

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 42

READT 067/13

IN THE MATTER OF

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

BETWEEN

RICHARD AND EVETTE CAMPBELL

Appellants

AND

REAL ESTATE AGENTS AUTHORITY (CAC20007)

First respondent

AND

BARFOOT AND THOMPSON LIMITED

Second respondent

READT 071/13

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BARFOOT & THOMPSON LIMITED

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REAL ESTATE AGENTS AUTHORITY (CAC20007)

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AND

RICHARD AND EVETTE CAMPBELL

Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 6 May 2014

DATE OF THIS DECISION 30 May 2014

APPEARANCES

Mr R Campbell on behalf of the appellants and second respondents
Mr M J Hodge and Ms N Copeland, counsel for the Authority
Messrs T D Rea and M Singh, counsel for Barfoot & Thompson Ltd

DECISION OF THE TRIBUNAL

Introduction

[1] Richard and Evette Campbell (“the complainants”) appeal against the Complaints Assessment Committee 2007 (“the CAC”) penalty determination of “no further order” against Barfoot & Thompson Ltd (“Barfoots”) for the unsatisfactory conduct outlined below. Barfoots cross-appeals against the CAC prior decision finding unsatisfactory conduct by Barfoots. We refer below to those two decisions of the CAC.

[2] The issue is whether “*by fairness*” a prospective purchaser of a residential property should be informed if there has been a relatively recent suicide at the property.

Background

[3] The property at 21 Amaretto Avenue, Dannemore, Flat Bush, Auckland, had been managed by the property management division of Edwards Realty Ltd (trading as Century 21) from 2009. During a tenancy, and prior to the property being listed for sale, one of the tenants committed suicide in the garage.

[4] The deceased’s wife and son remained in the property as tenants for a further year before the vendors listed the property with Century 21 on 4 August 2011. The property failed to sell at that stage.

[5] In December 2011, the property was listed for sale with both Century 21 and Barfoots. Century 21’s branch manager, Annette Edwards, then informed the Barfoots salesperson, Jitender Setia, that a former tenant had committed suicide in the garage. Ms Edwards also visited Mr Setia’s branch manager, Grant Sykes, and told him about the suicide.

[6] Mr Sykes consulted with Mr G Barfoot, a director of Barfoots who decided that no information about the suicide needed to be disclosed in the course of marketing the property. He concluded this on the basis that the suicide was a personal matter which only related to the occupants of the property and, particularly, in light of media restrictions and public policy issues around suicide. Also, Mr Barfoot considered that the suicide had no relevance to the condition of the property. Accordingly, he advised Mr Setia that it was the position of Barfoots that there was no need to disclose the suicide to prospective purchasers.

[7] On 21 January 2012, the complainants entered into an agreement to purchase the property. They understood that the property was vacant but had formerly been tenanted. The agency did not inform the complainants that there had been a suicide at the property.

[8] Five months after taking possession of the property, the complainants put the property back on the market having (they now say) felt uneasy in the property and

that it was “*dark and felt sad and depressing*”. They subsequently entered into an unconditional sale of that property. After a “*sold*” sign went up at the property, a neighbour enquired of them whether they had re-sold so quickly because of the suicide. The neighbour indicated that he had previously discussed the suicide with Mr Setia.

[9] After becoming aware of the suicide, the complainants disclosed this to the subsequent purchasers from them. Those purchasers decided not to move into the property and re-listed it for sale prior to settlement with the complainants.

Relevant Legislation

[10] Section 50 of the Real Estate Agents Act 2008 (“the Act”) reads:

“50 Salespersons must be supervised

- (1) *A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.*
- (2) *In this section properly supervised and managed means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—*
 - (a) *that the work is performed competently; and*
 - (b) *that the work complies with the requirements of this Act.”*

[11] Section 72 of the Act reads 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.”*

[12] Rules 6.4 and 9.21 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 respectively read:

“Rule 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.*

Rule 9.21: *A licensee must not disclose confidential personal information relating to a client, unless-*

- (a) *the client consents in writing; or*
- (b) *the licensee is required by law to disclose the information; or*

- (c) *disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the licensee by the client.”*

