BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 18

READT 064/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**BRYONY TESAR** of Motueka, Real Estate Agent
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20004)**
	First respondent
AND	**WENDY PARKER AND PHILLIP ARMIT**, Complainant Purchasers
	Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at NELSON on 31 January 2014

DATE OF DECISION 14 March 2014

APPEARANCES

The appellant on her own behalf
Ms J MacGibbon for the Authority
The second respondents on their own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Tesar ("the licensee") appeals against a 2 November 2011 decision of Complaints Assessment Committee 20004 finding her guilty of unsatisfactory conduct. In a separate decision (dated 19 December 2012) to deal with penalty, the Committee censured the licensee, ordered her to pay $4,000 to the complainants, and imposed a $2,500 fine payable to the Authority.

Factual Background

[2] At material times, the licensee was a salesperson with Green Door Real Estate Ltd at Motueka. She was engaged by vendors to sell a property in Motueka in May

2010. Ms Parker and Mr Armit ("the complainants") became interested in that property and made an offer. There were many communications between vendors and licensee, and the latter and the complainants.

[3] On viewing the property, the complainants were concerned that a wood-burner installed at the property might not be properly permitted.

[4] On 3 May 2010, the licensee sent an email to the vendors of the property asking their consent to her (as agent) or the purchasers applying for a certificate of acceptance and building consent, if required, for the wood burner currently located at the property.

[5] The vendors emailed back that day giving the licensee permission to organise a permit for the fire if one was required. They noted that the wood-burner was in the same position as when the house was built (in the 1990s) and signed off (not withstanding that this did not conform with the Council's approved site plan of the wood-burner) but that the original, burnt-out, stove had been replaced with a newer one. The chimney, hearth and back wall (tiled with insulation board behind) were original.

[6] The complainants allege that this information about the replacement of the wood-burner was never passed on to them by the licensee.

[7] On 7 May 2010, the vendors accepted an offer from the complainants to purchase the property. Significantly, in the context of this appeal, clause 18 of the sale and purchase agreement (amended by the vendors in accepting the complainants' offer as explained below) provided that within 5 days of the date of the agreement the vendors would apply for a certificate of acceptance and follow up inspection for the existing wood-burner, if required, at a cost of no more than $420. If a compliance issue should arise, the vendors agreed to have the wood-burner removed and the property would be sold without a wood-burner. Alternatively, any compliance issues with the wood-burner could be remedied at the sole expense of the purchasers on or before settlement. However, clause 18 of the form of offer from the complainants, prior to amendment by the vendors, had been much narrower and had provided that the vendors would obtain a certificate of compliance and building consent for the wood-burner, if required, on or before 30 June 2010.

[8] The complainants state that, when presented by the licensee with the amended clause, they were under a tight deadline. They contend that, before they agreed to the amendment, the licensee gave them an absolute assurance that there were no problems with the fire. They state that the licensee told them that one of the vendors would pay to get a permit for the fire as it was *"simply a paper chase"* or a formality.

[9] On 11 May 2010, the vendors applied to the Tasman District Council for a certificate of acceptance in respect of the wood-burner. On 3 June 2010, the Council advised that the plans and specifications did not fully comply with the relevant part of the Building Code. Neither of the models shown on the application was on the approved clean-air burner list supplied by the Ministry for the Environment.

[10] On 8 June 2010, the vendors' solicitor advised the complainants' solicitors that the Council would refuse compliance and asked whether they wanted the vendors to remove the wood-burner. On 10 June 2010, the vendors' solicitor advised the complainants' solicitor that they understood the complainants wanted the wood-burner to remain and that they would remedy the situation themselves.

[11] Also, on 14 June 2010, the Council advised that it would not permit the application for consent to be withdrawn and that either the application must proceed or the wood-burner be completely removed.

[12] On 15 June 2010, the complainants' solicitor wrote to the vendors' solicitor expressing the concern of their clients' at recent developments. The letter recorded the complainants' position that they had only agreed to the amended clause 18 on the licensee's assurance that the application for consent would be a formality.

