BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 94

READT 61/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**ROBERT AND ANGELA MCCARTHY**
	Applicants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC20007)**
	First Respondent
AND	**MICHAEL MATUTINOVICH**
	Second Respondent

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 21 and 22 May 2014

DATE OF DECISION 27 November 2014

APPEARANCES

Mr G Collecutt counsel for the appellants
Mr L Clancy for the first respondent
Mr G Galloway for the second respondents

DECISION OF THE TRIBUNAL

The Issue

[1] Mr and Mrs McCarthy are the owners of a lifestyle property at 83 Mataura Road, Waihi. Mr and Mrs McCarthy purchased the property in January 2010 through the offices of PGG Wrightson's Limited. The agent who sold the property to them was Mr Matutinovich. At the time that Mr and Mrs McCarthy entered into the agreement, they were both working as real estate agents in the Auckland market and owned a number of rental properties.

[2] Some months after purchase of the property Mr and Mrs McCarthy discovered that the Newmont Gold Mine had applied for resource consent to mine under the land that they owned. Subsequently, Mr and Mrs McCarthy have discovered that the

resource consent granted by the Environment Court granted Newmont Mine the right to mine under a number of properties in Waihi under permit number: 41808. While the initial application for a permit included the property owned by Mr and Mrs McCarthy, the resource consent granted by the independent commissioner on 30 April 2013 did not include the McCarthy's property.

[3] The agreement for sale and purchase entered into by Mr and Mrs McCarthy was subject only to conditions relating to curtilage and counterparts. It was not expressed to be subject to a LIM.

[4] While the evidence appears to have established that Wrightson's held a copy of the title: SA/44B/988, neither Mr Matutinovich nor the McCarthy's can remember viewing it prior to sale. This title shows that the land was subject to interests under the Coal Mines Act 1925, the Coal Mines Act 1979, the Mining Act 1971 and the Land Act 1924.

[5] During the course of the hearing Mr Clancy obtained a historical search of the title which showed as interest B541590.1 an exploration permit to Welcome Gold Mines Limited, Master Mining Limited, Waihi Mines Limited and AUAG Resources Limited for a term of 5 years commencing on 3 May 1999.

[6] The exploration permit would have expired in 2004. It does not appear to have been carried over to the title which was on the PGG Wrightson file.

[7] Mr and Mrs McCarthy say that Mr Matutinovich told them that a property at the southern boundary of the property was owned by the Newmont Mine but the mine had leased the property back to a local farmer. Mr and Mrs McCarthy claim that they asked Mr Matutinovich twice whether there was any intention to mine at or near the subject property and were told "no". Mr Matutinovich denies making any such comment. He acknowledges that he told the McCarthy's that one of the neighbouring properties was owned by the Mine, but denies any other representations.

[8] His evidence to the Tribunal is that Mr and Mrs McCarthy did not accept his advice to have the usual protections in the agreement – LIM, a due diligence clause and a solicitors approval clause. He says they were keen to buy the property and they wished to dispense with these requirements. Mr and Mrs McCarthy essentially agreed that they did not want these items although they deny that Mr Matutinovich ever mentioned anything about a due diligence clause. They said that this would have raised a number of flags for them and they would have remembered this. However they accept that he did ask them whether they wanted any other conditions in the agreement and they said "no". They said that they felt that their solicitor would have picked up any defect in the title listing the requisition clause.

[9] It is also common ground that the Martha Mine in Waihi can clearly be seen to be mining within reasonably close proximity to the property. However, Mr and Mrs McCarthy say that there was a suburb between themselves and the Martha Mine and they did not think that it would, or could, be possible that the Martha Mine could ever wish to mine underneath the property. They claim that Mr Matutinovich as agent had a duty to tell them that there was a potential for new mining near (or under) the property.

[10] Prior to this purchase, Mr and Mrs McCarthy owned a holiday home in Waihi Beach. Mr and Mrs McCarthy state that even though they owned a property at Waihi

Beach for some years it was a completely different environment to Waihi, was a holiday resort, and they were unaware of the issues relating to the mining in Waihi.

[11] Mr Collecut explained the appellant's case in this way. He said that there was an obligation on the agent in two stages. First, the agent had a duty to be aware of material facts which had (or could have) an impact on the market in Waihi. Mr Matutinovich, he submitted, should have been aware of the mining company's future plans as they were significantly publicised in 2004 and as an agent he should have been aware of the potential for mining. Second, he submitted that Mr Matutinovich also needed to understand the "product" that he was selling and should have made the McCarthys' aware of the need to potentially eliminate or investigate any mining risk for or near the property.

[12] In his closing submissions Mr Collecut expanded on the issues in this way:

(a) Was the mining permit or the risk of the mining permit in the area of the property a hidden or underlying defect of the property? The appellants say it was.