The Decisions of the CAC

[13] In its 19 July 2013 substantive decision finding that, in not disclosing the suicide to the complainants, Barfoots had engaged in unsatisfactory conduct pursuant to s.72(b) of the Act, the CAC set out its substantive reasoning as follows:

- “4.1 ... The Committee was concerned that the advice the agency gave to the licensee regarding disclosure of suicide at a property was not in line with current industry training or current accepted best practice. The Committee was concerned that one of the factors that may have influenced the agency’s decision not to disclose was that it may put prospective purchasers off the property, as had already been the case when Century 21 was the sole listing agency.*
- 4.2 The Committee accepts that it is difficult balancing the rights of the bereaved against those of prospective purchasers. However, given the purpose of the Act is to promote and protect the interests of consumers and promote public confidence in the performance of real estate agency work, the Committee is of the view that disclosure of such matters should be standard industry practice.*
- 4.3 The Committee finds that the agency was incorrect in the advice it gave its licensee regarding the obligations under rule 6.4.*
- 4.4 The Committee is of the view that in fairness, information pertaining to a suicide at a property is information that should be given to a prospective purchaser for that party to then make its own informed decision. Matters such as the length of time since the suicide, the publicity or not of the suicide may well be relevant to the decision of whether to disclose, but the Committee is of the view that an agency and licensee should err on the side of disclosing when assessing these matters.*
- 4.5 The Committee does not accept the agency’s submission that Rule 6.4 only relates to matters pertaining to the land and its condition, rather than anything to do with the occupants of a property. It is clear that disclosure of a suicide has an impact on the perceived value of a property by prospective purchasers and thus the Committee finds that in fairness that information should be provided to those buyers.*
- 4.6 On that basis, the Committee finds that the agency’s supervision and management practices do not reach the required standard in relation to this matter and the agency is therefore in breach of section 50 of the Act.”*

[14] In its 5 November 2013 penalty decision, the CAC determined to make no further order other than the finding of unsatisfactory conduct. It also held that there should be publication of its decision after the period for appeal ended; subject to any application to us for a non-publication order. In the course of its penalty decision, the CAC stated:

“3.4 The Committee accepts that the agency did treat the decision, regarding whether to disclose the information to prospective purchasers or not, with the degree of seriousness it deserved. However, the Committee found in its decision that the agency did not come to the correct decision. Given that the agency submitted it would still make that same decision if faced with it today, the Committee found that the level of supervision and management practices in relation to this particular issue was inadequate and as a result, therefore, it was not possible that salespeople under its direction and control were sufficiently managed to perform their work competently. It was on that basis that the committee made a finding of unsatisfactory conduct against the agency.”

The Case for Barfoots

[15] With regard to the appeal by the complainants against penalty, Mr Rea notes that their sole ground is that the agency should be ordered to refund fees (presumably, pursuant to s.93(1)(e)) of the Act) of about \$20,000 charged to them because they say that *“after paying commission on reselling the property, we made a real and measurable loss of \$20,000”*. In fact, no commission was ever charged to the complainants by the agency because they were purchasers and had used another agency for their onsale. It follows that there can be no basis for a refund of commission in this case.

[16] We have no jurisdiction to award compensation unless there has been *“misconduct”* as distinct from unsatisfactory conduct. In any case, the complainants have suffered no financial loss from the agency’s non disclosure of the suicide in the property because they had entered into an unconditional agreement to onsell it before learning of the suicide. The purchaser from them did not learn of the situation until then.

[17] Mr Rea submits that the CAC erred in finding the agency had engaged in unsatisfactory conduct because it has not breached any expressed obligation in the Act or its rules; there is no guidance in such a situation from industry literature; there is a lack of case authority on the issue; the agency provides substantial supervision and training for its staff; there has been no breach of the supervisory requirements under s.50 of the Act; and new obligations should not be imposed on real estate agents by the process of a Committee determination or a decision from us.

[18] In covering the above themes, Mr Rea put it that a decision whether or not to disclose the fact of the suicide is necessarily a judgement call due to the substantial grey area that exists when dealing with such an issue. He notes that, on the one hand, there is the clear Rule 9.21 prohibiting disclosure of confidential personal information and, on the other, the requirement of Rule 6.4 of disclosure of what *“in fairness”* should be provided to a prospective purchaser.

