amendments.

[14] A 7 February 2011 email from the vendors to the Licensee asserted that the repairs done had addressed any future problems with leaking and that the builder had assured the vendors that the work done had remedied the issue:

> “... as I understand it the repairs to the roof that we agreed to have addressed any future problems with potential leaking.
>
> Further, I spoke to [the builder] and he assures me that the work that he has done has fixed this issue and if water is still pooling it will not be a problem as the roof is weather tight. There is also a Master Builders guarantee on the new roof.”

[15] The vendors emailed the Complainant on 25 February 2010 and relevantly stated:

> ... the issue and basis of the repairs was that the ponding on the roof could potentially lead to a leak due to the nature of the construction method of the time and uncertainties whether it was weathertight.
>
> The work undertaken by the builder to replace the roof with new butynol cladding properly applied with extra spouting according to current building

> standards would in essence remove any future issues with potential leaking whatever the cause.
>
> I spoke to the builder and has assured me that this was the case. The roof has a 1% incline so there is run off to the drain. ...
>
> ...
>
> For your peace of mind I will arrange to have the warranty sent to you for your records.

The Committee's decision

[16] In the usual way, the Committee conducted an enquiry and held a hearing on the papers pursuant to s 90(1) of the Act. It determined the complaint on the basis of the written material before it: s 90(2) of the Act. It emphasised that it had "considered all email correspondence and other information provided to it" notwithstanding it did not address each email separately.

[17] The Committee determined under s 89(2)(c) of the Act to take no further action regarding the complaint or "any issue involved" in it.

[18] The Committee found that the allegations in relation to the first arm of the complaint had no basis and that the Licensee acted "throughout with the highest standards of transparency, and genuinely attempted to work with both parties to reach a resolution." It later went on to note that the Licensee "went significantly beyond what he was obliged to do in terms of his time and assistance to [the Appellant]. The additional services provided were significant in time and effort, and as many of them were not in any way related to the, securing of a sale, they indicate the professional and genuine approach of [the Licensee] throughout."

[19] The Committee considered that the quote was arranged to cover specific and recommended repairs in terms of the 20 December 2010 email and there was "never any suggestion that these repairs would completely and perfectly fix any roof issues." The vendors had arranged work to be done which they believed would remove any potential issues or uncertainty with weathertightness and this was with the "diligent assistance" of the Licensee.

[20] The Committee noted that no evidence had been produced to suggest that the repairs had not perfectly fixed the problem and, in any event, any such deficiency could not result from any actions of the Licensee. Nor was there any evidence produced to suggest that there was a legal dispute between the vendors and the Complainant.

[21] With respect to the second allegation that the Licensee deliberately edited the 12.13pm email of 7 February 2011 email and related limb that he sent the 20 December 2010 email to the Complainant in error, the Committee noted that there was no indication that the 20 December 2010 email was sent to the Complainant in error. It was “entirely in line" with earlier correspondence that the Licensee would send the email to both parties in its entirety and especially the email sent by the

Licensee earlier on 20 December 2010 which mentioned the importance of any instructions to another builder being consistent.

[22] The Committee was of the view that the 7 February 2011 email repeated the relevant portion of the 20 December 2010 email and considered that this "seem[ed] entirely appropriate." It found that the Complainant's proposition that the email was edited for a dishonest purpose was "far fetched." The 7 February 2011 email was edited given only a portion of it was repeated (the portion relating to the repairs to be done which was what was under discussion). The Committee found that only repeating a portion of the 20 December 2010 email in the 7 February email was consistent with the 20 December email being deliberately sent to all parties.

Jurisdiction on appeal

[23] Section 111 of the Act provides a right of appeal to us for any person affected by a determination of a Complaints Assessment Committee including any determination made under s 89. An appeal is by way of rehearing and we may confirm, reverse, or modify the CAC's determination.

[24] In *K v B* [2011] 2 NZLR 1 (commonly cited as *Kacem v Bashir),* the Supreme Court articulated principles it had elaborated in *Austin, Nichols* & Co *Inc v Stichting Lodestar* [2008] 2 NZLR 141:

> [32] ... for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary.

[25] We have previously held that CAC determinations under s 89 are subject to general rights of appeal and that the principles described in *Austin Nichols* will apply. In *O v Complaints Assessment Committee (CAC 100281)*[2011] NZREADT 15; (this decision is also known as *Jones* v *CAC 10028 and Shekell*), we remarked:

> Determinations pursuant to s 89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s 89 would generally be regarded as 'general appeals'. All parties agree that the Tribunal should apply the principles set out in *Austin, Nichols* as reiterated by *Kacem v Bashir* [2011] 2 NZLR 1 at [32].

