BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 5

READT 022/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**CAROL AND STEPHEN GALLIE**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC303)**
	First Respondent
AND	**BRUCE GOODHUE**
	Second Respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at AUCKLAND on 5 November 2014

DATE OF THIS DECISION 16 January 2015

APPEARANCES
The appellants/complainants on their own behalf
Mr M J Hodge, Counsel for the Authority
Mr T D Rea, Counsel for the licensee

DECISION OF THE TRIBUNAL

Introduction

[1] This case concerns the marketing of a residential property with subdivisional potential.

[2] Carol and Stephen Gallie ("the complainants and appellants") appeal against the 31 January 2014 decision of Complaints Assessment Committee 303 to take no further action on their complaint against Bruce Goodhue ("the licensee") who is employed at a Barfoot and Thompson agency in Auckland.

[3] The conduct in this case occurred prior to the Real Estate Agents Act 2008 ("the Act") coming into force so that s 172 of that Act applies as we cover below.

Factual Background

[4] The licensee was the listing agent for a property at 115 Martins Bay Road, Auckland ("the property"). The complainants were the ultimate purchasers of the property. They allege that they had discussions with the licensee prior to purchasing the property about its potential for subdivision and that the licensee dissuaded them from completing due diligence on the property.

[5] The vendors provided the licensee with a fact sheet which states the title is a new title and, because of the size of the property, could be subdivided under the 2000 District Plan without the need for a "*transferable title right*" (TTR). That fact sheet has the names of the vendors on its top and makes no reference to the licensee or his agency. The licensee states that this was provided to those interested in the property and was provided to the complainants. Because the latter live overseas, most communication between them and the licensee was via email.

[6] The complainants' initial offer to purchase the property was made on 3 February 2009 and contained a 15 working day due diligence clause. On 9 February the licensee suggested that due diligence should be completed by 17 February 2009. On 12 February the complainants emailed the licensee and stated that due diligence could not be completed by 17 February 2009. The licensee responded by email allowing for a 10 working day due diligence clause to 23 February 2009.

[7] The complainants emailed the licensee on 16 February 2009 enquiring about subdivision costs of the property. An email in reply was sent from the licensee to the complainants on 17 February 2009 advising that he had no figures and a subdivision cost would need to be investigated during the due diligence period and stating that a registered land surveyor could possibly advise that. Actually, on 18 February 2009 (after the contract had been completed), the licensee passed on to the appellants that the vendors thought that the subdivision could "most likely be carried out for approximately $50,000". An email had been sent from the licensee to the complainants on 10 February 2009 stating that the new GV for the property reflected the potential for subdivision.

[8] The agreement for sale and purchase was not completed until 17 February 2009. That did not allow enough time to complete due diligence prior to the vendors proceeding to market the property by tender, so the complainants decided to remove this clause from their final offer of purchase. They allege this was because the licensee had instilled confidence in them that a TTR was not required. The property sale and purchase settled on 1 June 2009.

[9] In the course of 2013, the complainants began the process of subdivision of the property and found that a TTR was required and would cost $30,000 to $40,000.

[10] A 2 April 2008 letter was supplied by the vendors from Tony Hayman of Buckton Consultants to the vendors stating that there would be no further expenditures if the boundaries are relocated in a certain way. The vendors said that they had followed that advice and the advice they had received from making enquiries with the Regional Council in early 2009.

[11] Upon receiving an email from the complainants in May 2013 about the need for TTR, the licensee followed up with the Auckland City Council where a Mr Michael Nielsen recorded (by 18 July 2013 email to the licensee) that a TTR is required but

that this was only clear from an in-depth research into the historic title. This issue and advice was also followed up with Buckton Consultants Ltd which then agreed a TTR was required.

The Committee's decision of 31 January 2014

[12] The Committee determined that the fact sheet submitted to the complainants was clearly information from the vendors as it had their names on the top of the document. They found that the licensee was acting as a conduit and that, as such, he was not responsible for the accuracy of the information.

[13] Further, they found that the information was given by the vendors in good faith and that they had researched the matter in depth with the local Council and came away with a different answer to the complainants' architect.

[14] In terms of the allegation of undue pressure, the Committee found that there was a lack of evidence to support the conclusion that the licensee had pressured the purchasers into removing the due diligence clause.

[15] The substantive reasoning of the Committee is as follows:-

"4.2 The Committee is satisfied that the matters raised in the complaint could have been complained about, although it would have been the agency that was responsible for the actions of the licensee.