[19] Mr Rea noted the CAC’s statement that current industry training suggests that best practice is to disclose the fact of a suicide. He referred, inter alia, to the CAC having stated in its decision *“given the purpose of the Act is to promote and protect the interests of consumers and promote public confidence in the performance of real estate agency work, the Committee is of the view that disclosure of such matters should be standard industry practice”*.

[20] There was reference to the finding of the CAC that *“the agency’s supervision and management practices do not reach the required standard in relation to this*

matter and the Agency is therefore in breach of section 50 of the Act". That s.50 requires that a salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager so that any agency work is performed competently and complies with the Act.

[21] We accept that Barfoots has in place a robust system of minimum qualifications, training, and supervision as Mr Rea submits. We also accept that whether there should be disclosure of the suicide by the agency in marketing the property was carefully addressed at senior management level and by Mr G Barfoot in particular. As Mr Rea also put it, in arriving at the decision not to disclose the suicide, the agency elevated its concern about duty to the highest level of Barfoots. That agency then made a judgement call based on a variety of thoughts and factors which included its view that there was a clear legal obligation of confidentiality for the vendor.

[22] Mr Rea emphasised that there is no dispute about the facts of this case which raises a novel personal and sensitive point for the real estate industry. He developed that theme in some detail. He seeks that we deal with the issue in a wide-ranging manner and, effectively, formulate a rule to guide real estate agents as to what should be disclosed to a prospective purchaser in the course of marketing a property and, particularly, with regard to a suicide or, possibly a murder or other disturbing event, which has taken place at the property. He seemed to be referring to events which some people might consider as creating a stigma of some type on the property.

[23] There is no dispute that the issue is about what should be disclosed to a purchaser or prospective purchaser in terms of general fairness.

[24] Mr Rea argues that a disclosure which a prospective purchaser might see as fair could be regarded as an unfair breach of privacy for a vendor. Also, there is an issue whether disclosure should be made to every possible prospective purchaser and at what stage. He emphasises the deep thought given to the issue by Mr Barfoot and his senior managers and asks us for guidance.

[25] Of course, Mr Rea seeks that we reverse the unsatisfactory conduct finding of the Committee against the agency and determine that no further action be taken in respect of the complaint.

The View of the Complainants

[26] For Mr and Mrs Campbell, Mr R Campbell considers that the agency is guilty of unsatisfactory conduct in this case and he seeks financial reparation "*for the wrong that occurred*", as he puts it. He seems to be submitting that the agency did not adhere to Rule 6.4 so that he says "*we feel that the property was misrepresented and as such we purchased it above its true market value*". There is no evidence of that before us. He adds that had he and his wife known about the suicide at the property, they would not have purchased it.

[27] Mr Campbell also observes that Rule 9.21 should not protect Barfoots because it deals with non-disclosure by a licensee of confidential personal information relating to a client, but the tragedy in this case related to a tenant of the client. That observation has merit on the particular facts of this case but the effect of Rule 6.4 is the issue in this case.

[28] Mr Campbell seems to seek recompense, or at least an apology from Barfoots and that there be publication of what he perceives as a failure by that agency.

[29] He feels that information, which should have been passed to him, was withheld. He submits that the issue is not really one of privacy because names do not need to be revealed but just the general facts of what happened at the property.

[30] Mr Campbell emphasised that when he disclosed the suicide to the purchasers from him (and Mrs Campbell), they immediately no longer wished to live in the property and resold it. He accepted that there would be no need to disclose had there been a death in the property in a natural manner.

The Stance of the Authority

[31] Mr Hodge acknowledged that the core issue is whether, in terms of “*fairness*” as expressed in Rule 6.4, the suicide of the tenant about 12 months prior to material times should have been disclosed by the agency to prospective purchasers. He submits that, there should have been such disclosure.

[32] He acknowledges that the issue is not straightforward but that, on the facts of this case, the agency made the wrong decision to not disclose. He emphasised that, by disclosure he simply means a general discreet disclosure, and only to a reasonably keen prospective purchaser.

[33] Mr Hodge accepted that, in general, sensible people will have different views on the issue now before us. Indeed, that was a point emphasised by Mr Rea who put it that “*fairness*” must always be considered in its particular context and not as a general issue. We agree. There was reference to the average salesperson lacking the qualification needed to sensitively handle such a disclosure.