(b) Was Mr Matutinovich aware of the hidden mining risk defects or ought Mr Matutinovich be aware of these defects? The appellants say he was or ought to have been.

(c) Did Mr Matutinovich have and discharge a duty to disclose the hidden mining risk defects to the appellants? The appellants say that he had a general duty to disclose the hidden mining risk defects even if he was not asked about risks in relation to the property. They also say that as a result of questions asked by the appellant, (about the mining company owning the neighbouring land), Mr Matutinovich had a particular duty of disclosure; and

(d) Was it a generic recommendation to insert any additional recommendations into the contract, e.g. due diligence, sufficient to discharge his obligations? The appellants submit that he did not make any recommendation about due diligence and in any event such a general recommendation would not advise the appellants of the significant potential risk of mining.

[13] Mr Galloway for the second respondent emphasised the lack of care that the appellants took in the purchase and their [attempt to] minimise their knowledge of the Waihi area.

[14] Evidence was given to the Tribunal of the disclosure statement that Wrightsons now required agents to provide to anyone intending to purchase in the Waihi area. This is a comprehensive statement advising the potential purchaser that mining is a "prolific industry in and around the Waihi district". The introduction of this policy promulgated in 3 March 2013 says the following:

> To ensure that our clients and customers are aware of the impact mining has on the area, we have set a practice policy and guideline to advise actions be taken when dealing with all real estate activity in the area.
>
> This policy is to protect the client and the customer (consumer) and to ensure PGG Wrightson Real Estate sales person and staff have the information to advise all parties involved in any real estate activity in the district.

> Newmont is the main mining company in the district and has an information centre based at Seddon Street, Waihi which has every detail recorded and available relating to mining in the district. This information covers current and future planned activity in and around and under the Waihi district. The information is available and makes it clear what operations are taking place. Mine staff are readily available to answer any questions that may arise relating to mining operations in areas that could be affected.

[15] However this was not the standard practice in early 2010.

The Issues

[16] The Tribunal must determine first whether or not Mr Matutinovich made the statements assuring Mr and Mrs McCarthy there was no mining activity planned for the neighbouring property and the property itself. Second, if he did make this statement, what is the effect of that statement? Third, if Mr Matutinovich did not make this statement what, if any, were his obligations to Mr and Mrs McCarthy when selling them the property? What information did he have a positive duty to disclose to them?

[17] Both Mr and Mrs McCarthy gave evidence. The cross examination of Mr and Mrs McCarthy was designed to destroy their credibility in a number of areas. In particular, how often they were in the Waihi area during the 2008/2009 period and their degree of knowledge of the general Waihi area.

Submissions of the Respondents

[18] Mr Galloway submitted that the appellants sought to exaggerate their evidence to create an unfavourable impression of Mr Matutinovich. He submitted:

a. The appellants went to some lengths to establish that they had no real knowledge of Waihi town so as to increase the element of reliance on the real estate agent and agency. Mr Galloway submitted that this denial of any knowledge of mining in the Waihi area was not credible.

b. Further Mr Galloway submitted that it was clear that Mr McCarthy visited Waihi Beach far more frequently than he admitted. Mr McCarthy claimed that he visited only once a month during this time. Mr Galloway pointed to Mr McCarthy's golf records which demonstrated that during the nine month period in 2008/2009 he played golf over 33 weekends in the Waihi area. Mr Galloway also submitted that the evidence about Mr McCarthy's golf playing with various members of the local golf club indicated that he was friendly with many more people in Waihi town than he admitted (thus supporting the contention that he was much more aware about what was going on in Waihi township than he let on). Mr Galloway also drew to the Tribunal's attention the fact that Mr McCarthy had given a less than frank answer to the investigator when asked why he had not disclosed that he had a house at Waihi Beach when he made his complaint. Mr Galloway also noted that Mr McCarthy and his former wife had owned a property in Waihi beach prior to the one he had purchased with the current Mrs McCarthy.

[19] Mr Galloway concluded by submitting that the totality of the evidence of Mr McCarthy was less than truthful and put a slant on evidence in order to get to the best impression. He also submitted that it was more likely than not that Mr and Mrs

McCarthy had their solicitor review the agreement for sale and purchase before it was signed.

[20] Mr Galloway submitted that the Tribunal should accept Mr Matutinovich's evidence saying that it was straightforward and candid.

Submissions on the evidence by the REAA

The REAA submitted that:

a. Mr Matutinovich had been selling real estate since 2004 and was clearly aware that mining was a significant activity in Waihi. Further it was well known that Waihi East (where the property was) was subject to mining exploration permits. This was clearly shown on the title, a copy of which was found on Mr Matutinovich's file and as an experienced real estate agent, he should have been put on notice that there were potential mining issues with the property. Further it would not have been difficult for Mr Matutinovich to ascertain whether or not the property was subject to a mining permit simply by looking either at a historical title search or on Property Guru.

b. In addition Mr Matutinovich was aware that a mining company owned the adjoining property. He considered recommending that the purchaser obtain a LIM, legal advice and putting a due diligence in the agreement was a sufficient discharge of his obligations and he did not offer purchasers any particular warning or advice about the potential mining issues.