4.3 The complainants submit that they relied upon the verbal discussions and emailed documents from the licensee along with the good reputation of the agency in making their decision to purchase the property. The Committee agrees that these factors should be relied upon. However, the Committee does not agree that the licensee or the agency has fallen short of the standards that a reasonable member of the public is entitled to expect, nor have they been incompetent or negligent. The Committee finds on the evidence before it that the licensee gained the information on the TTR from the vendor and that the documentary evidence supports the fact that it was clearly identifiable as the vendors' information. The act of passing information from one party to another in this way is referred to in law as acting as a conduit. The conduit is not responsible for the accuracy of the information.

4.4 Further, that the information on subdivision was given by the vendors in good faith. The evidence of the vendors is that they had researched the matter in depth with the local Council and came away with a different answer to the one that was provided to the complainants' architect by the same body.

4.5 The Committee then turned its mind to the allegation that the licensee dissuaded the complainants from undertaking due diligence. The written evidence of the sale and purchase agreement suggests that the clause was part of the initial offer. The licensee submits that this clause was removed by the complainants so that their offer would be acceptable to the vendors and that this would prevent the property from going to tender.

4.6 The Committee notes that the discussions took place four years before the issue became evident. It is one party's word against another and we are unable to make a finding against the licensee in those circumstances. The most reliable evidence we have are the emails between the parties and that evidence

does not indicate that the licensee has made any attempt to dissuade the complainants on this matter.

4.7 The Committee has some sympathy for the position in which the complainants now find themselves. The extra costs in gaining a TTR are not inconsequential; however the Committee cannot hold the licensee or the agency accountable for them for the reasons already stated.

4.8 The Committee will therefore take no further action on this complaint".

The Effect of the Real Estate Agents Act 1976

[16] The Committee determined to take no further action after making an evidential assessment of the material before it. It found that the licensee was acting merely as a conduit. As such, the issues under s 172 of the 2008 Act did not need to be extensively considered. Counsel for the second respondent has raised the issue of the application of s 172 to the current proceedings. That section reads:

*"**172 Allegations about conduct before commencement of this section***

(1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—

(a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and

(b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.

(2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred."

[17] The effect of s 172 is to create a three step process in respect of allegations about a licensee's conduct which occurred prior to 17 November 2009, namely:−

(a) Could the licensee have been complained about or charged under the Real Estate Agents Act 1976 in respect of the conduct?

(b) If so, does the conduct amount to unsatisfactory conduct or misconduct under ss.72 or 73 of the 2008 Act?

(c) If so, only orders which could have been made against the licensee under the 1976 Act in respect of the conduct may be made.

[18] The licensee was approved under the 1976 Act at the time of the conduct alleged. He has not been "*dealt with*" under the 1976 Act for that conduct.

[19] The conduct in issue could have been the subject of a complaint under the 1976 Act. Under Rule 13.1 of the Rules of the Real Estate Institute of New Zealand Incorporated (REINZ Rules) there were obligations that all members shall always act in accordance with good agency practices, and conduct themselves in a manner that reflects well on the Institute, its members, and the real estate profession. Therefore the conduct of the licensee could have been complained about.

[20] In determining whether this conduct is unsatisfactory conduct, under s 72(a), (c) or (d) of the 2008 Act, counsel for the Authority accepts that we take into consideration the obligations upon licensees at the time the conduct took place, rather than the new standards that have been set under the 2008 Act. Given the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 did not apply at the time, unsatisfactory conduct cannot be found under s 72(b) of the Act (which covers contravention of the Act or any of its Regulations or Rules).

[21] However, as Mr Hodge submits for the Authority, there were obligations on licensees to provide accurate information to consumers. Under s 9 of the Fair Trading Act 1986, licensees were required not to make misrepresentations. This is encapsulated in the decision of *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 (CA) where a licensee was held to have not provided accurate information about the location of the driveway and gates of a property. The Court of Appeal found that the agent had acted as more than a mere conduit and had promoted a property in a way that would in fact mislead members of the public.

[22] We consider that if we were to find the licensee went beyond acting merely as a conduit, the conduct can be considered as unsatisfactory conduct under the 2008 Act.

Relevant Evidence

Mrs C Gallie

[23] The complainants did not file briefs of evidence before us but Mrs Gallie made herself available for cross-examination. She responded to Mr Hodge that she and Mr Gallie (who had been unwell) consider that they had been misled by the licensee, but unintentionally on his part, and that caused them to purchase the property. They also consider that they were not given sufficient time to undertake due diligence about their prospect of purchase and that the licensee was responsible for that.