[34] Mr Hodge emphasised that, in its initial marketing campaign of the property, Century 21 Ltd considered that the suicide must be disclosed and did disclose it; but that Barfoots decided to the contrary.

[35] Mr Hodge submitted that most people in the present situation would want disclosure. He acknowledged that real estate agents are not social workers but put it that, as professionals, they should be able to make a sensible judgement call with regard to sensitive matters.

[36] Inter alia, in very thoughtful submissions, Mr Hodge submitted that we should not be creating legislation and must interpret Rule 6.4 and not prescribe new rules.

FURTHER DISCUSSION

Section 50

[37] Barfoots argue that the CAC was wrong to find a breach of its supervisory responsibility in terms of s.50 of the Act. It says that this was a decision made directly by its senior management (i.e. Mr G Barfoot himself), not a matter of supervision.

[38] It is submitted for the Authority, that the CAC was correct to make a finding of breach of s.50 of the Act as supervision is a broad concept and includes the making of a decision by senior management to be carried out by the salespersons acting on a particular transaction.

[39] We consider the s.50 aspect to be rather peripheral (but consequential as we find below) to the real issue which is the effect of Rule 6.4. However, an incorrect direction to a salesperson could constitute improper supervision and management.

Disclosure Requirements

[40] There is a clear and express disclosure obligation in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules), namely, Rule 6.4 set out above. The rule is expressed in general terms. It does not purport to identify and detail specific categories of information which must be disclosed.

[41] Counsel for Barfoots seeks to argue that Rule 9.21 is a clear rule in contrast to Rule 6.4. However, Rule 9.21 is general in the same way as Rule 6.4. It simply refers to a prohibition on disclosing confidential personal information relating to a client. What constitutes such information is, of course, left to interpretation and application in specific cases. The disclosure now in issue related to personal information about a tenant rather than about a client vendor. The disclosure requirements of Rule 6.4 may often have to be balanced against the confidentiality requirement of Rule 9.21. This must be done in particular circumstances which arise. Neither rule is absolute so as to trump the other as a matter of course; although there could be a factual situation where the seeming duty of disclosure under Rule 6.4 would be barred by the confidentiality requirement of Rule 9.21.

[42] In a consumer protection regime, with the desirability of allowing consumers to make informed choices, there will be a heavy emphasis on the need for fair disclosure. Mr Hodge submits that where a matter is finely balanced as material to the purchasing decision, the correct course is to err on the side of disclosure as a matter of fairness. If that threshold is reached, disclosure must be made. We agree.

[43] In the present case, the facts demonstrate that some agents and members of the public consider that disclosure of the fact of the suicide ought to be made. The Century 21 agents took that view, and made disclosure to prospective purchasers. The complainants feel strongly that disclosure should have been made, and the subsequent purchasers also saw this as very important.

[44] On the other hand, the information is unquestionably highly personal to the widow tenant and her family. Mr Hodge submits that, bearing in mind that this is information which could be sensitively conveyed at an appropriate time to a prospective purchaser showing strong interest in the property, and the importance of allowing informed choices by consumers, the CAC decision was correct.

[45] Barfoots have argued that if there is to be a requirement for disclosure of matters such as a suicide at a property, then this must be done through the promulgation of a specific rule by the Real Estate Agents Authority, not by way of decision-making of Committees or this Tribunal. We consider that Rules are by their nature typically general in nature, and that it is unnecessary to expect such a detailed level of prescription in them.

[46] It is well established that Courts/Tribunals may decide that, even if a practice is common with a profession or industry, it is nevertheless unacceptable.

The Complainant's Penalty Appeal

[47] The complainants have acknowledged that we cannot order punitive damages in this case. However, they seek an order requiring Barfoots to refund fees charged, pursuant to s.93(1)(e) of the Act. We have explained above why such an order is not appropriate on the facts of this case.

[48] Mr Hodge, as counsel for the Authority, submits that any order requiring the licensee to make a payment to the complainants would need to be under s.93(1)(f) of the Act which provides that, following a finding of unsatisfactory conduct, the Committee can order a licensee:

- “(i) to rectify, at his or her or its own expense, any error or omission; or*
- (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission.”*

[49] In *Quin v Real Estate Agents Authority* 2012] NZHC 3557, the High Court (per Brewer J) held that committees cannot order licensees to pay complainants money as compensation for errors or omission for pure market or economic loss (compensatory damages). Instead, licensees can only be ordered to do something or take action to rectify or “*put right*” an error or omission s.93(1)(f)(i). If the licensee can no longer “*put right*” the error or omission, they can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission, s93(1)(f)(ii).

