

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 15

READT 010/13

IN THE MATTER OF

an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN

IAN ANDERSON

Appellant

AND

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 20003)**

First respondent

AND

**GRAHAM SMITH, PHILIP DAVIS,
and NICOLA O'BRIEN**

Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

HEARD at AUCKLAND on 3 February 2014

DATE OF DECISION 24 February 2014

COUNSEL

Mr D Bigio for appellant
Mr R M A McCoubrey for the Authority
Mr T D Rea, for the second respondent licensees

DECISION OF THE TRIBUNAL

Introduction

[1] Ian Anderson ("the appellant") appeals against the 23 January 2013 decision of Complaints Assessment Committee 20003 to take no further action against Graham Smith, Philip Davis, and Nicola O'Brien ("the licensees") who, at material times, were employees of Barfoot & Thompson City Ltd's Branch at Auckland

Factual Background

[2] On 4 March 2012 the property complex at Linnet Place, Mangere, Auckland, was listed by its mortgagees with Barfoot & Thompson Ltd under a sole agency mortgagee tender with a tender closure date of 2 April 2012.

[3] Mr Smith is the manager of the agency, and Mr Davis and Ms O'Brien were the salespeople involved in the marketing and sale of the property.

[4] The property was advertised for sale as one lot. The advertisement began with "*Attention developers, investors, entrepreneurs, health and care professionals*". It went on to mention that the complex was "[o]riginally designed as a retirement village" and that there are "39 residential dwellings each on their own individual titles" plus a community centre. The advertisement appeared on the agency's website, as well as in other media.

[5] Mr Neville Tuck lawyer at Simpson Grierson represented the primary mortgagee, Westpac, and was the point of contact for the other affected mortgagees. Simpson Grierson provided or approved all advertising and handled all documentation.

[6] Each prospective purchaser was provided with a tender-pack containing relevant information relating to the property including the tender conditions which state that any purchaser must rely on his, her, or its own judgement and due diligence in all respects.

[7] On 3 April 2012, Mr Tam of Yang Lawyers wrote to the licensees claiming that the advertisement for the property was misleading and/or deceptive. Mr Tam stated that the advertisement failed to disclose :

- [a] by law, the property can only be used as a retirement village;
- [b] the property would be sold subject to existing tenancies and a life interest in one unit; and
- [c] the property exhibits a number of serious breaches of the Building Act 2004.

[8] The licensees forwarded this to Simpson Grierson as solicitors for the mortgagees who had instructed Barfoot & Thompson Ltd.

[9] On 10 April 2012, the licensees wrote to Yang Lawyers advising that the correspondence had been forwarded to Simpson Grierson who were handling all communications in relation to the property.

[10] On 10 April 2012, Mr Bigio, counsel for the appellant/complainant, contacted the licensees and was told that all communications must be referred to Simpson Grierson.

[11] On 13 April 2012, Yang Lawyers wrote to the licensees acknowledging that they had received a letter from Simpson Grierson on behalf of Westpac in relation to the 3 April 2012 letter. They also stated they understood the "*for tender*" sign had been removed from the property and sought confirmation that all advertising and marketing of the site had ceased.

[12] On 20 April 2012, Yang Lawyers wrote to the licensees enclosing a 10 April 2012 letter from Shanahans, Solicitors, advising Phoenix Villas 2010 Ltd (one of the mortgagor companies) that the mortgagees had entered into a conditional agreement for the sale of several units in the property. Shanahans advised that the contract was conditional upon due diligence being satisfied by 20 April 2012.

[13] Yang Lawyers then urged Barfoot & Thompson Ltd to cease the tender process immediately and not to engage in further advertising of the sale of the units. Yang Lawyers also indicated they would proceed to filing a complaint with the Real Estate Agents Authority.

