

[2014] NZREADT 43

Reference No: READT 052/13

IN THE MATTER OF an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN **FRANCES FITZGERALD**

AND **BARFOOT & THOMPSON LTD**

Appellants

AND **REAL ESTATE AGENTS
AUTHORITY (CAC20007)**

First respondent

AND **NILESH REDDY**

Second respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport QC - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

APPEARANCES

Mr T Rea and Mr Erskine for the appellants
Mr L Clancy for the first respondent
Mr N Reddy in person

HEARD at Auckland on 18 February 2014 (in part) and then on the papers.

DECISION OF THE TRIBUNAL

[1] The second respondent Mr Reddy and his wife purchased 1/59 Santiago Crescent, Unsworth Heights in October 2010. The property was a cross-leased rear property. Advertising for the property, which has been produced to the Tribunal, showed that the property was marketed as "*having a fully fenced rear yard, elevated north facing, bright and sunny*".

[2] The back yard was clearly shown in the photographs as being fenced with a large wooden fence. Mr and Mrs Reddy do not claim that they asked the licensee any questions about the fence or the boundary but they simply say that the licensee stressed to them that there was plenty of room for their children to play. The fence which delineated the back of the property was in fact in the wrong position. It has now been moved a number of metres nearer to the rear door of the property removing a large part of Mr and Mrs Reddy's back yard. They are understandably distressed about this and complain that the real estate agent should have been aware of where the real boundaries were and should have made them aware that the fence line was not on the boundary before they purchased it.

[3] The agent says that she was never asked about the boundary, she made no enquiries about the boundary, she was not the listing agent and all that she did was to show Mr and Mrs Reddy around the property (including the back yard).

[4] Mr Reddy complained to the Real Estate Agents Authority. The Complaints Assessment Committee found on the authority of *Rae v REAA & Burch* [2013] NZREADT 3 that the agent had a positive obligation to explore where the boundaries were and to convey this information to the purchaser. Accordingly they found Ms Fitzgerald guilty of unsatisfactory conduct but did not impose a penalty.

[5] Both Ms Fitzgerald and Mr Reddy appealed from this decision. Mr Reddy has abandoned his appeal but Ms Fitzgerald continues with her appeal.

The Facts

[6] There is little dispute over the facts. All the parties agree that no representation as to the boundaries was ever sought or made by Ms Fitzgerald. The advertisement was not drafted by Ms Fitzgerald. It records the property having "*a sunny and fully fenced back yard*". The property did appear to have a fully fenced back yard and is apparently sunny. The problem lies with the fact that what Mr and Mrs Reddy considered they were bargaining to purchase was not in fact what they ended up with.

[7] Mr Rea called evidence from Mr Morley, as an expert agent valuer. He also called evidence from a valuer Mr Hampson. Mr Morley said that the agent had discharged her obligations. The Tribunal questioned him as to what an agent should do if, hypothetically, Mr and Mrs Reddy had asked about the boundary. He said that it was perfectly permissible for the agent to have said that the boundary was the fence line. He said the agent had no positive obligation to do anything more than to point out what appeared to be the boundaries. He did not consider that the agent should necessarily draw the parties' attention to the fact that this might not be the boundary and said that it was an unnecessary step in urban Auckland, where he as a valuer had never checked boundaries in conducting a valuation but simply assumed they were where they appeared to be.

[8] The issue for the Tribunal is where (or if) responsibility for this problem lies.

[9] The Real Estate Agents Authority submits that the Complaints Assessment Committee were correct to reach the decision that Ms Fitzgerald had breached her obligations. They say that the Tribunal's decision in *Rae* was a binding decision for the Complaints Assessment Committee. Further Mr Clancy submits that the Real Estate Agents Act is consumer protection legislation and that all agents should make an effort

to ensure that the product they are selling is accurately described. He submits that Ms Fitzgerald (and Barfoot & Thompson) should have taken steps to ensure that what they were selling, as it appeared to the casual observer, was in fact what was being bought.

[10] Mr Clancy submits that the property was marketed in a way which involved an implicit representation that the back yard as fenced was part of the property being offered for sale. He refers to the flyer, and the physical appearance of the property and Mr Reddy's unchallenged evidence that Ms Fitzgerald told him "*that's the backyard for the kids to play in, that is a good kid's area*". He argues that this in fact was a misrepresentation of the true position which was that the property had little useable land at the back of the house. Mr Clancy submits that nowhere on the evidence can it be shown that the licensee or the agency undertook any due diligence to check that the back yard, [used as part of its marketing campaign] was actually part of the property nor were the complainants told that they should check the boundary.

