

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 17

READT 027/13

IN THE MATTER OF

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

BETWEEN

CAROL AND PETER BURNETT

Appellants

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC20003)**

First Respondent

AND

DONALD MACKENZIE

Second Respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at ROTORUA on 14 February 2014

APPEARANCES

Mrs Burnett (with daughter)
Mr M J Hodge for the Real Estate Agents Authority
Mr D MacKenzie, Second Respondent

DECISION OF THE TRIBUNAL

[1] In 2012 the appellants, Mr and Mrs Burnett, purchased a property at 127 Terrace Street, Putaruru. Mr Don MacKenzie from Ray White in Putaruru was the agent acting on the sale. The property at 127 Terrace Street, Putaruru was advertised as having “*some windows with double glazing*”. When Mr and Mrs Burnett purchased the

property they say that they discovered that the windows in the lounge and bedroom were not double glazed, but they were in fact secondary glazed. This means that the windows were covered with a detachable second acrylic pane. Mr and Mrs Burnett say that this is a product called secondary glazing which they claim is inferior to the product that they had considered that they were purchasing. In the words of Mrs Burnett double glazing is two panes of glass within a frame fitted to the windows which would allow the windows to be opened and closed in the normal way.

[2] Mr and Mrs Burnett complained to Mr MacKenzie that they had not received double glazing, but rather had received secondary glazing. Mr MacKenzie gave evidence that from his enquiries that secondary glazing was a recognised form of double glazing and it had sound proofing and heat retention properties identical to or better than double glazing. He produced information from the internet showing that the Double Glazing company and Magicseal regard secondary glazing as a form of double glazing. Mr MacKenzie also said that the type of double glazing was pointed out to the Burnetts before the purchase. Unfortunately Mr Burnett has died between the lodging the appeal and the hearing of this case so evidence is only able to be given by Mrs Burnett. She was adamant that at no time had Mr MacKenzie pointed out the type of windows to her husband and her that the windows were not properly double glazed but rather were removable (secondary glazed) windows. Mrs Burnett says that the windows are inferior. She seeks to make an order that Mr MacKenzie be required to compensate her by providing double glazed windows in the bedroom and lounge. This cost is about \$5,000.

[3] Mr MacKenzie disputes this evidence. He says that his advertisement was accurate. He says there was double glazing in some of the windows and that secondary glazing is in fact an accepted form of double glazing. Mr MacKenzie says he asked the vendor to point out to the Burnetts when they came to inspect the property how the windows could be detached for cleaning. He says Mrs Burnett had said that she did not need to see this now because she knew how they worked.

[4] Mr MacKenzie also called evidence from a Mr Wolffenbuttel. Mr Wolffenbuttel told the Tribunal that he had conducted an inspection of the property in person in order to provide an informal building report for the Burnetts prior to purchase. He said that he had pointed out to them the type of glazing, as he had told them that he had had to

remove the screens in order to repaint the window sills. Mrs Burnett denies that this happened. She says that Mr Wolffenbuttel inspected another property for them but he did not actually make a physical inspection of this property prior to purchase as he assured the Burnetts over the telephone that he knew it very well.

[5] The issue for the Tribunal therefore is whether or not Mr MacKenzie has breached any of his obligations as an agent in the description of the double glazing in this property as “*some windows double glazed*”?

[6] The Complaints Assessment Committee issued a decision which found that the use of the term “double glazing” was not misleading because:

“4.2.1 *Firstly, that the product which has been installed by the owner of the Property is frequently described in publications, advertising and websites as a form of double glazing. The fact that it can be described as secondary glazing does not make the use of the more usual term misleading.*

4.2.2 *Secondly, that the product fulfils the characteristics of double glazing in both heating and noise insulation. The Complainant states that for a product to be described as double glazing the windows must be sealed. The Committee considered this argument is relevant only if the Licensee had made a representation about the quality of the product rather than its generic description. Therefore the Committee is satisfied that the advertising is not false information or misleading.”*

[7] Did Mr and Mrs Burnett receive double glazing?

We agree with the decision reached by the Complaints Assessment Committee. Double Glazing obviously had a different and narrower meaning to Mr and Mrs Burnett than that which is contained in the literature. To them it was one type of window only whereas the window manufacturing websites and those in the industry appear to have a number of products which fit within the definition of double glazing. Mr MacKenzie’s advertisement was accurate in that “*some of the windows were double glazed*”. Further Mr MacKenzie was not making any representation about the type or quality of the double glazing. The windows were in fact a form of double glazing. This is sufficient to discharge his obligations.

[8] The Tribunal have a great deal of sympathy with Mrs Burnett but do not find that the agent has breached any of his obligations under the Rules or the Act. Mrs Burnett has not provided any evidence to counter the material provided by Mr MacKenzie.

[9] The Tribunal make this finding of fact on the balance of probabilities and the fact that Mr MacKenzie has put forward evidence which shows that the type of glazing on the property is within the accepted market description of double glazing. Even Mr and Mrs Burnetts own evidence in the form of an e-mail from the Double Glazing company says that:

“In saying this the Double Glazing Company recognises that there are a number of companies misrepresenting secondary glazing as being double glazing. Given this (misleading) practice, it can be appreciated that misunderstandings can occur.”

[10] The evidence therefore satisfies the Tribunal on the balance of probabilities that there has been no breach of Mr MacKenzie’s obligations.

[11] In the circumstances of this case therefore the Tribunal find that there is insufficient evidence to uphold the appeal. The Tribunal confirm the decision of the Complaints Assessment Committee.

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

DATED at AUCKLAND this 11th day of March 2014

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member