A Summary of Evidence Adduced to Us

The Evidence of the Licensee Mr Philip Davis

[14] Mr Davis came to give evidence under subpoena issued on behalf of the appellant. He has been a real estate agent at Barfoot & Thompson Ltd since 1996. He explained that his communications to the Authority probably had the input of Simpson Grierson as solicitors for Barfoot & Thompson and/or from his colleague Mr Paul Humphries at Barfoots. He confirmed certain bullet points in his letter to the Authority of 22 May 2012 outlining his involvement in the sale process of 33 Linnet Place, Mangere, expressed as follows:

“My involvement as licensee in the marketing of the above mentioned property commenced from the first weekend of marketing and was as follows:

- *To carry out a series of open home presentations to prospective purchasers and other Barfoot & Thompson salespeople over the five week marketing programme.*
- *Co-ordination of access and viewing arrangements with tenants.*
- *Prepare weekly marketing reports to be sent to the mortgagees' representative.*
- *Contact likely prospects from our existing database.*
- *Distribution of purchaser packages to all interested parties.*
- *Respond to all telephone, email and internet inquiries addressed to us.*
- *Follow up of prospective purchasers.*
- *Liaising with prospective purchasers and other Barfoot & Thompson salespeople regarding the property and the tender process.*
- *Provide information to prospective purchasers during the preparation of their tenders.*
- *Negotiation with the tenderers.”*

[15] Mr Davis summarised his role in the sale process as being in accordance with standard operating procedures followed by him and his said business partner, Mr Paul Humphries, as specialists (he put it) *“in the recovery process for both mortgagee sale vendors and the High Court. In this partnership, Paul Humphries generally prepares the file until marketing commences. From that point on my role starts in the presentation and marketing of the property”*.

[16] In the course of quite extensive evidence, Mr Davis explained how he had conducted open homes at the property which involved showing prospective purchasers through the development. He emphasised that he had told all interested parties that the property, with its units, was non compliant in terms of resource management consents which confined the use of the units to that of a retirement village and did not extend to general residential use.

[17] Mr Davis was pressed by Mr Bigio as to why he had not explained earlier to the appellant that he had so informed all prospective purchasers. Mr Davis responded that he simply answered the questions put to him by the Authority's investigator. He said he carefully explained, among other things, to prospective purchasers what units were rented and at what rent and that that use was non-compliant and that prospective purchasers needed to research that aspect, although he supplied a LIM report to them. He said that he made it clear to all prospective purchasers that the property was being sold subject to existing tenancies. He was in no doubt that the ultimate purchaser, Guznee Holdings Ltd, had been given all that information by him before it prepared its tender.

The Evidence of the Licensee Ms N O'Brien

[18] Ms O'Brien was also subpoenaed by the appellant. She had also attended all the open homes for the property. She confirmed that as the agents took people around the development, they explained the tenancy situation and that ordinary residential use was a non-compliance with the existing resource consent which only covered use of the property as a retirement residential complex. She added that at each open home there would be quite some discussion between the agents and prospective purchasers who were all given a package of relevant documents to take away. They were also referred to the website which the agency had created for the property because it provided further information.

[19] Mr Bigio asked her why she had not told the Committee of the Authority that she had so informed prospective purchasers. She seemed to reply that she was guided by her colleagues and Simpson Grierson as the solicitors for Barfoot & Thompson Ltd in responding to the Authority's investigation.

The Committee's Decision

[20] In deciding to take no further action against the licensees, the Committee found that:

- [a] The advertising was not misleading as:
 - [i] The advertisement was clear that the sale was as one lot;
 - [ii] The fact there was no mention of any "*competing interests*" in the property, was entirely appropriate, particularly given the mortgagees' legal representative advised that did not need to be mentioned; and
 - [iii] Even if the licensee had been aware of the Building Act breaches, it would not be usual to see reference to those disclosed in advertisements, particularly in a mortgagee sale where it is usual for the mortgagee to exclude any liability for such breaches.