[13] The complainants have provided the Committee and us with a quote dated 19 July 2010 for installing a new wood-burner acceptable to the Council at a cost of $5,987.26.

[14] We are advised from the bar of the following. The complainants sued the licensee's agency in the Disputes Tribunal for that cost. In a 16 May 2011 decision, the Disputes Tribunal recorded that the licensee had acknowledged she told the complainants that the application for certification would be a *"paper chase"* but emphasised that she had stated she was simply repeating what the vendors had told her. In the absence of direct evidence from the vendors on that point, the Disputes Tribunal accepted the licensee's evidence. Accordingly, that claim of the complainants failed.

[15] Counsel for the Authority notes that the licensee disputes our jurisdiction to hear this appeal in light of the Disputes Tribunal decision. We considered the overlap of civil and disciplinary proceedings in *Sherburn v REAA and Harlow* [2012] NZREADT 33. There we accepted that the disciplinary provisions of the Real Estate Agents Act 2008 are completely separate from and have no impact on civil remedies available to parties, and that the two types of proceeding may comfortably co-exist. We accepted that we are not bound by findings of other courts in civil proceedings on matters raised before us in the disciplinary context.

[16] Counsel for the Authority submits that the said findings of the Disputes Tribunal do not impact on our ability to hear and determine this appeal. We agree.

Oral Evidence of Appellant to Us

[17] The appellant emphasises that she only passed on to the complainant purchasers precisely what the vendors had told her, namely, that the compliance process regarding the wood-burner would simply be a *"paper-chase"*; that the vendors said they had *"installed the wood-burner as per the manual"*; and that the vendor husband was a builder and knew what he was doing when he installed the wood-burner. She emphasises that it was not her opinion that it would merely be a paper-chase to obtain compliance, and that she was simply passing on that as information which the vendors had relayed to her.

[18] The appellant also emphasises that she advised the complainant purchasers to consult with a solicitor before signing any offer to purchase the property and that they have acknowledged this by signing a particular page on the contract. She also points out that *"the purchasers had another timeframe to consult with a solicitor about this contract which contained clause 18"*.

[19] The appellant generally criticises the Committee's reasoning for finding unsatisfactory conduct on her part.

[20] The appellant presented her views confidently and assertively. She emphasised that she had inserted the original clause 18 in the contract to protect the complainant purchasers but (as we have explained above) the vendors would not accept that version and replaced it.

[21] Under cross-examination, the appellant licensee insisted that she had not relied on anything which the vendors had said to her. She said that she simply passed on to the complainants, as purchasers, information as told to her by the vendors for the purpose of relaying it to them. On that basis she told the purchasers that the vendors had said that obtaining Council compliance for the wood-burner would be only a paper-chase. She added that she herself had still inserted the original clause 18 to protect the complainants as purchasers. She emphasised that she herself gave no assurances to them nor guarantees. Curiously, many of her communications with the complainants were by telephone on the basis that they were not on email whereas, in fact, they were.

The Evidence of Ms Parker as a Purchaser

[22] Ms Parker emphasised that she and Mr Armit would never have purchased the property had they known it was impossible to obtain a Council permit for the wood-burner as installed. The problem seemed to be that it had been installed too close to a wall and that certain parts of it (e.g. a flu) were secondhand and in an unacceptable state. This meant that there was no point in any owner of the property seeking a compliance permit for the wood-burner.

[23] It seemed that this whole issue commenced because the complainants felt that the wood-burner had been installed too close to a wall and went to the local Council to check out the position. They found that the plan previously tendered to the Council for approval showed the wood-burner installed in a different part of the particular room. However, they, the complainants, then understood that they simply needed to get approval for the siting of it and they did not know there was a problem about its actual construction.

