

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 98

READT 037/14

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

BETWEEN **BRIDGET DIXON**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 20004)**

First respondent

AND **JOY BAKER**

Second respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Mr G Denley – Member
Mr J Gaukrodger – Member

HEARD at WELLINGTON on 20 October 2014

DATE OF DECISION 5 December 2014

APPEARANCES

Ms B Dixon, appellant in person
Ms MacGibbon for first respondent
Mr J Parker and Ms J A Herd for second respondent

DECISION OF THE TRIBUNAL

[1] This case concerns Ms Dixon's purchase of a property at 53 Tirangi Road, Rongotai, Wellington in the middle of 2013. Ms Dixon purchased the property from a Mr and Mrs Empson trading as A & F Properties Limited. Ms Baker was the agent who had been marketing the property on a shared listing. Ms Baker was then part of the Re/Max group. At the time that the agreement for sale and purchase was entered into between A & F Properties Limited and Ms Dixon on 29 May 2013 the agency agreement had expired and the property had been withdrawn from the market. However nothing turns on this fact.

[2] Ms Dixon first saw the property in March 2013. She liked the property very much and attended two further open homes at the property – the first on 7 April and the second on 14 April with her two sons. However she was not able to make an

offer to purchase a property because her own property remained unsold. When Ms Dixon visited the property on 7 April she noticed that the floor in the dining room was sloping and she asked Ms Baker a question about this. Ms Baker said that she did not know why the floor was sloping and she rang the vendors. Ms Baker says she rang the vendors in front of Ms Dixon and asked them about the sloping floor. At that time Ms Baker says she also showed Ms Dixon the box file containing all the material that the vendor had supplied about the work done on the property including all the Code Compliance Certificates they had received. Ms Baker said that the vendor told her that they had not repiled the property but had tied some piles down that were not secured. Ms Baker says that she told Ms Dixon that and urged her to undertake further investigations. Ms Dixon says that she did not either have this conversation with Ms Baker or recall that that was what Ms Baker told her about the piles. In any event nothing further happened and Ms Dixon did not make an offer on the property until the property was withdrawn from the market for sale at the end of May 2013. At that time Ms Dixon indicated that she was in a position to make an offer. Ms Dixon made an offer which was subject to obtaining a building inspection and a LIM report and a solicitor's approval.

[3] At the time that the agreement for sale and purchase was being drafted Ms Dixon says that Ms Baker asked her for the name of the person who would be doing the building inspection report. Ms Dixon said it would be a friend of hers who was working as a woodwork teacher. Ms Baker told Ms Dixon that this person would not be suitable and that she would need to find someone who was qualified as a building inspector. Ms Dixon says that Ms Baker phoned her from the home of the vendors and whilst she was on the telephone she could hear her telling the vendors that the person she was going to use was a woodwork teacher. She felt that this was unduly disrespectful and it was not an appropriate way to have addressed this issue.

[4] Ms Dixon then contacted a building inspector from ProCheck, a Mr Richardson. He arranged to inspect the property on 13 June 2013. In his diary he has noted on that day "*e-mail Bridget Dixon Reg ... (unreadable) – check chimney condition*". Mr Richardson noted in his report that there were some concerns with the piles. He said that the foundations required repiling. A photograph showed that several piles did not appear to be attached. Ms Dixon was obviously extremely concerned about this. She believed that Ms Baker had known about the defect and did not disclose this to her before she submitted the offer(s). As a consequence of discovering that the house needed repiling Ms Dixon was unable to arrange for replacement insurance. Ms Dixon was concerned that Ms Baker should have known this might have been a problem because of the piling issue.

[5] Ms Dixon accepted that she could have cancelled the agreement because of the unsatisfactory building report but she chose not to do so and she has subsequently had the piles repaired at a cost of \$8,000.