- [b] No question of unsatisfactory conduct arose in relation to the sale process and potential breaches of the Tender Code. The Committee observed that the licensees were instructed to ignore the private treaty sale of several units for the purposes of their agency, which they did.
- [c] The aspect of Mr Anderson's complaint against the licensee's lack of response had no substance. The licensees were instructed to refer all communications to Simpson Grierson, which they did, and they were not authorised to reply to the complainant's letters.

Grounds for Appeal

[21] The appellant alleges that the Committee's decision was wrong and that, in particular:

- [a] The licensees' advertising of the property was misleading.
- [b] The Committee was wrong to accept that the licensees' reliance on instructions from the mortgagees absolved them of any responsibilities to the public; and
- [c] The licensees and/or the agency (Barfoot & Thompson Ltd) breached the REINZ Code of Conduct for Tender.

[22] However, the focus of the appeal was on the alleged misleading and/or deceptive advertising.

Our Jurisdiction

[23] The committee held a hearing on the papers, pursuant to s.90(1) of the Act, and made a decision to take no further action under s.89(2)(c). Section 111 provides a right of appeal to us for any person affected by a determination of a Committee, including a decision under s.89. The appeal is by way of rehearing and, after hearing the appeal, we may confirm, reverse, or modify the determination of the Committee.

[24] Mr Anderson is therefore entitled to judgment in accordance with our findings, notwithstanding that may involve an assessment of fact and degree and entail a value judgment.

[25] We have before us all the material previously before the Committee, as well as the further material filed by the parties for the purposes of the appeal. We may consider all of that material in exercising our own judgment as to the facts and which of the orders available on appeal is appropriate. We also heard evidence (under subpoena of the appellant) from two of the licensees Mr P Davis and Mrs N O'Brien whom we assess as credible witnesses.

Discussion

[26] The appellant submits that the advertising of the property was misleading because it failed to advise prospective purchasers that the property could only be used as a retirement village; of the existence of the purported life interest; and compliance issues in terms of the Building Act 2004.

[27] As it stands, the resource consent for the property is for use as a retirement village. There is no consent or approval in place for purely residential use. In order

to use the property (or the individual units) for private residential occupation, a new resource consent would be required.

[28] With regard to the licensees' advertising of the property, counsel for the appellant submits that the use of the words "*39 residential dwellings*" all being held on individual titles in a "*popular residential area*" of Mangere was misleading, and is evidence of an intention to entice purchasers.

[29] Counsel for the Authority submits that although the wording of the advertisement, if viewed in isolation, is less than ideal, we may consider it relevant that the property was a major development, which would almost certainly attract commercially sophisticated purchasers.

[30] We accept that a detailed tender pack was provided to interested parties and included the Particulars and Conditions of Tender. This is a comprehensive document and, as the Committee noted, contains terms that any purchaser must rely on its (or his or her) own judgement, and due diligence in all respects, as is usual for commercial and, particularly mortgagee sales of this nature.

[31] Given the size and value of the property, any potential purchaser was likely to be a reasonably sized investor and/or developer and well placed to undertake their own due diligence to identify any resource consent requirements or other matters arising out of their review of the tender pack. Mr McCoubrey submits that this, combined with other factors referred to by the Committee and matters referred to below, meant that it was open to the Committee to decide to take no further action.

[32] Counsel for the appellant submits that the licensees had a duty to disclose the existence of the appellant's life interest in Unit Q. The Committee found that the licensees were advised by the vendor's solicitors that, as the mortgagee did not consider itself legally bound by the life interest (having not consented to it), it did not need to be disclosed and that it was not for the licensees to challenge that position.

[33] It is submitted for the Authority that Simpson Grierson provided or approved all advertising material and advised the licensees on issues relating to disclosure; and it was reasonable for the licensee's to rely on this advice.

[34] The appellant has not sought to continue his claim of non-compliance with the Building Act 2004.

[35] Counsel for the appellant submits that the agency simply took, and acted on, directions from the mortgagees, without applying any independent judgement to the situation. However, it is submitted for the Authority that it was open for the committee to determine that it was reasonable for the licensees to rely on the advice provided by the vendor's solicitors.