[24] Ms Parker said that when she and Mr Armit ascertained that the vendors would not accept the form of clause 18 put into their offer by the appellant, they felt they should pull out of proceeding with the purchase, but were assured by the appellant that obtaining a compliance certificate for the wood-burner from the Council was *"just a paper chase"*.

[25] Ms Parker said this issue has caused them much stress and that they believe it caused them to lose on resale money on the property and had also meant they were worried that their insurance policy might not be valid.

[26] Ms Parker believes that the vendors did not know their wood-burner could never be approved by Council due to its construction and components; i.e. it was far too close to a wall and the fire and flue were secondhand so that a permit could never have been granted for the wood-burner.

[27] Ms Parker's evidence was confirmed by Mr Armit.

Further General Matters of Evidence

[28] The clear stance of the complainants is that the appellant licensee had not merely said that she had been told by the vendors that it would only be a paper chase to obtain a permit for the wood-burner, but she had said that she herself knew it would just be a paper-chase.

[29] The parties cross-examined each other rather bluntly throughout the hearing.

[30] The complainants insisted to the appellant that she had not related to them that there were items in the construction of the wood-burner which were secondhand so that a permit could never have been obtained. The stance of the appellant throughout is that she merely told the complainants, as prospective purchasers, what had been told her by the vendors and she was merely relaying that to them.

[31] The appellant was direct with the complainants and insisted that she had told them to see their lawyer if they were uncomfortable in any way or otherwise to sign the offer she tendered to them. They say that was not what was put to them by the appellant who told them they did not need to see a solicitor because risks were dealt with in clause 18 of the contract.

[32] Some of the exchanges between the parties included the appellant putting it that although the complainants say they could not afford to replace the wood-burner at a cost of just under $6,000, they had borrowed a second mortgage of $70,000 subsequent to purchasing the property to make various other improvements with regard to the water and power supply and driveway access. We regard that aspect as quite beside the point when dealing with the conduct of the licensee in terms of the complaint made by the second respondents and the findings of the Committee.

[33] At one stage the complainants seemed to be saying that, because of the alleged failure of the appellant, they had lost $13,000 on resale, although the appellant put it that must not be so because the fireplace could have been remedied for $6,000. This interchange led the complainant to emphasise that they did not bring their complaint to the Authority seeking money, but because of their concerns about the conduct of the appellant licensee.

The Committee's Decision

[34] The Committee dealt with a wider range of complaints than the issue before us. It rejected most of them but found that , without necessarily intending to, the licensee had misled the complainants about the application for Council certification of the wood-burner during negotiations for the sale of the property. The misrepresentation was that the application would be *"simply a paper chase"* because the wood-burner had been correctly installed. In other words, that the application for certification was a formality.

[35] The Committee noted the decision in *Bonz Group Pty Ltd v Cooke* (1996) 7 TCLR 208 (CA) that conduct may be misleading under s.9 of the Fair Trading Act 1986 despite the absence of any element of intention. The Committee considered that a licensee's conduct may similarly breach the provisions of the Act despite the absence of any element of intention.

[36] The Committee concluded that it had been proved, on the balance of probabilities, that the licensee had engaged in unsatisfactory conduct.

Discussion

[37] Counsel for the Authority noted that, in documents filed for this appeal, the licensee appears to accept telling the complainants that Council approval of the application regarding the wood-burner would simply be a *"paper chase"*, because the wood-burner had been installed *"as per the manual"* by a builder who *"knew what he was doing"*. The licensee contends, however, that this was not unsatisfactory conduct as she simply passed on information she had received from the vendors and made it clear to the complainants that she was merely relaying such information to them from the vendors.

[38] It is submitted for the Authority that the Committee was correct to find that a misrepresentation by a licensee, absent any intention to mislead, may still amount to unsatisfactory conduct; that, generally speaking, a licensee will be required to have good grounds for making a representation about land being marketed for sale; and that where a licensee makes a representation as a *"mere conduit"* of information from the vendor to the purchaser, the licensee must make absolutely clear to the purchaser that the information is provided on that basis and has not been verified. In principle, we agree.