[26] The Appellant is therefore entitled to judgment in accordance with our opinion, notwithstanding that this may involve "an assessment of fact and degree and [entail] a value judgment.

[27] We have before us the material previously before the Committee as well as further material filed by the parties, in particular by the Complainant, for the purposes of the appeal and oral evidence. We may consider all of that material in exercising our judgement as to the facts and which of the orders available on appeal is appropriate.

Summary of issues on appeal

[28] The appeal is primarily centred on factual findings in relation to matters including:

(a) Whether the licensee engaged in unsatisfactory conduct regarding the quote for the roof repairs; and

(b) Whether the purported various inaccuracies in terms of the Committee's decision in fact exist.

[29] The following points are noted in relation to some of the Complainant's key points on appeal:

(a) The licensee failed to obtain a quote for the ponding/pooling problem: in the 20 December email, the first point in relation to repairs is the "[o]bvious pooling of water" and the email then further particularises factors contributing to the pooling. The "recommended repair" section of the 20 December 2010 email appears to be directed at the problem of pooling of water and, given the repairs recommended by the builder as outlined in that 20 December email, appears to have been carried out. The "recommended repair" in that 20 December email was:

> Remove all the current Butynol
>
> Remove all nails in the ply underlay and replace with stainless steel screws
>
> Re-lay new butynol in vertical rather than horizontal strips
>
> Extend the main roof downpipe directly to flat roof down pipe outlet
>
> Provide new effective overflow outlet from flat roof.

(b) That there was editing by the Licensee of the 7 February 2011 email: as noted above, the Committee found that the 7 February 2011 email "simply repeated the relevant portion of the 20 December email, which seems entirely appropriate." The Committee went on to find that the email "certainly was edited, in the sense that only a portion was repeated - being that portion that was under discussion."

(c) That the Complainant was mistakenly copied into the 20 December 2010 email from the Licensee to the vendors and builder: an email from the licensee to the builder sent about half an hour after the 20 December

2010 email states: "I hope you are OK with me sending a copy of my last e-mail regarding the roof quote to the purchasers [Complainant]. I did so for the following reasons

1. transparency

2. the purchaser is suspicious that you and by implication me, have been withholding known "issues" from him?

3. I believe he is thinking much higher costs to repair than is the case

(d) Emails withheld from the Committee regarding the Complainant being overseas: the Complainant asserts that "... it appears [the Licensee] for some reason may have chosen not to provide any of the multiple emails to the committee that indicate I was out of the country and was finding it difficult to get quotes."

The Hearings Before Us

[30] On 22 March 2012 we heard most of the evidence from Professor Crick and Mr Woodley and their basic argument, but in a semi-formal manner and without cross-examination because the then counsel for the Authority had been unable to attend due to airflight cancellations that morning. That part-hearing concluded with the Chairman (Judge Barber) speaking along the following lines on behalf of this Tribunal:

> We are concerned at a lack of full evidential coverage in the appeal brought by *Professor* Crick to date. For instance, we do not have available the actual quote of the builder for the building work in question (apparently it is still held by the vendor), and neither the builder nor the vendors had been asked to give evidence before us.
>
> Also we consider that Professor Crick's problem is that of a building dispute. Very simply put, he agreed to buy the house on the basis that a small butynol roof area be upgraded to both ensure water/weathertightness and, in particular from his point of view, to eliminate or significantly reduce ponding.
>
> (As the work has been performed, it apparently is perfectly watertight but the ponding problem still exists much as before, because instead of a fall of about 3%, the fall has been retained at 1% although some extensions to downpipes have been effected.
>
> The Professor made it clear that if he had thought, 13 months ago, that Mr Woodley was prepared to be his main witness in a civil action against the builder, this complaint to the Real Estate Agents Authority about Mr Woodley's conduct would never have been brought by him. It is not clear to us why Professor Crick then believed he would not have the support of Mr Woodley in such a civil action against the builder.
>
> It seems that the builder had agreed to eliminate the ponding (as well as renew the butynol area of the roof), but Mr Woodley seems to think that the