[36] There was much reference to *M v Real Estate Agents Authority (CAC 20004)* [2013] NZREADT 63 where we made clear (inter alia) that while licensees must ascertain the accuracy of information before making positive representations to consumers, they are not expected to be lawyers. However, rather unexpectedly for the appellant, the uncontradicted evidence adduced to us is that correct representations were made by the licensees to all prospective purchasers in the present cases.

[37] Also, the present licensees took appropriate steps before marketing the property and all matters relating to the sale/transaction process were vetted by Simpson Grierson. This included the advertising itself, the issue of disclosure of the purported life interest over Unit Q, and clarification that a normal residential use of the property would not comply with existing resource consent. As the Committee noted, this will not necessarily exonerate the licensees from responsibility for any misleading statements. However, the licensees' advertising campaign reflected the advice they received from the vendor's solicitors.

[38] Mr McCoubrey puts it that, in short, while the advertisement may arguably be seen as misleading, in the present context (disciplinary proceedings in relation to conduct rather than civil liability proceedings), it was open to the Committee to effectively decide that the licensees had taken all reasonable steps.

[39] Counsel for the Authority submits that the Committee's finding, that there was no question of unsatisfactory conduct arising in relation to the matter, was open to it on the facts.

[40] As Mr Bigio had stressed, the appellant/complainant took issue with the advertising of the sale of the units because that advertising neglected to advise prospective purchasers that, as then consented to in terms of resource management, the units could only be used as a retirement village and were not available under the terms of the governing consent for ordinary residential accommodation.

[41] There were various other issues but the main focus before us was that the use of the units was restricted to being part of a retirement village. There was concern by the appellant about the existence of a life interest to him and his wife with regard to Unit Q as well as certain alleged Building Act non compliance matters.

[42] There is no doubt that a change of use would be required for any residential development of use of the site and that was made clear in a valuation report which seemed to be readily available to all interested parties.

[43] A further concern of the appellant seemed to be that, allegedly, Barfoot & Thompson Ltd failed to respond in a substantive way to communications to it about the above matters from the appellant or his lawyers and simply referred those communications to the lawyers for the mortgagees for a response. Mr Bigio put the point as that Barfoot & Thompson Ltd (through its agents) appeared to take direction from the mortgagees *"without undertaking any independent assessment of their obligations under the general law or the Real Estate Agents Act (Professional Conduct and Client Care Rules 2009)"*.

[44] Mr Bigio referred to the Committee of the Authority finding that the advertising was not misleading on the following basis:

The licensees stated that nothing in the advertisements suggest that the units might be used for residential property and the Committee agrees. Although the word "residential" is used, the context is such that its use is not misleading. The word clearly stated that the sale was as one lot.

A further detailed tender pack was provided to interested parties"

[45] Mr Bigio then submitted that approach did not look at the thrust of the relevant advertisement as a whole and he referred to Rules 5.1, 5.2, 6.2, 6.4, and 9.1 of the

Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which respectively read as follows:

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

5.2 A licensee must have a sound knowledge of the Act, regulations made pursuant to the Act, rules issued by the Authority (including these rules) and other legislation relevant to 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.

...

9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.”

[46] With regard to the text of the advertisement, Mr Bigio submitted that it shows an intention to entice prospective purchasers interested in residential development and does not allude to the limitation put on the site by the resource consent. He submits that the tender pack provided by the agency does not absolve the licensees from responsibility for bringing to prospective purchasers' attention the limited use to which the site can be put.

[47] However as the evidence before us unfolded, it became clear that prospective purchasers carefully had their attention drawn to the limited use to which the site could be put.

[48] We agree with Mr Bigio that Rule 9.1 makes perfectly clear that a licensee has an independent duty to ensure compliance with the law notwithstanding the client's instructions. If Barfoot & Thompson Ltd simply took direction from the mortgagees, without applying any independent judgement to the situation, that could be a breach of the law.

