BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 81

READT 042/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**JAMES LAW**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20004)**
	First respondent
AND	**FONTEYN DEVELOPMENTS LTD**
	Second respondent (but not participating in this appeal)

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 17 October 2014

REPRESENTATION

Mr T D Rea, counsel for the appellant
Ms J F MacGibbon, counsel for the Authority
No appearance or participation in this appeal by or for second respondent

DECISION OF THE TRIBUNAL

Introduction

[1] The appellant appeals the 12 November 2013 decision of Complaints Assessment Committee 20004 finding him guilty of unsatisfactory conduct, and its consequential 27 March 2014 decision on penalty. However, as we cover below, further evidence adduced to us prior to the appeal fixture rebuts the complaint of the second respondent who had declined to participate in this appeal. Accordingly, the Authority virtually concedes the appeal.

Background

[2] The relevant and basic sequence of events is as follows.

[3] James Law Realty Ltd (JLRL) was acting as the agent of Xiang Yun Developments Ltd (XYDL) in respect of the marketing of the latter's residential units at 68 Fonteyn Street, Avondale, Auckland. A marketing launch was scheduled for 16 March 2013, and there had been some prior advertising of a function to be held on site on that date. Up to that point, there had been quite limited contact with prospective purchasers.

[4] Previously, on 25 January 2013, Mr Law had been taken to lunch by Timothy Manning, a director of Avondale Properties Ltd (APL) and also a director of the complainant/second respondent, Fonteyn Developments Ltd of which APL is a subsidiary. APL was a former owner of the property which it had sold to XYDL. Mr Manning then said he was owed money by XYDL or its director, Mr Han, and he asked for Mr Law's help in recovering the alleged debt. Mr Law declined. This was the first knowledge Mr Law had of any dispute between APL and XYDL. There was no suggestion at this time that the issue was of any relevance to prospective buyers from XYDL or that Mr Manning expected XYDL or JLRL to inform prospective buyers of that matter.

[5] On 22 February 2013 Mr Manning, on behalf of Fonteyn Developments Ltd, wrote to JLRL alleging that certain intellectual property rights ("IP") had not passed from APL to XYDL so that, allegedly, XYDL could not transfer ownership of IP which it did not own. The letter put JLRL on notice that purchasers of residential units needed to be informed of this and that such purchasers, allegedly, might somehow assume an obligation for the alleged debt. The letter also stated that legal proceedings were on foot for APL to recover the debt from XYDL and Mr Han. This last statement appears to then be incorrect, given that statutory demand proceedings in the High Court had been disposed of with costs orders against APL in October 2012; that APL had filed a notice of discontinuance in the High Court in respect of caveat proceedings on 2 November 2012; and a subsequent District Court claim was not filed until 5 April 2013.

[6] Upon receipt of the 22 February 2013 letter, Mr Law referred the matter to XYDL's solicitors, Messrs Loo and Koo, and also sought advice from the Real Estate Institute of New Zealand ("REINZ"). Messrs Loo and Koo provided information about the dispute, including copies of correspondence and documents which were used by JLRL in compiling an *"information pack"* about the dispute for prospective purchasers.

[7] Mr Law corresponded with REINZ's Advisory Services Manager, Nicole Song. She responded on 28 February 2013 advising that rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (referred to below) could potentially apply, but that Mr Law should find out more about the dispute and, if it turned out just to be an IP dispute, then she would consider that as something solely between XYDL and APL. On 1 March 2013, after receiving further information from Mr Law, Ms Song advised further that the issue appeared to her to be an IP dispute which did not seem relevant to the proposed property transactions.

[8] Nevertheless, Mr Law took a cautious approach and advised his salespeople to disclose the dispute to anyone who appeared to be a genuine prospective buyer of a unit, whether they asked about or not. The evidence of the various salespeople

involved in the marketing of the property is that the issue was, in fact, routinely disclosed.