> matter is academic because the butynol roof is watertight so that ponding does not cause damage.
>
> In any case, from Professor Crick's point of view, the picture changed dramatically in the course of the hearing before us because he realised that he did have (in Mr Woodley) the pivotal witness he needs to bring a case against the builder for damages for defective workmanship (in that ponding has not been eliminated). Also, we explained that he can do this in the Disputes Tribunal, a much cheaper forum than the District Court, because the amount to remedy the ponding is apparently only about $6,000.
>
> Accordingly, it was agreed to be best that Mr Crick, with the help of Mr Woodley, make sensible progress in the Disputes Tribunal with a civil claim against the builder rather than currently pursue his allegations of unsatisfactory conduct against Mr Woodley in this forum.
>
> We indicated that, on the evidence so far before us, we would be of a similar view to the Committee that there has been nothing unsatisfactory in the conduct of Mr Woodley.
>
> In order to facilitate a more positive financial outcome as outlined above, we have adjourned the case for three months on the basis that Professor Crick forthwith file proceedings against the builder in the Disputes Tribunal and, in a month's time, report progress to us (i.e. when he is likely to get a fixture before a Disputes Tribunal referee).
>
> We have indicated that if the matter does not proceed as above, we shall reconvene the appeal before us or, if appropriate, dismiss it for non prosecution.
>
> We emphasise to the parties that we are not a forum for the resolution of building disputes but are here to consider the conduct of real estate agent licensees and, from what we have heard so far we find it hard to disagree with the Committee.
>
> We also gave some quite helpful advice to the parties about pursuing the matter before the Disputes Tribunal and Ms Robson, in particular, pointed out that the building contract seems to have been between the vendor and the builder rather than Professor Crick and the builder; although there seems to have been novation by Professor Crick and also Mr Woodley seems to have been agent for both the vendor and Professor Crick as purchaser.

[31] After that part-hearing, Professor Crick took proceedings against the builder, Mr Dan Albert, in the Disputes Tribunal but was unsuccessful. Accordingly, the matter resumed before us on 26 November 2012 and was fully heard except that Mr Albert did not attend to give evidence, but he did on 26 November 2012. We consider that Mr Albert's evidence is pivotal to our conclusions with regard to this appeal and we now cover his evidence.

[32] In the first instance, Mr Albert tendered a typed brief (dated 26 November 2012) as follows:

> "For the attention of the Real Estate Agency's Panel Members READT 63/11
> I, Dan Albert, Trading as Quality Construction Company have been asked by Mr. Murray Woodley from Tommy's Real Estate to assess the condition of a roof section at 55 Halladale Road, Papakowhai - Porirua. Following that assessment I have provided a quote and outlined the scope of the work that is covered by the quote to the owner of the property at 55 Halladale Rd.
>
> That quote and the scope of work was accepted and the work was completed on 20/01/2011.
>
> At the time of quoting, scoping and completing the work I was aware that a potential purchaser of the house is concerned about ponding on parts of that roof, mainly around the outlet. I believed that the buyer's concern was for the roofs water tightness.
>
> Dan Albert"

[33] Mr Albert was then carefully cross-examined by all parties as he was a witness under subpoena from us.

[34] Mr Albert emphasised that the relevant events took place over two years ago so that he was a little hazy. He recalled meeting with the parties at the property on about 20 December 2010 and conferring with them, mainly, while he was on the roof inspecting its state in terms of watertightness and possible ponding. At that time there was no water on the roof and no evidence of ponding but he felt the roof was not well constructed and might soon commence to leak.

[35] Broadly he was concerned that the slope of the roof was only about 1% which was appropriate when it was built but, currently, building consents require about a 4% slope. Also the roof membrane of butynol was likely to be then soon pierced by the original screws popping through the membrane and creating leakage. He advised those present that the roof needed repairing in terms of new butynol with such strips to be applied differently (i.e. in vertical rather than horizontal strips), new plywood under the membrane, and new stainless steel screws, and efforts to create the best possible fall, and resiting of drainage pipes. He seemed to be saying that he understood that a conditional sale to Professor Crick might not come about if remedial steps were too major and expensive, but he understood the issue was about weathertightness rather than ponding. He was not given to understand that the issue of ponding could be a deal breaker. He noted that the ponding or pooling of water seemed to be only in a confined area surrounding the drainage outlet to spouting and seemed to have been exacerbated by the butynol in that area having risen through age.

[36] We understood that Mr Woodley had made it clear to Mr Albert that Professor Crick's concern was about the ponding around that outlet, but there was much general discussion about the limited fall of the roof overall.

