

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 73

READT 085/13

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

BETWEEN **BERYL HENDERSON**

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20008)**

First respondent

AND **DAVID JONES**

Second respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson

Mr J Gaukrodger- – Member

Ms C Sandelin- – Member

HEARD at WELLINGTON on 7 May 2014

DATE OF DECISION 23 September 2014

APPEARANCES

Mr N Davis for the appellant

Mr R McCoubrey for first respondent

Mr J Parker and Ms L Tidey from Morrison Kent for second respondent

DECISION OF THE TRIBUNAL

[1] Mrs Henderson complained to the Complaints Assessment Committee about the conduct of Mr Jones. The Complaints Assessment Committee dismissed this complaint. Mrs Henderson appeals to the Tribunal.

[2] Her complaint concerned her purchase of a property at 493 High Street, Epuni, Lower Hutt in January 2013. Mrs Henderson complained that she felt bullied by Mr Jones (the agent) and that he had misled her as he had prepared a contract without a condition requiring a builder's report and further "*misled me about it being too late to withdraw my offer*".

[3] Mr Jones denied these claims. Evidence was given at the hearing by Mrs Henderson and her builder Mr Noel Gilmore. Mr Beilby from Selig Real Estate, Mr Jones's employers and Mr Jones gave evidence.

The evidence

[4] Mrs Henderson is 75 years of age and is a retired nurse. She told the Tribunal that in January 2013 she had been depressed and was being treated for depression by her General Practitioner and as a result had been sleeping poorly. At that time she said that she was feeling very vulnerable. She told the Tribunal she believed that Mr John Beilby of Selig Real Estate and Mr David Jones were aware of her vulnerability because of their dealings with her over the years and during January 2013. Mrs Henderson said that the agents should have been aware of her depression and her vulnerability.

[5] Mrs Henderson was looking for a new house in December 2012 to January 2013. Mrs Henderson visited the Open Home at 493 High Street, Lower Hutt on 30 December 2012 but did not go upstairs. She discussed the property with Mr Beilby in January 2013. They discussed making an offer. On 22 January 2013 Mr Beilby phoned Mrs Henderson and asked if she wanted to proceed to make an offer. The terms were discussed. Mrs Henderson said that she told Mr Beilby that her offer would be \$650,000 non-negotiable and this should include a "*builder's report*" condition. They discussed a title search and having the cross lease checked. Mrs Henderson said that she did want the offer to be as "*clean*" as possible but she took that to mean that she did not need a finance clause. She was adamant that her instructions were that the agreement must have a condition requiring a builder's report. She confirmed however that she did not want to discuss the purchase with her solicitor as "*she would try to talk me out of it*". She did not seek a solicitor's approval clause. Mrs Henderson said that subsequently both Mr Beilby and Mr Jones turned up to have her sign the agreement which made her feel "*intimidated, overbored, pressured and hassled*". She said that Mr Jones told her not to put a builder's report condition into the contract as he said "*you don't need a builder's report, it's a first class property*". Mrs Henderson said she felt flustered and signed the agreement quickly but believed she had the building report condition in the contract because she arranged to have her daughter, and subsequently, the next day, Mr Gilmore, see the property.

[6] The vendor however did not accept the offer. The next day Mrs Henderson agreed to offer \$655,000 for the property. She initialled the change to the price. She was told that the purchaser would not be able to sign until 8.00 o'clock that night. Accordingly Mrs Henderson did not believe that this was a binding contract (at least until 8.00 pm). She made arrangements for Mr Gilmore (her builder) to view the house. Mrs Henderson and Mr Gilmore saw the property on 23 January. Mr Gilmore pointed out various issues with the property, including problems with the Butynol and potential leaks on the front deck and gallery. Mr Jones accompanied the builder and Mrs Henderson on this inspection.

[7] Mrs Henderson decided that she was not happy with Mr Gilmore's report and therefore she wanted to withdraw her offer. She advised Mr Jones but was told by him that it was "*too late*". She spoke to Mr Beilby and said that she was not happy with the builder's report and she wanted to withdraw the offer. She was again told she could not withdraw. She talked to her lawyers the next day and reported to her GP that she was extremely stressed and depressed.