Submissions of the Appellant

[21] Mr Collecut submitted that it was clear on the facts that Mr Matutinovich had made the representations claimed by the McCarthy's. He submitted that the appellant were not experts on the Waihi property market or mining, despite having a holiday home in Waihi Beach. They had no knowledge of the mining activities in Waihi. Mr Collecutt submitted that the McCarthy's knowledge is not relevant and the only relevant issue is whether Mr Matutinovich fulfilled his duty of disclosure.

[22] From this evidence the Tribunal reached the following factual conclusions:

i. Mr and Mrs McCarthy were very keen to buy the property. It represented an opportunity for Mrs McCarthy to have the lifestyle property and horse arena and barns that she had dreamed of.

ii. Mr and Mrs McCarthy were impatient to purchase the property and as real estate agents themselves understood the implications of deciding whether or not to examine the title and the LIM for the property. They had purchased over 35 properties themselves, they had an excellent solicitor and they felt confident that any issues with the title could be identified and addressed by him using the requisitions clause in the sale and purchase agreement. They did not consider or concern themselves as to whether anything could be shown in a LIM on the Title which might have any real importance on their potential purchase.

iii. We have considered carefully whether or not the McCarthy's have proved that Mr Matutinovich made the statements about future mining. His version of the events is that Mr and Mrs McCarthy were told about the mine owning a farm on the boundary to the property but did not enquire further. Mr and Mrs McCarthy claim that they did ask the further questions and were told "no". When faced with diametrically opposed evidence, the Tribunal must reach its decision based on its assessment of the veracity of the deponents based on the internal consistency of the evidence and any other documentation which existed at that time.

iv. Having considered all the evidence the Tribunal prefer the evidence of Mr and Mrs McCarthy on this point. Whatever their knowledge the focus for the Tribunal must be on the conduct of the agent. At that time Mr Matutinovich considered that his obligations under the Real Estate Agents Act 2008 were met by simply recommending a title search, a LIM and a due diligence clause. The Tribunal accept that these events took place soon after the 2008 Act came into force and thus the change in an agent's obligations was relatively new. But this did not obviate Mr Matutinovich's responsibility/obligations under the Act. Mr Matutinovich did explain that the neighbouring property was owned by a mine. It would be contrary to common sense if any potential purchaser, when given this information, did not ask a follow-up question as to the reason that the mine owned a dairy farm and what the mining risks were because of this information. The Tribunal consider that it is most likely that at least on one occasion Mr Matutinovich was asked a follow-up question about the reason the neighbouring farm was owned by a mine and reassured the McCarthy's that there was no intention to use it or their property for mining. They therefore accept the McCarthy's evidence on this point.

[23] For the reasons set out above the Tribunal find that Mr Matutinovich did give the reassurance claimed. However, it appears Mr Matutinovich was unaware of the mining intentions of Martha Mine. While the mining appears to have been widely publicised in 2004, Mr Matutinovich was living in Auckland at that time and was unaware of the potential risk. The McCarthy's did not seriously appear to challenge that evidence, although Mr Matutinovich accepted in evidence that he may have been aware that the Waihi East permits were consolidated in 2006. However on the balance of probabilities the Tribunal concluded that the information that there was potential mining under the property was unknown to either party. This was an innocent misrepresentation. What then are the implications of this statement under Rules 6.4 or 6.5?

[24] First the McCarthys' own knowledge has little relevance to the questions. Whilst many of the points that Mr Galloway makes in his submission illustrate that the McCarthy's were foolish in not getting more information before they purchased the property does not assist us in determining Mr Matutinovich's obligations. How often the parties came to Waihi, whether they were aware of the mining in Waihi (and the Tribunal note that it could not realistically be the position that they were unaware of the mining rise in Waihi); and how often Mr McCarthy played golf and with whom are relevant when considering the question of their credibility, but not relevant when considering the question of Mr Matutinovich's responsibilities under Rule 6.4 and 6.5.

[25] The parties submissions on Rules 6.4 and 6.5 are:

- Mr Collecutt submitted that the Complaints Assessment Committee incorrectly considered the appellants' subjective knowledge was relevant and that they ought to have had knowledge about mining in Waihi. He submitted the purpose of the rules was to abolish the concept that the buyers had to beware and instead imposed a positive duty on the agents to disclose. He submitted that the doctrine of *caveat emptor* has no application under Rule 6.5.

