BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 54

READT 030/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**JINSHAN SONG** of Christchurch, Complainant
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20008)**
	First respondent
AND	**DIANNE CLEMENT**, of Christchurch, Real Estate Agent
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms C Sandelin - Member

HEARD at CHRISTCHURCH on 12 June 2014

DATE OF THIS DECISION 15 July 2014

APPEARANCES

The appellant on his own behalf
Mr R McCoubrey, counsel for the Authority
The licensee on her own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Jinshan Song ("the Complainant") appeals against the 14 March 2014 decision of Complaints Assessment Committee 20008 to take no further action in respect of his complaint against Ms Dianne Clement ("the Licensee").

Factual Background

[2] On 20 April 2013, the Complainant attended an open home for a unit at 64A Toorak Avenue, Avonhead, Christchurch. When he asked why the property had not sold, the Licensee told him that another purchaser had made an offer but then

cancelled the agreement. The Complainant asked the Licensee if there were any problems with the house, and she replied that he should not worry about the previous offer.

[3] The Complainant went ahead and made an offer on the property, which was accepted, so that he then signed a sale and purchase agreement on that evening of Saturday 20 April 2013. We note below that the unit was one of two units on a section of land with perpetual cross-leases to each owner.

[4] The Complainant alleges that the next working day (the Monday) after the Complainant had signed the agreement, the Licensee telephoned him to say that there was an issue with the title for the property as the vendor had applied for a new title. The Licensee advised that this would take a few weeks to issue. As it happened, the title issue was not resolved until nearly four months later.

[5] When the Complainant met with his lawyer about the purchase (which seems to have been on the afternoon of Monday 22 April 2013), he was told that the title just needed to be updated as the house had been rebuilt (apparently, consequential to earthquake damage). He was advised that he could cancel the contract if he wished, but he chose not to. Instead, the Complainant rented the house from the vendor in the interim until the title became available and the purchase could be settled.

[6] It is accepted by both parties that the Licensee knew about the title issue prior to the Complainant signing the sale and purchase agreement.

[7] The appellant complained that the Licensee had not, but should have, disclosed the issues with the title prior to the Complainant signing the sale and purchase agreement.

[8] The property is one of two units at 64 Toorak Ave, Avonhead, Christchurch. They are held on the basis of each unit owner owning a half-share in the total land and holding a 999 year cross-lease from the other unit owner. It happens that some extra buildings had been added to the land in recent years but the titles to the property had not been updated to reflect that. Accordingly, in about January of 2013 the property was re-surveyed, but by the time Unit A, which was acquired by the Complainant appellant, was marketed the new titles had not yet been issued by the Land Transfer Office. There also needed to be a new title issued for the adjoining unit which, curiously, was also on the market at the same time. As it happened it took about a further four months for titles to be issued in the updated form.

[9] As explained below, the appellant/purchaser (and Complainant) elected to proceed with the purchase transaction on the basis that, until the new title was available and settlement of his contract could take place, he paid rent to the vendor at a rate of $200.00 per week which, over the period until settlement, totalled $2,171. He seems to be seeking reimbursement for this from the Licensee although, presumably, he saved mortgage interest over that period and would not have been required to pay outgoings on the property until formal settlement.

The Reasoning of the Committee

[10] It is helpful to set out the thoughtful reasoning of the Committee in its said decision which reads as follows:

"4.1 The primary point raised by the Complainant is that the Licensee did not advise him that a new title was required to be issued on the property before he signed the agreement for sale and purchase. However, the parties conflict on this point as the Licensee is adamant she explained the new title issue to the Complainant prior to him signing the agreement. It was her practice to advise all prospective purchasers that inquired about the property all about the new title. We also note in the agreement for sale and purchase that under the heading 'further terms of sale' there is an array of terms, one of which refers to the contract being subject to approval of the title by the purchaser's solicitor. Another term states the form and content of the contract is subject to the approval of the purchaser's solicitor. Both these terms are initialled by the Complainant.

4.2 On balance it is our view that, given there is a specific term in the contract relating to the title being subject to the approval of the purchaser's solicitor, it is more likely than not the Licensee did explain to the Complainant the issue of the title on the property. For these reasons we are not persuaded that the Licensee did not advise the Complainant about the issues regarding the title.

4.3 Similarly, under the 'further terms of sale' in the contract there is also a specific term relating to the Earthquake Commission claim of the vendor being transferred to the new owner on settlement, and that this clause is for the sole benefit of the purchaser. This term has also been initialled by the Complainant. Based on this term of the contract we accept the Licensee's explanation that she raised this point with the Complainant for insurance purposes only as the vendor, who was a builder, had carried out minor repairs. The Complainant himself also acknowledged there were no earthquake issues in the building report. We find no wrong doing on the part of the Licensee on this point.