[8] Mr Gilmore confirmed that he went to see the property and that he had concerns about aspects of the property. He said that Mr Jones was concerned to minimise any problems that he identified with the property but he did not mention at any time that Mrs Henderson had an unconditional contract or that it was a waste of time doing a builder's report/inspection.

[9] Mr Beilby and Mr Jones denied most of this evidence. Mr Beilby said that he had stressed to Mrs Henderson that she should put a builder's report condition in the contract. He said that Mrs Henderson told him that she had a builder look at the house and he advised her that it had been built of quality materials and that "*anyone who uses copper spouting would not skimp on anything else*". He said she declined to include this condition. He said that he also suggested that Mrs Henderson discuss this with her solicitor. However she also declined this. He said he came back with Mr Jones on the 22nd at 11.30 am to sign the agreement. He denied that he or Mr Jones put any pressure on Mrs Henderson to sign the contract. He acknowledged that Mr Jones arranged to take Mrs Henderson's daughter through the property that day. The following day he and Mr Jones went to Mrs Henderson's house and had the change in price initialled.

[10] Mr Jones told the Tribunal that he had known Mrs Henderson for a long time through the church but that he was not aware of her illnesses as set out in her medical report. Mr Jones denied that he pressured her to sign the agreement. He said that both he and Mr Beilby suggested to her that she insert a builder's report condition in the contract and it was always his practice to recommend that. However, he said Mrs Henderson declined this. Mr Jones said that when the vendor asked for more money he told Mrs Henderson of the options but let her think about the property and offer overnight. It was not until the next morning that he arranged to go back to Mrs Henderson's house and have her sign an amended agreement. He said that he did meet with Mrs Henderson and her builder on 24 January and was told that some maintenance was required. He said he got the impression that the builder thought that he was present to give a pre-purchase report and was attempting to find fault to reduce the price. He said he pointed out that the Sale and Purchase Agreement had already been agreed. Mr Jones said that there was no pressure put on Mrs Henderson at all. He also denied he had been anything other than courteous when Mrs Henderson sought to cancel the agreement.

[11] Mrs Henderson's grounds for appeal as advanced by her counsel were that she had undue or unfair pressure put on her to sign the agreement, that Mr Jones had failed to include a building report condition in the contract despite receiving clear instructions to do so and that Mr Jones treated Mrs Henderson very badly when she complained and tried to cancel the contract.

Was undue or unfair pressure placed on Mrs Henderson?

[12] The medical certificate provided by Mrs Henderson shows that Mrs Henderson had been suffering from depression and chronic alcoholism for some time. Mr Davis submitted that it would have been obvious to Mr Jones and Mr Beilby that she was suffering significant emotional difficulty at the time of the purchase. He submitted that Mr Jones knew that she was in a vulnerable position as he knew Mrs Henderson and that he should have been aware of this at the time the agreement was signed. He further submitted that Mr Jones's behaviour in having Mrs Henderson sign the agreement did constitute undue and unfair pressure. Mr Davis repeated Mrs

Henderson's evidence that she felt rushed and hassled when she was asked to sign the agreement on 22 January 2013 by having two large men come to her property.

[13] Mr Davis submitted that Mr Jones acknowledged that he may have said to Mrs Henderson about some of the documents that "*you know this already*" rather than taking her through them. Mr Davis accepts that there is a stark contrast between the evidence of Mrs Henderson and Mr Jones and Mr Beilby regarding the insertion of a builder's report condition. Mr Davis submitted that the transcript shows that:

- (i) Mrs Henderson had previously obtained building reports for all of her properties and had declined to purchase a property because of the building report.
- (ii) Mrs Henderson was clear that her builder needed to see the inside of the property as well as the outside.
- (iii) In the telephone conversation on 22 January 2013 Mrs Henderson had made it clear that she wanted a building report and that she simply expected that it would be inserted in the agreement.