- He submitted that the Complaints Assessment Committee incorrectly formed the view that the decision to exclude the due diligence provisions in the agreement with the sale and purchase was relevant to Mr Matutinovich's obligations. He submitted that the Complaints Assessment Committee seriously failed to consider Rule 6.5 and its implications in its decision.

- Mr Clancy submitted that there was a clear breach of R 6.4 by Mr Matutinovich, if the Tribunal finds he told the McCarthy's that there were no mining issues with the property. He submitted that even if this incorrect statement was unintentional, this was irrelevant. Mr Clancy also submitted that even if the Tribunal does not accept the evidence of the complainants as to their specific requests for information, a disciplinary issue nevertheless still arises in light of the evidence given by the Licensee that he was aware of the mining company owning the adjoining property. He submitted that the proactive disclosure duties on Licensees under the Act and the Rules make such a failure to disclose a breach of R 6.5.

- Mr Galloway submitted that the existence of the mining permit was not a defect in the land. Further the evidence about real estate practice at the time was that the Real Estate Agents were not advising purchasers about the existence of the mining permit. Mr Galloway submitted that Mr Matutinovich's recommendation that the appellants obtain a LIM and a certificate of title and a "due diligence" clause discharged his duty. Mr Galloway further submitted that the LIM report would not have disclosed the existence of the permit and that the valuation obtained for the vendors also made no mention of the existence of the permit.

- Mr Galloway submitted that the decision of the Complaints Assessment Committee was correct. He submitted that there was no breach of Rule 6.4 because Mr Matutinovich did not mislead Mr and Mrs McCarthy, nor provide false information, nor withhold any information that should have been provided to the McCarthy's.

- He submitted that Rule 6.5 requires the Authority/Tribunal to determine whether there was a defect that should have been disclosed and whether the defect was known by Mr Matutinovich. He submitted that it was not until Newmont made its announcement in August 2011 that there was any knowledge that the company would apply to mine under houses and therefore there could not be any known defect which he was required to disclose.

Discussion

[26] Rule 6.4 requires the Tribunal to find that Mr Matutinovich misled the McCarthy's or provided false information or withheld information should by law or further subject provided to a customer.

[27] We have found that Mr Matutinovich did make the statement the McCarthy's complained of. We make this finding despite the fact that the misstatement was innocent. The Rule is clear, any incorrect information is a breach of the Rule. We therefore conclude that there was a breach of R 6.4. The information given about the mining intentions of the mine on the adjoining property was incorrect.

[28] Did Mr Matutinovich also breach R 6.5? This rule provides that there is no positive obligation on the licensee to discover hidden or underlying defects but must disclose known defects to the customer. The question is therefore, what known defect should Mr Matutinovich have been obliged to disclose to Mr and Mrs McCarthy? Mr Galloway has submitted that there were no known defects at the time.

[29] We considered that even in early 2010 the question of mining and its relevance to property in the Waihi area must have been something that Mr Matutinovich should have considered. In answer to the question from the Tribunal, he told the Tribunal that he had never once, in all of the time that he had been an agent, been asked any question about impact of mining on land in Waihi. Quite frankly, this seems incredible given the impact of the mine on the town and the scheme which has been developed by the mine to supplement the sale prices received for properties. The Newmont Mine played a large part in the Waihi community. Mr Matutinovich may well have assumed that Mr and Mrs McCarthy (who had been resident in nearby Waihi Beach) were fully aware of all of the implications, effects and potential risk of any property in the Waihi area. But, as Mr Collecut points out, the test is not one of what Mr and Mrs McCarthy have known, but what Mr Matutinovich should have disclosed as a defect with the property. The evidence establishes that mining was a known "factor" in the Waihi area. But was it a defect? A perusal of the Title, which no one seemed to have undertaken, would have indicated that the land was potentially subject to a number of claims under the Mining and Coal Mining Acts. This clearly has a potential to be a defect.

[30] But was it a known defect with this property or a potential defect? The Tribunal considered on the facts of this case, the mining was a potential defect with the property and the Act imposes a positive obligation on an agent only to disclose defects which he or she knows about. We do not consider that the evidence establishes conclusively that Mr Matutinovich knew that there was a defect or a potential with this property.

[31] Accordingly we find that there has been no breach of Rule 6.5.

[32] In the circumstances of this case therefore the Tribunal find Rule 6.4 was breached by Mr Matutinovich, but not Rule 6.5.

[33] The Tribunal consider that on the facts that they heard that this was a breach of the Rules at a very early stage just after the Act came into force. Therefore we consider that a token penalty only is required. We therefore censure Mr Matutinovich but do not impose any monetary penalty on Mr Matutinovich.

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

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Ms K Davenport QC
Chairperson

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Mr G Denley
Member

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Ms N Dangen
Member