[39] Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 provided that a licensee must not mislead a customer or client. We accept that a wilful or reckless breach of rule 6.4 (which would include an intentional misrepresentation) may amount to misconduct under s.73(c)(iii) of the Act. A breach of rule 6.4 which is not committed wilfully or recklessly (including an unintentional misrepresentation) may amount to unsatisfactory conduct under s.72(b) of the Act.

[40] Given the purpose and context of the Act and the Rules, several of our decisions have emphasised the importance of licensees ascertaining the accuracy of information before passing on that information to consumers.

[41] In *LB v The Real Estate Agents Authority* [2011] NZREADT 39, the issue before us was whether *"the ... activities of the ... licensee constituted unsatisfactory conduct and, in particular, whether she (through her company) had a duty to ensure her marketing of the property was accurate"*. We said:

> *"[18] We consider that a licensee, upon taking instructions for a sale of property, should search its title, or have some competent person search it for the licensee, and be familiar with the information gained from such a search. In this case it would have also been necessary to search the content of a transfer shown as containing a restrictive covenant. Such a search is not a difficult task to carry out or arrange. Similarly, the licensee should ascertain such matters as zoning and compliance with town planning regulations or Council requirements. We do not accept that a licensee can simply regard such matters as within the realm of a vendor or purchaser's legal adviser. Licensees should be familiar with and able to explain clearly and simply the effect of any covenants or restrictions which might affect the rights of a purchaser. This is so whether that purchaser is bidding at auction or negotiating a private treaty."*

[42] Importantly, we held that a licensee could not rely on having acted merely as a conduit from seller to purchaser in order to exonerate him or herself from responsibility for a misrepresentation. We said that a licensee should not *"place sole reliance and credence on advice or assurances from a vendor"*, even if these are given in good faith (at our para [20]).

[43] In *Donkin v Real Estate Agents Authority & Morton-Jones* [2012] NZREADT 44 we considered the limits of an agent's obligation to obtain information (in that case a LIM and rating information) before making a positive representation in relation to a property. We said at [8] that:

> *"... when advertising includes a positive representation such as in this case, that the property is a legal home and income, then the agent must ensure that either:*
>
> *(a) they have made proper enquiries to ensure the property is a legal home and income; or*
>
> *(b) they make it clear to any purchaser that this is a statement from the vendor and will need to be independently verified by the purchaser; or*
>
> *(c) they clearly inform a purchaser that there may be issues regarding this and they need to obtain independently legal advice."*

[44] We clarified this at [9] by saying:

> *"The point is that an agent should make sure before a positive representation is made that they have at least taken some precautions to check the veracity of the representation. ... we do not expect that land agents will have the ability of a solicitor to determine the acceptable risks and problems with titles and/or covenants and/or LIM reports but clearly purchasers rely upon an agent when making representation as to the state of the property. The agent's job is to ensure that the purchaser is not misled. In this particular case if the agent had bothered to obtain a LIM or had called the Council to ask, or even obtained a rates report then there would have been no misrepresentation. The difficulty here was that, without checking further, the agent accepted the vendor's words and made no effort to alert anyone of any potential risk in accepting this statement."*

[45] In coming to our decision, we noted the High Court's decision in *Altimarioch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 3 July 2008, where Wild J said of an agent's misrepresentation:

> *"[248] ... Bayleys needed to "get right" important details such as water permits and easements.*
>
> *[249] I accept that Bayleys' primary function was to find a buyer. But of what? Bayleys needed either to give accurate details about Altimarloch in the sales information it provided, or to be able to provide that detail accurately to prospective buyers upon request.*
>
> *...*

> *[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 [vendors] and/or [the vendor's lawyers] before issuing the brochure."*