4.4 We conclude, based on the above reasons, that there has been no breach of the Rules or provisions under the Real Estate Agents Act 2008."

A summary of further evidence to us

The Evidence of the Appellant

[11] The appellant's prime language is Mandarin. He seemed to us to have a good understanding of English but, perhaps, with some room for confusion. Much of the evidence from both parties seemed rather beside the point to us, but the essential stance of the appellant is that he believes that the Licensee knew that there would be a significant delay from 20 April 2013 the date of the agreement for sale and purchase until title became available to enable settlement.

[12] The appellant believes that the Licensee purposely concealed that information from him although, on the next working day (Monday 22 April 2013), she told him that there was a little problem over the title as the vendor had surrendered it and applied for a new title which could be two weeks away. He is adamant that the Licensee did not say anything about there being a problem with the title on the night of Saturday 20 April 2013 when he and his wife signed an offer to buy the residential unit. He said that, on the Monday, the Licensee called him (and his wife Ms Jenny Peng) and advised there was an issue with the title and he needed to talk to his lawyer and that was the first he (the appellant) had heard of any issue over title; and the Licensee then said it could be two to four weeks before the situation was remedied.

[13] The appellant said he arranged to see a lawyer (a Mr G Sumby, of Christchurch) that Monday afternoon who told him there should not be a problem in getting a new title, which was simply an updating of the old title. Their lawyer then told him and his wife that they could cancel the contract in terms of clauses inserted for their protection by the Licensee. Because the appellant and his wife liked the house, were first home buyers, very much needed the accommodation, and had spent money on a builders report, they decided to continue and defer settlement until the title was issued.

[14] There is no dispute that the appellant's lawyer was rung on the Monday by the Licensee who then advised that the vendor had done a silly thing and put the property on the market without an up-to-date title and she did not think the new title would be issued prior to the settlement date in the contract so that he, as solicitor for the Complainant purchaser, should talk to the vendor's solicitors, and that happened. Mr Sumby has confirmed to the Committee that he met with the Complainant appellant and his wife that afternoon of Monday 22 April 2013 and explained the situation. Mr Sumby had quite some difficulty in making the Complainant understand the position, presumably, due to the appellant's prime language being Mandarin. That evidence from Mr Sumby was adduced to us by consent.

[15] The appellant Complainant was, of course, cross-examined by the Licensee who put to him the essence of her case, namely, that before the agreement was signed on the evening of Saturday 20 April 2013, she advised the appellant and his wife that there was an issue with the title, explained what it was, and strongly advised them to contact a lawyer about it. She even suggested a lawyer by the name of Shirrlay Sun who represented many Chinese persons in Christchurch with regard to property transactions. The appellant asserts that such a conversation did not happen.

[16] The appellant acknowledged that the Licensee had put various protective conditions into the agreement for sale and purchase document which were adequate to protect him in all the circumstances, but maintained that these were merely standard clauses which the Licensee would have inserted in all her contracts.

[17] Frankly, the evidence deteriorated to a distinct conflict between the Complainant and the Licensee as to whether or not on the evening of Saturday 20 April 2013 she had warned him of the title delay issue or not. She says that she did. He says that she did not and that he did not learn of the problem about issuing a new title for the property until about midday on the Monday, 22 April 2013, when she rang him and told him. The appellant insists that the Licensee did not tell him about any title delay problem on the Saturday 20 April 2013, nor mention that he should see the lawyer Shirrlay Sun. He said that he would have remembered the name Shirrlay Sun because he would not have been prepared to go to her.

[18] In the course of the evidence, it emerged that there was no reference in any of the flyers for the property to the likelihood of delay in issuing title.

[19] The Licensee put it to the appellant that he was told of the title delay problem on the evening of Saturday 20 April 2013 before he and his wife signed the offer, and the Licensee also then advised him to get legal advice. The appellant responded that he had not then engaged a lawyer and needed to wait until the Monday 22 April 2013 to do that and he knew that there were sufficient protective conditions of his position in the contract.

[20] As covered above, settlement was deferred until the new title was issued on 15 August 2013 and, in the meantime, the appellant and his wife rented the property from the vendor.

[21] The appellant also covered the reasons given above for his not wishing to cancel the agreement adding that he would have needed to pay his lawyer in any case and go looking for houses again. Also, he liked the house, needed the accommodation as he and his wife had a newborn baby, and he had understood that it would not take long for the new title to be issued.

The evidence of the Licensee

[22] Simply put, the evidence of the Licensee is that on the evening of Saturday 20 April 2013 she went to see the appellant and his wife before they made an offer for the residential unit, and she explained that new titles needed to be issued for both the freehold and the leasehold interests being acquired and that they needed to take legal advice about that.

[23] She also said that because they wished to proceed there and then on the evening of Saturday 20 April 2013, she particularly put a clause in the contract document allowing two working days for the obtaining of their solicitor's approval to the contract. There was reference to that clause.