[6] The property was due to settle on or about 12 July 2013. However it appears that Ms Dixon needed to move into the property at Tirangi Road a week before settlement because the settlement date had not been discussed with her and had been arranged at a time when she was due to be out of Wellington on holiday with her sons. Accordingly an agreement was negotiated which gave Ms Dixon access to the property a week before settlement. Ms Dixon was concerned because Ms Baker asked her to give an undertaking that she would settle on 12 July. She says she is now very concerned about this because she did not realise at the time that one could not give such undertakings and she had to refer the matter to her solicitor. In any

event this was resolved and Ms Dixon moved into the property the week before she was due to settle and duly settled on 12 July. When she returned from holiday she almost immediately made the complaint concerning Ms Baker. Her complaint is dated 19 July 2013.

[7] Ms Dixon was also concerned about the advertisement which had been placed in the newspaper which advertised the property as:

“A gorgeous character”

Just step through the front door of this home and you will see for yourself. Absolutely nothing for you to do – my vendors have tastefully upgraded this lovely character home ...”

This advertisement was in the Dominion Post.

[8] Ms Dixon also complained about Ms Baker’s conduct in calling her, in asking her if she could afford the property and in telling Ms Dixon not to advise her bank about the defect with the piles.

[9] During the course of her evidence Ms Baker also commented that she had been told at a seminar that her duty as an agent was only to disclose defects to those people who showed an actual interest in the property rather than everybody who came through the property. The Tribunal will deal with this point later in the judgment.

Ms Dixon’s Concerns

[10] The concerns which Ms Dixon has raised in this appeal are as follows:

- (i) Should Ms Baker have told Ms Dixon and any other potential purchaser in writing that there were “*issues with the piles*”?
- (ii) Was Ms Baker’s behaviour as an agent inappropriate in the following ways:
 - In her continued calls to the purchaser?
 - When she asked Ms Dixon whether she could afford to buy the property?
 - When she told Ms Dixon not to refer the property report to her bankers but wait until the property was owned by her and then ask if she could borrow more money?
 - In placing the advertisement showing that there was “*nothing to do*”.

Discussion

[11] In dealing with Ms Dixon’s concerns we have to determine whether on the balance of probabilities the evidence that Ms Dixon has given is more believable than the evidence of Ms Baker. We make this decision based on not only the oral evidence that we have heard but the written contemporaneous evidence at the time of the events.

[12] If the appellant has proved these facts then we must consider whether there has been a breach of the Rules.

[13] Rule 6.4 of Rules states:

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.

[14] In Wright v CAC & Woods the Tribunal said:

The emphasis in r 6.4 and 6.5 is on the conduct of [the] licensee. The Rules provide that a licensee must ensure that they are open and honest with a purchaser so that they are not misled in their decision to make an offer to purchase a property. *There does not need to be any reliance by the purchaser on the statements (or lack of statements) by the agent and it is clear that a duty of utmost good faith is required from the agent.* We also agree with submissions made by counsel that, for example, suggesting a building report should be obtained cannot avoid liability under r 6.4 or 6.5. However each case depends on its factual circumstances ...

A licensee must comply with r 6.4 and 6.5 and cannot turn a blind eye to problems with the property.

The Rules

[15] The Tribunal have articulated the issues slightly differently to the way in which Ms Dixon has articulated them and the way in which Mr Parker has set them out in his submissions. This is because while Ms Dixon as a layperson, did an excellent job of presenting her case she did not attempt to construct her case in terms of what legal principles or rules might have been breached. In our view Ms Dixon's concerns set out above can be grouped into issues concerning (1) the piles and (2) conduct.

The Issues

Issue 1: Ms Baker's Conduct

[16] Did any of the matters listed at paragraph [10] amount to conduct which breached Ms Baker's obligations to Ms Dixon?

Issue 2: The Piles

[17] Rule 6.4 of the Rules says 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. Did Ms Baker breach this Rule?