[46] In a recent decision, *L v Real Estate Agents Authority (CAC 20004)* [2013] NZREADT 63, we made it clear that it is not only in respect of express representations that agents are expected to do due diligence. In *L*, the agent advertised a property to which a covenant restricting the age of those able to live at the property attached. Rather than making a positive representation as to the age requirements to live at the property, the agent made no reference to the covenant's existence or its contents. We held:

> *"[13] ... [T]he obligation of an agent is to go further than simply recognising that there are issues with the title and drawing it to the purchasers and their solicitors' attention. ... 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 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 ..."*

[47] We said at para [15] that the Act places a positive obligation on agents to be *"open"*, honest, accountable and to ensure that nobody is misled or deceived at the time the property is being sold. The Act purports to *"protect members of the public when they are making what can often be the biggest purchase of their lives"*.

[48] Ms MacGibbon submitted that if we are satisfied that the licensee told the complainants that the application for consent in respect of the wood-burner would be *"simply a paper chase"*, and did not make clear that she was simply passing on information from the vendors which she had not verified, then a finding of unsatisfactory conduct would be entirely appropriate. That must be correct in principle.

[49] The complainant Ms Parker submitted that the evidence and stance of the appellant is untrue and not credible. She also seemed to be putting it that the vendors knew the wood-burner was non-compliant but that had not been mentioned in the listing agreement. The appellant retorted that, at the time of the listing agreement, she did not know of the non-compliance of the wood-burner and that when she later found out she immediately told the complainants. They accept that but note that they were not told that the fire and flue of the wood-burner were secondhand and inadequate, and that the wood-burner could never comply with Council requirements.

[50] It seems that the appellant was sure that Council approval could be readily obtained for the wood-burner. However, there is a conflict in evidence as to just what the appellant told the complainants about its state and prospects for obtaining from Council a certificate of compliance for it.

[51] The attitude of the appellant is that the Committee acted merely on hearsay allegations from the complainants as purchasers, that she has been put to much stress, has not breached the Act or its regulations in any way, and has simply passed on to the complainants assurances given to her by the vendors. She maintains that she merely relayed to the complainants what the vendor had told her and made it clear that those were not necessarily her views.

[52] Insofar as the appellant complains about the process at CAC level being unfair, we do not find any unfairness as she alleges but, in any case, there has been a full rehearing before us. The appellant also complains that, to date, these proceedings have given her much bad publicity and been damaging to her business and her career and all this is unfair to her.

[53] The issue is whether the appellant licensee misled the complainant purchasers. She says that she made it clear to them that she was only relaying to them what the vendors had told her about the wood-burner and that she was not giving them any assurances or advice.

[54] When we stand back and absorb the evidence overall on the balance of probabilities, it seems to us that the appellant's error was that she did not make it clear to the complainants that the husband vendor, a builder, knew that the installation of the wood-burner was deficient but he felt it would only be a *"paper chase"* to obtain compliance. It may be that the complainant purchasers became confused and misunderstood what the appellant was saying to them. However, it seems to us that she made a statement which was misleading but, probably, unintentionally so, namely, that to obtain Council compliance for the wood-burner was merely a matter of paperwork. As explained above, she tried to protect the complainant purchasers with her version of clause 18, but the vendors would not accept that.

[55] All in all, we consider that the Committee was correct to find that there has been unsatisfactory conduct on the part of the appellant but, in all the said circumstances, we consider such conduct to have been at a relatively low level. The issue of penalty has also been put before us. Accordingly, whereas the Committee censured the licensee and ordered that she pay $4,000 to the complainants and a fine to the Authority of $2,500; we confirm the finding by the Committee of unsatisfactory conduct and its orders except that we reduce the compensation to be paid by the appellant to the complainants from $4,000 to $2,000. That $2,000 is to be paid by the appellant to the complainants within one calendar month from the date of this decision; and the fine is to be paid to the Registrar of the Authority at Wellington within two calendar months of the date of this decision.

[56] 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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Mr G Denley
Member

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Ms N Dangen
Member