[24] She added that, first thing on the Monday morning, she phoned the appellant's solicitor to discuss the title issue with him; and she says that she knows that the vendors' solicitor also communicated with the appellant's solicitor about that issue on Tuesday 23 April 2013.

[25] It was firmly put to the Licensee by the Complainant appellant that when he and his wife signed the offer to purchase the property on the evening of Saturday 20 April 2013 she had not told them of the issue about delay in the issuing of a new title; but the Licensee absolutely asserts that she did and that she had told all prospective buyers of that problem.

[26] Under cross-examination from Mr McCoubrey, the Licensee asserted that she had warned the appellant of the title delay problem on 20 April 2013 and told him that she was inserting a clause to cover that by giving his solicitor two days to cancel the contract for any reason at all, and she then rang his solicitor promptly on the Monday morning. She accepts, as Mr McCoubrey put it to her, that the conditions in the offer are fairly normal and that, with hindsight, maybe she should have added a particular clause tailored to the certificate of title delay problem but, at the time and even now, she did not feel that was necessary and that, in particular, she had put lawyers onto the issue as soon as she could on the Monday. She said that she had also been given to understand from the lawyers that there would not be much more of a delay in the new title being issued.

[27] The Licensee also candidly stated that from 18 March 2013 she had known of the need for the issue of a new title and that it could take more time. She acknowledged that she did not mention that in any sales material, but says she made a point of verbally telling all interested parties of there being a possible problem of delay in the actual issue of the new title for both the above unit and its adjoining unit on the same section of land. She now wishes she had inserted a clause in the contract recording that it was conditional upon the new title being issued within a particular time.

Discussion

[28] Mr McCoubrey helpfully referred in some detail to relevant statute and case law about a Licensee's disclosure duties.

[29] The definition of "*unsatisfactory conduct*" is set out in s.72 of the Act which reads as follows:

> ***"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."*

[30] For present purposes, it is only necessary to note that rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 reads:

> *"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."*

[31] There was reference to Rule 10.7 which provides:

> *"6.5 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely, on the basis of the licensee's knowledge and experience of the real estate market, that land may be subject to hidden or underlying defects, the licensee must either–*
>
> *(a) obtain confirmation from the client that the land in question is not subject to defect; or*
>
> *(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses."*

[32] There is one broad factual issue, namely, whether the Licensee advised the Complainant about the possible delay in issuing the new title prior to him and his wife signing the sale and purchase agreement.

[33] The Complainant submits that the Licensee only informed him about the title issue after he had signed the sale and purchase agreement and that was by a Monday 22 April 2013 email.

[34] In response, the Licensee has claimed that she had visited the Complainant and his wife prior to them making an offer and had explained to them that a new title would be issued and that they should consult a lawyer on the issue. She also says that she advised them that, should they choose to proceed with the purchase, she would insert a clause into the sale and purchase agreement to allow two working days for the Complainant to obtain legal advice. The Complainant has submitted that clause is a very general clause and therefore does not prove that the title issue was explained to him and his wife. He has also submitted that the clause is one generally used by the Licensee's employer agency and not specifically added for his circumstances by the Licensee. That is an understandable view.

[35] It is correct that the Licensee has added a number of special conditions to the standard REINZ and Auckland District Law Society form of agreement for sale and purchase of real estate. Those clauses are fairly standard but gave ample protection to the Complainant and his wife as purchasers in the context of this case. There were four clauses giving the purchasers 10 working days to have their solicitor approve title, town planning, resource management matters, and a LIM report; arrange finance; obtain *"a Building Report/Structural Engineer's Report"*; and obtain satisfactory comprehensive insurance for the dwelling. There was the said further condition that the contract was subject to *"the purchasers' and vendor's solicitor's approval of form and content within 2 working days of acceptance of his agreement."* There was an extra condition providing for the deposit to be held by the Public Trustee. The benefits of a relevant earthquake commission claim were transferred to the purchaser.

[36] The Licensee stated that she phoned the Complainant's lawyer the next working morning and discussed the title issue. The Complainant has submitted in his brief of evidence that this cannot be true as he and his wife did not engage a lawyer until two days after the signing of the contract. He refers to an email his wife (the said Jenny Peng) sent the Licensee on the early afternoon of Monday 22 April 2013 (at 12.20 pm) providing their solicitor's contact details relating to Shirrlay Sun, but a little later (at 1.12 pm) Ms Peng advised the appellant they had changed their minds and were seeing Mr Sumby. They say that it was by email of 3.43 pm that Monday when the Licensee first advised them of the title delay issue. The Licensee has said that she phoned their previous Chinese-speaking lawyer (Ms Sun) but she seems to have also contacted Mr Sumby.

[37] The conflicts of evidence are puzzling.