[14] Further Mr Davis submitted that Mr Gilmour's evidence corroborated that of Mrs Henderson. He submitted there was no reason for him to lie and Mr Gilmour's evidence was he was never told the property was under contract and that there was no building report condition in the contract.

[15] In turn he submitted that Mr Jones was not credible as:

- He was argumentative.
- He was advocate for his own cause.
- He minimised parts of his evidence, such as why he did not check about the building inspection given that he was there as a friend and to protect her.
- His behaviour when Mrs Henderson sought to cancel the offer – where he did not assist her to terminate the contract.

[16] Mr Parker for the second respondent submits that Mrs Henderson's evidence was not credible. He submitted that she changed her position on relevant issues in her evidence. He pointed to evidence in which Mr Jones denied knowing that the appellant was either clinically depressed or suffering from alcoholism and thus said she was vulnerable to suggestion. Mr Parker stressed that Mr Jones had never seen any sign of her drinking and he did not know the details of her illness. Mr Parker submitted that despite cross examination Mr Jones's evidence as to his knowledge of the appellant's health and position remained unchanged and unaltered. Further, he submitted that the simple presence of two men in Mrs Henderson's kitchen could not in itself constitute unfair pressure. He submitted that both Mr Jones and Mr Beilby were adamant that they went carefully through the agreement with Mrs Henderson and raised with her the question of the building report. They say that it was clear that

the building report was not required by Mrs Henderson. Mr Parker submitted that the transcript shows that when asked by the Tribunal whether she had asked for a builder's report condition Mrs Henderson said:

"I'm sure I intimated that that's what has always been and that's what I've had previously and I expected it to be the same as what I've, what is normally ever been, you know, in these contracts".

[17] Mr Parker submitted that evidence of the respondent was at all times clear and to be believed.

Decision

[18] The issue for the Tribunal is one of credibility of the witnesses, together with an examination of such contemporaneous documents as exist. It is clear that Mrs Henderson was under significant stress while giving evidence and it may be that therefore her evidence was not as clear as she would have liked. However, Mrs Henderson's evidence was somewhat confused and she became flustered on the important point as to whether or not she asked for a building report condition in the contract. When questioned by the Tribunal she could not be conclusive on this point.

[19] The appellant must prove the charge to the satisfaction of the Tribunal on the balance of probabilities, i.e. is it more likely than not that Mr Jones did pressure Mrs Henderson into signing the contract.

[20] After having carefully considered all of the evidence and the submissions of counsel the Tribunal conclude that Mrs Henderson has not discharged the burden of proof to prove her case (and thus the appeal). Our reasons for this are as follows:

- (i) Mrs Henderson herself was unable to give a clear statement that she had asked for the building report to be included in the agreement. Rather it seems to have been just an assumption by her that it would be included.
- (ii) When Mrs Henderson was giving evidence at the hearing it was clear that she was under stress. Had the agents been dealing with her in such a state it would have been most unfair and improper of them to have had her sign an agreement. However there does not seem to be any independent evidence to suggest that Mrs Henderson was in this state when she signed the agreement in January 2013. Indeed her own evidence was that she masked or hid this behaviour in a wish to get Mr Jones and Mr Beilby out of her kitchen. She acknowledges that she declined the suggestion that she take legal advice.
- (iii) Combinations of factors make the Tribunal conclude that it is less likely that Mrs Henderson was objectively pressured to sign the agreement or that she asked for a building report clause and this was not inserted in the contract. Her own subjective view may have been that she was being pressured but the Tribunal must make an objective assessment of the issue.

[21] As to the conduct of Mr Jones when Mrs Henderson wished to get out of the contract; we have concluded that again there is insufficient evidence to support the claim. We accept Mr Beilby and Mr Jones's evidence that they phoned the vendor asking him to let Mrs Henderson out of the contract and then they could not persuade him to do this.

[22] In the circumstances therefore Mrs Henderson has not proved her appeal and the Tribunal dismisses the appeal.

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

Ms K Davenport
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member