Rule 6.4 – timing of disclosure, and to whom disclosure need be made

[9] Rule 6.4 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."*

The CAC Decision

[10] The substantive decision of the CAC dated 12 November 2013, issued on the basis of the evidence then available, clarifies the above situation significantly as is shown in the following extract:

> *"1.3 The complainant has notified the licensee that there is a dispute relating to the ownership of the intellectual property ("the IP") relating to engineering in respect to the dwellings they are marketing at 68 Fonteyn Street, Avondale, Auckland ("the property"). The complainant has put the licensee on notice that all purchasers of the units at the property may be affected by the outcome of the dispute and should be notified of the dispute.*
>
> *1.4 The licensee is unwilling to act upon the notice given by the complainant and accordingly is not notifying prospective purchasers of the IP dispute.*
>
> ***2. Material Facts***
>
> *2.1 The complainant is a developer and previous owner of the property, which was a retirement development. The complainant, through one of its subsidiaries Avondale Properties Ltd, sold the property to Xian Yun Developments Ltd ("the purchaser") in May 2012.*
>
> *2.2 The agreement for sale and purchase between the complainant and the purchaser provided that the vendor would settle outstanding accounts and arrears in relation to the land and the development, except for two outstanding accounts, namely one to the Auckland Council for $67,801.97 and a second to Fraser Thomas Ltd for $149,000 ("the fee"). The amount owed to the Auckland Council has been paid. The second payment, the fee to Fraser Thomas Ltd for its engineering services and creation of part of the intellectual property included in the sale, has not been paid.*
>
> *2.3 There is a dispute between the parties as to whether that means the purchaser was obliged to pay the two outstanding accounts as part of the purchase price. A further term of the agreement for sale and purchase between the complainant and the purchaser recorded that the parties agreed that the purchase price included the land, all improvements built on land, and all intellectual property is related to the development of the land. The vendor agreed to provide the purchaser with original documents and take all necessary steps to pass, transfer and assign all titles and benefits and intellectual property free of encumbrance and liens on settlement.*

2.4 The complainant's position is that the purchaser has failed to pay the fee owed to Fraser Thomas Ltd and accordingly the ownership of the IP has not passed to the purchaser. The complainant asserts that the purchaser's failure to own the IP could ultimately affect purchasers of the units at the development.

2.5 Fraser Thomas Ltd has taken the view that the fee is owed by Norwich Properties Ltd (another of the complainant's subsidiaries), that it is a civil debt and if it is not paid within a reasonable time they will issue civil proceedings against Norwich Properties Ltd to recover the amount owed. They also indicate they have no intention of pursuing purchasers of the units at the property for the fee.

2.6 The complainant through its subsidiary Avondale Properties Ltd has issued proceedings against the purchaser for the recovery of the fee. This has included the placing of a caveat on the property on two separate occasions. The developer has challenged the validity of the caveat in the High Court and successfully had the caveats removed.

2.7 The complainant has now issued proceedings in the District Court in respect of the IP dispute and has also put a warning on the purchaser's website about the dispute.

2.8 The licensee has advised his sales people to make no mention of the IP dispute to purchasers unless they are specifically asked. The licensee's reasoning for not doing so is that the complainant has already lost twice in the High Court and a legal opinion he has from the purchaser's solicitor is that the question of liability of the fee has already been resolved in favour of the purchaser."

[11] On the situation put before it, the Committee then issued its decision with detailed reasoning but the following paragraph encapsulates matters as they then stood:

"4.1 In very simple terms the complainant alleges that the purchaser's failure to pay the fee owed to Fraser Thomas Ltd could affect all future purchasers of units in the property and that that is a matter that the licensee has a duty to disclose to prospective purchasers."

[12] Against that context, the Committee issued a penalty decision of 27 March 2014 censuring the appellant, requiring him to undergo an appropriate educational course, and imposing a fine of $2,500.

The Stance of the Appellant

[13] Mr Rea submits that there does not need to be a *"blanket"* disclosure made of every issue potentially affecting a property or prospective purchaser immediately to every person who makes any request about, or who views a property, no matter how casual or fleeting the interest. He puts it that it is necessary to apply a common sense approach, and that the nature and timing of the disclosure which is required will depend upon all of the circumstances.