[18] We have listened carefully to Ms Dixon's complaints concerning Ms Baker's conduct and conclude that her conduct, which may have been a little over enthusiastic and 'pushy', was probably motivated by a desire to assist Ms Dixon. She may have been a little too enthusiastic in her attempts to do so and clearly her questions about Ms Dixon's financial position, designed she said, to reassure and support Ms Dixon, had the opposite effect. Her calls and Ms Dixon's other areas of complaint [reporting direct to the bank] also can be described in this way. Whilst this conduct was unfortunate in the context of this case and exacerbated the stress that Ms Dixon felt in what seems like a very complicated sale/purchase process we do not consider that Ms Baker breached any obligations of an agent.

[19] With respect to the advertisement we consider it is very dangerous for any agent to make such a sweeping statement about an older home. However in this case we consider the advertisement was in the nature of puffery rather than a

representation about the state of the property. The evidence did not show Ms Dixon was misled by the advertisement nor did she claim to be. Further she was protected by the agreement being conditional upon a builder's inspection clause. However had Ms Dixon been misled then this may have been a breach of R 6.4.

The Piles

[20] In Wright v CAC and Woods [2011] NZREADT 21 the Tribunal said that "*it is clear that a duty of utmost good faith is required from the agent*". The Tribunal therefore need to examine Ms Baker's conduct in light of this statement.

[21] What were Ms Baker's obligations on being asked a question about the sloping floor and discovering that some of the piles had been tied down? We have reviewed the submission of all parties on this point and as to when disclosure should be made. As Ms Baker herself commented, she is not a builder, and she did not understand the significance of the vendor's answer to her question except that she did know after the phone call to the owner that there had been some work done to the piles. It is the Tribunal's view that this information should have been conveyed to Ms Dixon in writing at that time. We have considered the question of the time at which an agent must convey this information to potential purchasers. We do not think any restriction can be placed upon this obligation. It is our view that the Act requires openness. An agent must be open from the beginning of the sale process and as soon as any defect is known. We consider that this means that the information relating to known defects should be available at every open home in writing. If defects are later discovered then those defects must be notified in writing immediately to all known potential purchasers and in writing to any subsequent purchaser.

[22] Ms Baker knew that the piles had been tied down [and putting to one side the question of whether she told Ms Dixon orally about the piles] she did not convey this information in writing to Ms Dixon or to any other potential purchaser. She said she told them at open homes. However R 6.4 requires Ms Baker to make sure that defects are discussed.

[23] We accept Ms Dixon's evidence that she did not know that there was a problem with the piles. We consider that this is borne out by the request that she made to Mr Richardson to inspect the property. Evidence has shown that she was very keen to unboard the fireplace in the house and this was of concern to her. She asked Mr Richardson to look at this. Given her careful and considered nature we do not think that if she had been aware of the problem she would have failed to have asked Mr Richardson to also look at the piles when she was asking for the building report to be commissioned. She did not do so. We therefore consider that on the balance of probabilities Ms Dixon has established that Ms Baker did not make this evidence known to her and Ms Baker is thus in breach of R 6.4. It may have been just because it was conveyed to her in a positive way such as 'there is no problem with the piles' or simply that she was not told or alternatively that she did not hear what she was told. This illustrates the importance of making sure that this evidence is put in writing. The onus is on the agent. The Rule does not specifically require it to be in writing but in our view this is best practice.

[24] However we also note Ms Baker's answer to a question that the Tribunal asked her as to her current practice. She told the Tribunal that she now puts information about every defect in writing. We consider therefore that Ms Baker has effected a positive change to her practice and has altered her practice appropriately.

[25] In the end Ms Dixon did not suffer loss because of the piles because of the provision in the agreement which made the contract conditional on a satisfactory building report. Ms Baker is to be commended for including this. In our view therefore the appropriate penalty is to censure Ms Baker and to impose no other penalty.

[26] Accordingly we allow the appeal and find Ms Baker was in breach of Rule 6.4.

[27] The Tribunal censures her.

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

Ms K Davenport QC
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member