[24] Mrs Gallie said that the marketing material provided by the licensee about the property referred to its subdivisional potential and she was told that a TTR would not be needed to subdivide. She said she had relied on the "*fact sheet*" document from the vendors and her ongoing dialogue throughout the purchase process with the licensee.

[25] Her concern is that it is now expensive for her and her husband to purchase a TTR in order to proceed with the subdivision.

[26] She said that, at material times, the appellants were not aware of the existence of a 2 April 2008 report from Buckton Consultants Ltd to the vendors setting out issues, timeframes, and cost estimates to subdivide the land. As it happens, the appellants have instructed Buckton Consultants Ltd to act on their behalf to achieve such a subdivision. Mrs Gallie seemed to accept that the vendors relied on that report for thinking that a TTR would not be required and that the consultants have

changed their mind in the meantime and ascertained that a TTR is now required by Council in order that the subdivision be approved.

[27] Mrs Gallie also responded to Mr Hodge that the licensee never told the appellants to make further enquiries themselves.

[28] She also maintains that neither the licensee, nor Barfoot and Thompson Ltd, ever suggested to the appellants that a due diligence clause be inserted in their offer to purchase but that Mr Gallie, himself, drafted and inserted such a clause in their offer. As covered above, the appellants subsequently removed that clause from their final offer to enable them to purchase the property from the vendors and avoid going to tender.

[29] Mr Rea cross-examined Mrs Gallie in some detail as to the precise sequence of events and she insisted that the licensee had told her that a TTR would not be required. She said that she herself phoned the husband vendor and discussed the property with him, but not subdivisional aspects, and did not raise with him whether a TTR would be needed for subdivision.

[30] It seemed that the appellants had, at material times prior to purchasing, undertaken quite thorough investigative work themselves regarding the property and its potential. Mrs Gallie is an IT manager and speaks English very fluently. She accepted that there is no written record of the licensee advising her or her husband that they would not need a TTR to subdivide.

The Evidence of the Licensee

[31] The licensee had filed a detailed brief of evidence-in-chief but, of course, was also carefully cross-examined and re-examined.

[32] The licensee noted that the property was marketed as "potentially" subdivisible based on a document (i.e. the "*fact sheet*" referred to above) recording various details about the property and, inter alia, stating "*Subdivision Potential: Under District Plan 2000, Countryside Living Town Zone. Minimum average site size of 1.5 ha (does not require the purchase of a Transferrable Title Right*").

[33] The licensee was conscious that the husband vendor was a retired building inspector for the North Shore City Council and was relying on information about the property based on his enquiries with the Rodney District Council and from his surveyors Buckton Consultants Ltd.

[34] The licensee emphasised that he provided all prospective purchasers with a copy of that information from the vendors but as well (he put it) "*strongly recommended that they make their own further enquiries regarding all aspects of the property as part of the due diligence to be carried out*". He said that with the exception of passing on advice from the vendors that a new driveway to the main road would be required for a subdivision, he did not discuss the requirements for any potential subdivision with any prospective purchaser "*as this was outside my knowledge and expertise*". He said that all interested parties were expected and encouraged to carry out due diligence on the property.

[35] Inter alia, the licensee said that a due diligence clause was inserted in the initial form of agreement for sale and purchase on his recommendation for the benefit of the complainants but they removed it. This meant that it was not part of the final

agreement for sale and purchase dated 18 February 2009 at a price of $748,000 with settlement date 1 June 2009. He said he was not consulted about the deletion of that due diligence clause by Mr and Mrs Gallie but understood it was removed so that an unconditional contract could be reached and the property not go to tender. He said that, at all material times before the concluded agreement, he continued to encourage Mr and Mrs Gallie to undertake due diligence and that they indicated their intention to do so.

[36] The licensee also said that he had no detailed discussions with them regarding the property and that, in particular, he never discussed with them the issue of whether a TTR would be required for a subdivision of it and that issue was never raised with him. He said that the only mention of that issue was in the written information received from the vendors which was passed on to Mr and Mrs Gallie who did not query with him any of that information except that they queried the cost of subdivision. He had replied to them in an email of 17 February 2009 stating "*re the cost of the subdivision I have no figures, this will have to be investigated during the due diligence period*". In an email of 18 February 2009 (in which he advised that the vendors had accepted the offer from Mr and Mrs Gallie), the licensee told them that "*the vendors mentioned to me that they thought the subdivision could most likely be carried out for approximately $50,000".*

[37] Inter alia, the licensee denies the appellants' assertion that he led them to believe that the information from the vendors regarding the subdivision potential was accurate and that therefore due diligence was not required regarding that issue.