[14] Mr Rea submits that, in this case, it was entirely appropriate for Mr Law to instruct the salespeople to use some discretion and to disclose the fact of the dispute

to prospective purchasers when they expressed a level of interest on the basis of which they could reasonably be considered to be *"genuine"* prospective buyers. He also submits that this approach is consistent with the views expressed by us in the recent decision *Campbell v Real Estate Agents Authority* [2014] NZREADT 42 in which we considered that disclosure (of a fairly recent suicide at the property being marketed) should be made *"to reasonably interested prospective purchasers"*.

[15] We think there is merit in those submissions of Mr Rea but, in any case, the appellant asserts that the CAC was incorrect to find that he had advised salespeople of JLRL not to disclose to prospective purchasers the existence of a dispute between Avondale Properties Ltd ("APL") and XYDL, the latter of whom JLRL acted as vendor's agent, unless the salespeople were questioned about it. Evidence now available supports that assertion as we explain below.

[16] Counsel for the appellant submits also that the CAC decision contains further errors in finding that the appellant held the view that the existence of the dispute between APL and XYDL was *"something that [JLRL did] not need to disclose to prospective purchasers"*, and in finding that the appellant *"elected not to disclose* [information] *to prospective purchasers"*. Current evidence supports that submission.

[17] Counsel for the appellant also submits that, contrary to the CAC decision, the appellant did instruct JLRL's salespeople to disclose the existence of the dispute and to provide information about it to prospective purchasers or their solicitors, once the prospective purchasers' level of interest was such that they could reasonably be considered to be *"genuine"* potential buyers. The evidence for the appellant is that the existence of the dispute was routinely disclosed to parties regardless of whether they had asked about or not, and the appellant has never said anything to the contrary. Again, the evidence now available to us, but not available to the Committee when it considered this case, supports the submissions of Mr Rea for the appellant.

Stance of the Authority

[18] A fixture to hear this matter had been made in Auckland for 1 October 2014 and the appellant had filed a witness brief not only for the appellant but for three other witnesses to support the appeal.

[19] However, by a 25 September 2014 memorandum, counsel for the Authority noted that the Committee had relied upon a response sent to it by the appellant disputing the need to disclose the said dispute to prospective purchasers. Simply put, the appellant and his agency held the listing for the above commercial development at Avondale (to sell the residential units) but there was a dispute between the former owner (APL) and the current owner of the development (XYDL) and the Committee had found that the appellant had a policy of non-disclosure of that to prospective purchasers and determined that to be a breach of the Rules.

[20] However, upon the witness briefs being filed with us prior to the above proposed fixture, Ms MacGibbon, wisely in our view, considered that there is now clear evidence that disclosure of the dispute to interested parties did in fact take place by the appellant.

[21] Ms MacGibbon also noted that the appellant's submissions clarify that the issue before us is a factual one as to whether or not the appellant did make appropriate disclosure; and the evidence now available shows that he did.

[22] Accordingly, Ms MacGibbon concedes, on behalf of the Authority, that the decision of the Committee finding unsatisfactory conduct cannot now be sustained. Also, the Authority does not now oppose the appeal before us which is, in effect, against a factual finding by the Committee in respect of which we have much more extensive and different evidence than was before the Committee.

[23] In those circumstances the Authority agreed to the fixture being vacated and to our deciding the matter on the papers as we have covered it above.

Decision

[24] Mr Rea has filed affirmations from his witnesses so that we have evidence before us on behalf of the appellant rather than, merely, witness briefs. We agree with Ms MacGibbon that the evidence is clear that the appellant did make disclosure to the second respondent, and in general, of the dispute mentioned above between the said companies; and that the appellant does not seem to have a policy of non-disclosure of material matters to prospective purchasers.

[25] In the rather unusual circumstances we have covered above, we hereby quash the Committee's finding of unsatisfactory conduct and, of course, the consequential penalties. This appeal is allowed and no further action is to be taken against the licensee regarding the said complaint.

[26] 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

_____
Mr J Gaukrodger
Member

_____
Mr G Denley
Member