[37] At first, we understood Mr Albert to recall that he indicated it might cost up to $10,000 to remedy all ponding and weathertightness issues although, subsequently in his evidence, he became unsure as to in what context he had referred to the figure of $10,000. He seemed to have understood that the vendor to Professor Crick would not pay that much even if it meant losing the sale to Professor Crick. In any case,

Mr Albert was able to deal with a butynol expert subcontractor that very day and, shortly after that, the roof was remedied to his satisfaction at a cost of approximately $2,000.

[38] Mr Albert recalled that he was asked to organise a quote to remedy the potential weathertightness problem of the roof rather than eliminate ponding. Frankly, we inferred that he regarded his methodology as being inclusive of solving any ponding issue.

[39] Mr Albert also felt that it was curious that the butynol had been laid horizontally rather than vertically and he felt that remedying that, so that water would run with the fall, should ensure ready drainage of water to the roof outlet and, we inferred, eliminate ponding. Also, the extending of the drainpipe would remove much of the water involved in any ponding.

[40] It was clear to us that Mr Albert brought much experience to making the roof watertight and he expected to eliminate the ponding in the course of that. Mr Albert was satisfied that the work outlined in his quote, and which he subsequently implemented, should have fixed all concerns of Professor Crick. Regrettably, very little of these discussions were put in writing by Mr Albert and he now feels that his advice "could mean different things to different people"; but he asserted that the work he did should have remedied all problems mentioned to him and he felt that Mr Woodley's email of 20 December 2010 covered his understanding of matters at that time.

[41] We assess Mr Albert as a thoroughly honest witness. We do not have any credibility issues with any other witness except that the Appellant/Complainant has become rather emotional over this case rather than standing back and looking at it in a rational manner. It follows that we regard Mr Woodley as thoroughly honest also.

Our Conclusions

[42] We can only stand back and absorb the evidence and endeavour to come to objective conclusions. Very simply put, Professor Cricks' concern is that Mr Woodley as Licensee, and the agent for the vendors to Professor Crick as purchaser of the property, did not arrange for Mr Albert to remedy a roof ponding problem as instructed by Professor Crick but "only" had the builder address weathertight issues.

[43] It seemed to be accepted that the Licensee's role in endeavouring to assist Professor Crick, as purchaser, feel comfortable with the state of the roof was real estate agency work. In our view it is, although Mr Woodley could be regarded as having acted in that respect well beyond the call of duty. He did his best to have Professor Cricks' concerns met, presumably, because that should facilitate a sale with commission to him from the vendors but also, in our view, because of his high standards of service. We are satisfied that Mr Woodley simply acted as an honest and dedicated Licensee determined to give of his best to all parties.

[44] In many ways, unhappy though he is at this situation, Professor Crick seems to have benefited not only in having a roof made weathertight but by having, in effect,

a better designed and constructed roof. His stance and criticism of Mr Woodley seems to us to be rather unreasonable in the total context of this case. However, our concern and jurisdiction is limited to the conduct of Mr Woodley as a real estate agent.

[45] As Mr Hodge put it in final oral submissions, the case developed into whether there had been a discussion in late 2010 where Mr Woodley ascertained from the builder that a ponding problem needed to be fixed or whether "only" weathertightness was to be remedied.

[46] We note that there seems to have been the strong inference or allegation from Professor Crick that Mr Woodley considered that to remedy ponding might cost about $10,000 in which case the sale deal to Professor Crick would have foundered, and Mr Woodley would have missed commission from his vendors, so that Mr Woodley organised the remedial work agreed upon for something over $2,000. We think that to be an unfair view. We consider that Mr Woodley honestly thought that Mr Albert's remedial work quote would well meet Professor Cricks' concerns and, indeed, there is clear evidence from Mr Albert that he thought that also. Very simply put, it was expected that the remedial work undertaken to deal with watertightness would also resolve or eliminate any ponding problems.

[47] Although the Licensee, Mr Woodley, went well beyond the call of duty as real estate agent for the vendor, he handled this sale and purchase transaction and got himself involved in the issue of roof repairs. His services to the Complainant were provided for the purpose of bringing about the said sale and purchase transaction and constitute "real estate agency work" as defined in s 4 of the Act. Accordingly, it has been appropriate that we review his conduct as we have. Having done that, we agree with the findings and views of the Committee.

[48] This appeal is hereby dismissed.

[49] 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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Ms J Robson
Member

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Mr J Gaukrodger
Member