[49] In his closing oral submissions, Mr Bigio expressed some bafflement that the licensees had not earlier made clear that they had carefully explained to all prospective purchasers, including the actual purchaser company, the then current restrictions on use of the retirement units in terms of the then existing resource consent. He outlined at least four particular stages of this saga when (he submits) the licensees ought to have raised the key matter which emerged from the evidence before us from Mr Davis and Ms O'Brien, namely, that they had taken care that any prospective purchaser was not misled or confused over the limited use to which the units could then be lawfully put.

Our Conclusions

[50] It certainly is unfortunate that not until the hearing before us was it made clear that there could not have been any misrepresentation to prospective purchasers

about the scope of the resource consent approval at material times. However, that seems to have arisen out of confusion and misunderstanding and is not in any way sinister; and we assess Mr Davis and Mr O'Brien as honest and helpful witnesses.

[51] In any case, we agree with a submission from Mr Rea that the advertising in question was not misleading either by its reference to "*residential*", or its omission of reference to limitations contained in the resource consent. The units are, in fact, "*residential*" in the sense that they are intended to be lived in, as distinct from commercial premises. The advertising does not represent that the units were able to be used for all residential purposes without limitation or without amendments to existing consents.

[52] We do not think any reasonable purchaser could have been misled by the advertising. We accept that any reasonable purchaser, especially in this mortgagee sale situation, would be expected to undertake its own diligence and satisfy itself of any consent requirements. Having said that, we are not attracted to the submission that because the type of interested prospective purchaser could be regarded as "*sophisticated*" in terms of property dealings, that agents could allow them to look after themselves to some degree. While the experience or sophistication of a party or a prospective purchaser could be a factor, sometimes, in assessing the standard of conduct provided by an agent, we think that the highest and strictest standards in terms of the Act and its regulations must always be applied.

[53] In the course of argument before us, there was quite some reference to clause 17.6 of the particulars and conditions of tender which provided that "*the vendors advise that the current usage of the property is likely to be outside the terms of the current resource consent conditions and the purchaser is deemed to have accepted this and is deemed to have made its own enquiries in this regard*". In other words, the particulars and conditions of tender contain various provisions making clear that a purchaser must rely on its own judgement and that no warranty was given as to the property by the vendor or the mortgagees, and there was reference to "*resource*" consent conditions.

[54] In those respects Mr Rea seemed to be submitting that members of the public are to be taken to have a reasonable level of common sense and that confusion or uncertainty resulting from a representation may not be sufficient for misleading conduct. He submitted that the advertising complained of in this case fell well short of any reasonable threshold for "*misleading conduct*", particularly, in the overall context of the mortgagee sale and other information supplied to prospective purchasers.

[55] We simply observe that where the conduct of an agent is in issue, each case needs to be considered on its particular facts. In this case, the evidence is clear that no prospective purchaser was misled in any way about the prospective use of the property or any of its units.

[56] We think that it was in order and reasonable for the licensees to rely on the advice of Simpson Grierson.

[57] None of the licensees nor Barfoot & Thompson Ltd have breached any code of conduct relating to tenders.

[58] Apart from what we have covered above, no other issues seem to be seriously pursued at this stage on behalf of the appellant.

[59] Simply put, the evidence before us is that the licensees were completely candid and informative to the purchaser and to any prospective purchaser. Accordingly, there is no merit in the concerns or stance of the appellant. We cannot find anything unfair or unsatisfactory resulting from the conduct of the licensees or from Barfoot & Thompson Ltd with regard to this case. We find that the licensees did not engage in any unsatisfactory conduct and that the decision of the Committee is to be upheld. At least the hearing before us seems to have given proper ventilation to the issues.

[60] Accordingly, we agree with the Committee that no action should be taken under the Act or its regulations against any of the licensees. Therefore, this appeal is hereby dismissed.

[61] 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

Ms N Dangen
Member

Ms C Sandelin
Member