[38] There is a copy of an email to the Complainant's wife from the appellant sent at 3.43 pm on that Monday 22 April 2013 which seems to be in response to Ms Peng advising by 12.20 pm email that day that their solicitor would be Shirrlay Sun. In that email the appellant advises of the title problem but it is not clear whether she is giving initial advice of that, or an up-date, or is putting this matter on the record; but it is clear that the appellant was anxious to brief the Complainant's solicitor on the issue at the earliest opportunity.

[39] As Mr McCoubrey put it, we simply need to find what seems to have taken place in the conversations between Complainant and Licensee on the evening of 20 April 2013 prior to the Complainant and his wife signing the agreement for sale and purchase. Mr McCoubrey also put it that, if we are satisfied that the Licensee warned the appellant/Complainant of the likely delay in the issuing of a new title, then she fulfilled her duty; otherwise she did not.

[40] The Licensee's case is that she did know about the new title issue, and that she had a duty to warn and explain the title position to the appellant and his wife, but prior to the offer being signed did explain that.

[41] Accordingly, the issue in this case, which is about the conduct of the Licensee at material times, is who said what to whom at those material times which particularly cover the open home that day of 20 April 2013, and the visit of the Licensee to the appellant and his wife that evening to facilitate their signing an offer to buy the property.

[42] The Licensee simply puts it that she did forewarn and explain the title delay issue to the appellant and his wife as she should have before they signed their offer to purchase the residential unit. She adds that, as well, she put in a suitable protective clause, as explained above, and she made a point of advising them to contact their lawyer, and suggested Ms Shirrlay Sun. On the Monday she contacted Ms Sun and later Mr Sumby (whom the appellant instructed on the Monday), to make sure that the issue was understood and being dealt with on their behalf by their lawyer.

[43] The appellant's stance, as indicated above, is simply that he had no knowledge whatsoever of there being a title delay issue until about midday Monday 22 April 2013 when the Licensee rang and told that to him and his wife and then saying that there would be about a four week delay in the issue of the new title. He has also said he did not know of the issue until the appellant advised him and his wife of that by email at 3.43 pm on the Monday. We have referred to that email above. He seemed to be saying that the Licensee knew of this all along (which she admits) and only told him on the Monday because the contract had been signed by then and she knew that the issue would arise. The Complainant also asserts that although he had not been told about the likely delay in the issuing of the title, his neighbour (in the adjoining unit) knew of that.

[44] In cross-examination before us, the Licensee had also asked the appellant why he had not replied to her e-mail of Monday 22 April 2013 and record that the title delay problem was new information to him, if that is what it was. The appellant's response was that he was busy at work when he got that informative e-mail about the problem from the Licensee and neither he nor his wife were able to make contact by phone with the Licensee that afternoon; but he was not particularly worried because he did not expect much of a delay over the issuing of the title. Also, he then believed that the Licensee had only just found out about that likely hitch and it did not occur to him to blame her at that point.

Our Conclusions

[45] Both the appellant and the Licensee seem sensible, intelligent, and honest people to us. Somehow, confusion must have arisen, perhaps, due to English not being the appellant's (or his wife's) natural language. Possibly, the parties have become hazy as to who said what to whom on Saturday 20 April 2013 and, indeed, on the Monday 22 April 2013. We simply do not know who to believe or disbelieve. The onus is on the appellant to prove his case on the balance of probabilities i.e. to prove that the Licensee is guilty of unsatisfactory conduct. He is unable to do that.

[46] Having said all that, the possible problem of delay in issuing a new title should have been mentioned by the Licensee in her advertising flyers for the property; although, probably, she did not realise it would take so long for the new titles to be

issued in the circumstance of all survey work having been completed in January that year. Also, we have no reason to disbelieve that she verbally told all interested parties, including the appellant and his wife, of the possible problem over the issuing of titles and how that could delay settlement of a purchase.

[47] In the context of the facts as we have covered them above, we do not find that the Licensee's conduct comes within *"unsatisfactory conduct"* as defined in s.72 of the Act set out above. We do not think that the Licensee's conduct falls short of proper standards. It was certainly not incompetent or negligent and could not be reasonably regarded by agents of good standing as being unacceptable. It does not convene any provisions of the Act or its regulations or rules. It has not been proved that the appellant was misled in any way by the Licensee or that any false information was provided, nor has there been withholding of information proven.

[48] We have no reason to disbelieve the Licensee's evidence that before the agreement was signed by him she fully informed the appellant of the possibility of there being a delay in the issue of title and the consequence of that and the need to discuss that situation with his solicitor.

[49] Accordingly, we confirm the decision of the Committee to take no further action in respect of the appellant's complaint against the Licensee, because there has been no breach of the Act or its rules. This appeal is hereby dismissed.

[50] 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 J Gaukrodger
Member

_____

Ms C Sandelin
Member