[50] Apart from the cost of re-selling the property (a cost contemplated in the *Quin* decision), the only possible relevant expenses of the complainant are the \$6,000 of improvements they spent to lighten the house (including solar tubes to lighten the living area and repainting the walls). However, these costs did not relate to the non-disclosure to the complainants. In the exercise of its discretion, the CAC decided that expenditure was not directly attributable to the unsatisfactory conduct. We agree.

[51] We observe that, where there has been misconduct by a licensee, we have power to award compensation against that licensee.

[52] It is settled law that a penalty decision of the Committee involves the exercise of discretion and that as our Supreme Court put it in *Kacem v Bashir* [2010] NZSC 112 AT [42]:

“... 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 when 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 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.”

[53] The complainants need to overcome that high threshold to be successful on appeal against the CAC's decision on penalty.

Our Findings

[54] We are indebted to all counsel for their very detailed written and oral submissions.

[55] In terms of s.72 of the Act, for there to be unsatisfactory conduct on the part of Barfoots in this case there must be real estate agency work which falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee (s.72(a)); or a contravention of one of the said Rules (s.72(b)).

[56] In terms of other aspects of unsatisfactory conduct as defined in s.72, we would not regard that agency as having been incompetent or negligent in terms of s.72(c) but, possibly, its failure to disclose the suicide "*would reasonably be regarded by agents of good standing as being unacceptable*" in terms of s.72(d). The submissions before us focussed more on s.72(b) relating to a breach of the Rules but could have focussed also on s.72(a) in relation to the standard of the work.

[57] We see this issue as pivoting around Rule 6.4 (set out above) insofar as it requires a licensee not to withhold information which should "*by fairness*" be provided to a customer or client. What was the fair thing required of Barfoots about disclosure of the suicide in the course of its marketing campaign to sell the property?

[58] The issue of fairness is a concept which must be confined to the precise facts of the case.

[59] In this case, the sad suicide of a husband tenant of the property took place about 12 months prior to material times when Barfoots learned of it. It took place in the garage of the property. The deceased's widow and child continued living in the property for nearly 12 months prior to their selling it, although it seemed to have been on the market for some months prior to that.

[60] We can accept that many prospective purchasers would not be much bothered by that sad event having taken place at the property. On the other hand, we realise that many prospective purchasers would find that event to create some sort of stigma or spiritual concern and make them feel uncomfortable in the property. That would be at varying levels of discomfort depending on the particular person. We accept that such a stigma to a property would eventually fade into the past.

[61] We emphasise that Mr G Barfoot and some of his managers and licensees gave earnest and sincere thought to the proper and fair way to handle disclosure, or non-disclosure, of the suicide in terms of their marketing of the property. If a factor in their reasoning, possibly unconsciously, was that disclosure would make the property either more difficult to sell, or less likely to achieve the desired price, that can to be understood some extent.

[62] We are conscious that the appeal to us is a rehearing; but we regard the said decisions of the Complaints Assessment Committee as thoroughly covering the facts and the issues in a well reasoned and thoughtful manner. We consider that the CAC was correct to find the agency guilty of unsatisfactory conduct in this case, even

though the agency seems to have acted with sincerity and sensitivity, because it breached Rule 6.4 and consequently breached ss.72 and 50 as explained above.

[63] We also consider that, overall, the CAC was correct to make no further order other than its finding of unsatisfactory conduct and that is our finding. Also, no type of compensation to the complainants is appropriate in this case.

[64] Simply put, we think that the fair thing was, quite clearly, for Barfoots to disclose in succinct and general terms the sad event to reasonably interested prospective purchasers; because for many people the suicide event would be off-putting and affect use and enjoyment of the property.

[65] We emphasise that this issue must of its nature remain a fairly grey area and relate to the precise facts of a situation.

[66] Accordingly, both appeals are dismissed.

[67] 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

Mr G Denley
Member