[38] The licensee insists that neither he nor his employer (Barfoot & Thompson Ltd) were the source of the incorrect information provided by the vendors to the appellants that a TTR was not needed; and that the information he passed on to the purchasers was only that received from the vendors and was clearly identified as being such.

[39] He again asserted that the complainants were strongly recommended by him to undertake their own due diligence on the property, but chose not to.

[40] He observed that the marketing proceeded on a basis that the complainants secured the property in a non-competitive environment for $748,000 which was more than $200,000 below the then Government Valuation of the property, and he then added:

> *"I recall stating that this valuation took into account the subdivisional potential of the property and believe that this is a correct statement. There was no mention or indication by me that this valuation amount recognised that a TTR would not need to be obtained. This was never discussed with me and was an issue requiring detailed investigation by a Council officer and/or surveyor."*

Discussion

[41] The information on a TTR not being needed to subdivide the property was provided on the fact sheet document which clearly implied that it was information from the vendors. The licensee's evidence is that, at all times, he conveyed that this was simply information which was being passed on from the vendors and that the complainants should undertake further enquiries. The licensee further states the vendors had made enquiries with the Rodney District Council and, on reliance on that information, engaged surveyors, Buckton Consultants Ltd, to make the site suitable

for subdivision. In 2013 Buckton Consultants Ltd was engaged by the complainants for the surveying of their site.

[42] The complainants dispute that the licensee stated that he was simply passing on information and that they should ascertain for themselves whether a TTR is in fact required. They state that they relied on the information he gave them and that he instilled such confidence that they felt they did not need to undertake due diligence and that the information he had provided was accurate.

[43] We must make a factual assessment of whether the licensee advised the complainants that the information was from the vendors and that they should make further enquiries or if, in fact, he purported to provide accurate information regarding not needing a TTR.

[44] As part of their reliance on the information regarding a TTR, the complainants state that the licensee also pressured them to remove the due diligence clause. The licensee states that no pressure was exerted and that the evidence shows that the complainants chose to remove this clause to enable them to make an offer prior to the property going through a tender process.

[45] Again, this is a factual matter for our determination as to whether the licensee actively dissuaded the purchasers from having a due diligence condition in the sale and purchase agreement.

[46] We record that the licensee was a salesperson at the time of the alleged conduct; and the provisions of the 1976 Act mean that (if we were to uphold the complaints) that the only order that can now be made against the licensee is censure and a fine of up to $750.

[47] In final oral submissions, Mr Hodge noted that the two issues in this case are simply whether the licensee knew that the representation in the written document of information (the "*fact sheet*") from the vendors that a subdivision would not require a TTR was incorrect and misleading; and also whether the licensee dissuaded the complainants from keeping the due diligence condition in their offer to purchase.

[48] As Mr Hodge points out it is now clear that the starting point is that the vendors' said written memo or fact sheet contained a misrepresentation because a TTR is now required by the Rodney District Council for the property to be subdivided. For our purposes, we need to decide whether the information was merely provided to the complainants by the licensee as a conduit for the vendors and in a situation where there is an absence of fault by the licensee. Of course, these issues involve findings of fact and, indeed, of credibility by us. As Mr Hodge put it, there is no dispute between the parties on the relevant legal principles, and the issues are matters of fact for us.

[49] On behalf of the licensee, Mr Rea agreed with the submissions to us from Mr Hodge but Mr Rea also analysed matters in quite some detail, both in writing and orally. Because, as we explain below, our views coincide with those of Messrs Rea and Mr Hodge, we need not fully cover the very detailed and helpful submissions of Mr Rea.

[50] Essentially, Mr Rea submits that, in good faith, the licensee passed on the information he received from the vendors. He knew that, with regard to the subdivision potential of the property, the vendors had made detailed enquiries with

the Council, engaged surveyors, and had incurred significant costs in changing the property's boundary based on information received from the Council in order to meet subdivisional requirements. As matters then stood, Mr Rea puts it that had the licensee made direct enquiries himself with the Council, it is very unlikely that he would have received different information from that provided to the vendors, which is now known to be incorrect, due to the complexity of the particular situation which required both knowledge of the District Plan and research into the subdivision history of the site.

[51] Mr Rea submits that the Committee was correct in finding that the licensee was acting as a conduit and was not responsible for the accuracy of the information provided regarding the TTR.