"Given the value and importance of real estate transactions to consumers it is crucial that representations made by licensees when marketing property, whether express or implied are made on reasonable grounds (or, if not, that is made clear to consumers). That is no more than is required in other consumer law contexts, it is consistent with the Tribunal's interpretation of the Act and the Rules and it is the least that should be expected of reasonable competent licensees".

Mr Clancy also submitted that the Tribunal should not rely on Mr Morley's evidence as it was contrary to the decisions in *LB and Donkin*.

[11] Finally he submitted that the appellant's references in her submissions to the agreement for sale and purchase and vendors' contractual obligations are not helpful when considering an agent's obligations. Mr Clancy therefore submitted that for these reasons the licensee made an unintentional or innocent misrepresentation regarding the property and a finding of unsatisfactory conduct should be made.

[12] Mr Rea for the appellant submits that there can be no positive obligation on a licensee to check every boundary where this issue is not drawn to their attention by the vendor and where there is nothing extraordinary in the property to put them on notice. He submits that Ms Fitzgerald discharged her obligations in respect of the property.

[13] Mr Rea identifies the fact that the sale took place in 2010, three years before the *Rae* decision was issued by the Tribunal. Mr Rea submitted that, at that time the agent had no legal obligation to undertake any investigations about the boundary and there was no standard requiring them to do so.

[14] He submitted that an agent further had no obligation to locate boundary pegs because this would not [necessarily] provide a clear answer as to the position of the boundary and an agent should not him or herself give any representation or statements of fact about boundaries. He submitted that the only proper person to ascertain the whereabouts of the proper boundary was a qualified surveyor.

[15] Further he submitted that the investigation of the proper boundary lines of the property is not real estate agency work and cannot constitute a breach of Rule 5.1 of the Client Care Rules 2009.

[16] Mr Rea also submitted that trying to search out the boundary pegs is contrary to the standard prescribed by Rule 6.5 [a licensee is not required to discover hidden or underlying defects in the land]. Mr Rea drew to the Tribunal's attention to all the facts that he said supported the fact that the licensee was not on notice as to any question about the boundary.

[17] Mr Rea submitted that this was also contrary to the provisions of the Agreement for Sale and Purchase (clause 5.1) where a vendor is not bound to point out the boundaries of a property. Mr Rea submitted the responsibility for investigation and ascertainment of the correct boundary lines is that of the purchaser, not the agent.

[18] Finally Mr Rea referred to the expert evidence of Mr Hampson and Mr Morley. Mr Rea submitted as a matter of principle there should not be any onus on agents to ascertain boundaries as it is contrary to current Real Estate Agent industry standards and practice. He submits that *Rae* was wrong as decided, and agents should not have to make any endeavour to locate or ascertain the boundaries to a property being marketed.

Discussion

[19] We have considered Mr Morley's oral testimony and find that the standard he espouses is not in keeping with numerous decisions of the Tribunal. It is clear that an agent's obligations under the new Act go much further than Mr Morley was prepared to allow.

[20] An agent has an active role to play in conveying information about the property to a potential purchaser and must be cognisant of that role and carry it out to the best of his/her ability. The Tribunal consider that if Ms Fitzgerald had been asked by Mr and Mrs Reddy whether the fence constituted the boundary then she would have been obliged to have made enquiries about that and either confirmed where the boundaries were or advised the Reddys' to obtain a surveyor's advice.

[21] The Tribunal reiterate that there is an obligation on an agent to be proactive where they are asked or might reasonably be expected to be asked about a boundary, for example where there is no clearly marked fence, where the boundaries appear to be in bush land or where a title is 'limited as to parcels'. However we have cautioned against obligations which require agents to become lawyers and we extend this to surveying. An agent must make every effort to know the product that they are selling but they are not required to anticipate problems where a problem might not exist. It would be unduly burdensome if in every case where there is no apparent cause for concern an agent was required to verify the boundary or be liable for failure to do so. However the agent must not mislead or deceive or hide anything from the purchaser. We consider that these two paragraphs set out the obligation imposed by the Tribunal in *Rae*.

[22] We acknowledge that the Real Estate Agents Act is important consumer legislation and that agents play a vital part in ensuring that purchasers are protected.

[23] On the facts of this case Ms Fitzgerald was not making any effort to hide anything from Mr and Mrs Reddy, nor did she dissemble. She simply was silent because as far as she [or anyone else] knew there was nothing extraordinary about the position of the boundary. The fence had been in this place since the property was constructed.

[24] We conclude therefore that in the circumstances of this case Ms Fitzgerald was not guilty of unsatisfactory conduct and we reverse the decision of the Complaints Assessment Committee.

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

DATED at AUCKLAND this 6th day of June 2014

Ms K Davenport QC
Chairperson

Mr G Denley
Member

Ms N Dangen
Member