[52] With regard to the appellants' assertion that the licensee misled them as to the accuracy of the information provided by the vendors and therefore dissuaded them from undertaking due diligence regarding the requirements for subdivision of the property, essentially, the licensee denies that he dissuaded the appellants in any way from doing that and, to the contrary, strongly recommended that due diligence be undertaken on all aspects of the property, particularly, given that the appellants were overseas purchasers.

[53] We find that there is no documentary evidence to suggest that the licensee dissuaded the appellants in any way from undertaking due diligence. There are the assertions of the complainants but denials by the licensee. There is no mention in any of the documentary evidence put to us that the licensee ever referred to the TTR issue with the appellants.

[54] We agree that the licensee's statement that the valuation of the property took into account the subdivision potential could not reasonably be interpreted to mean that a TTR would not be required by any future subdivision.

[55] The licensee disputes that the issue of whether a TTR would be required for subdivision was ever discussed directly or indirectly by him with the appellants and puts it that, in any case, he did not have the knowledge or expertise to discuss such a matter.

[56] Mr Rea submits that the appellants chose to take a risk and not undertake due diligence in order to secure the property significantly under valuation prior to the commencement of a tender process.

[57] The stance of the complainants is clear from what we have covered above. Mrs Gallie emphasised to us that the due diligence clause drafted by Mr Gallie read:

> *"16.0 This agreement is conditional upon the purchasers being entirely satisfied in all respects that the property is a suitable investment at the agreed purchase price, following the purchasers carrying out a due diligence investigation without limitation at the agreed purchase price. This condition to be satisfied on or before 4.00 pm on the 15th working day after the date of this agreement".*

[58] Mrs Gallie puts it that the above clause is sensible and was not provided nor suggested by the licensee but drafted by Mr Gallie. She also submits that at no stage did the licensee suggest there could be any possible complication with the subdivision title requirements so as to need due diligence. She said that the complainants requested many times of the licensee that they have sufficient days for

due diligence but (she says) these requests were not granted. Accordingly she said, in the final offer of 18 February 2009 the complainants removed the due diligence clause because they had not been successful with their request for a 15 working day period for due diligence; and also because the licensee had re-emphasised that the land complied with Council requirements for subdivision without the need of a TTR and persuaded the complainants that the information provided to them by the vendors was accurate.

[59] Generally speaking, Mrs Gallie submits that, in terms of the overall marketing process, the licensee was much more than a conduit for the vendors and led the complainants to think that he, the licensee, believed in the truth of the information he was providing them from the vendors and convinced the complainants that all the information from the vendors was accurate.

Our conclusions

[60] It is clear law from the Act that the onus of proof rests with the appellant complainants and that the standard of proof is the balance of probability.

[61] The evidence and allegations of the complainants are concerning but we have no reason to disbelieve the licensee. There is no convincing evidence, on the balance of probability, that the complaints of the appellants are meritorious. Broadly, we agree with the submissions of Mr Rea on behalf of the licensee.

[62] We can understand the concern of the appellants that all concerned seemed to think, in about June 2009, that a TTR would not be required by the council for a subdivision of the property and that view was based on sensible enquiry at the time.

[63] However, it seems very probable to us that the licensee made it clear to the complainants that he was merely passing on information to them from the vendors and that they should make their own enquiry and take their own advice about subdivisional prospects and requirements. It may very well be that his approach instilled them with confidence but he was acting as a conduit from vendors to purchasers without adding any personal view of his own. Perhaps the complainants felt under pressure but there is no evidence of the licensee exerting that on them except their own general assertions.

[64] It could not sensibly be that the licensee knew that the representation in the vendors' fact sheet, that a subdivision would not require a TTR, was incorrect and misleading, because that was then the view of Buckton Consultants Ltd as professional surveyors and seemed to be the view of Council administration staff.

[65] There is no convincing evidence that the licensee dissuaded the complainants from retaining the due diligence condition in their offer. The evidence strongly suggests that they opted to remove that condition in order to be able to purchase the property without needing to enter a tender process.

[66] Also, we are satisfied that the licensee acted in good faith throughout the transaction. He knew that the vendors had not only made enquiries with the Council about subdivisional requirements for the property but had also engaged the said surveyors and made boundary adjustments.

[67] In the ordinary course, real estate agents are not expected to undertake research or display the knowledge of a lawyer or surveyor. This is a clear case of the

licensee acting as a conduit in passing then seemingly correct information from vendors to purchasers.

[68] Accordingly, this appeal is dismissed so that the sound findings of the Committee stand.

[69] 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 G Denley
Member

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Ms N Dangen
Member