BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 90

READT 019/15

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**GRAEME WILLSON** of Pukekohe, Real Estate Agent
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (per CAC 301)**
	First respondent
AND	**AMANDA BOYD and TERRENCE MACKEL**
	Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

HEARD at AUCKLAND on 21 September 2015

DATE OF THIS DECISION 14 December 2015

COUNSEL

Mr T D Rea and Ms C R Eric for appellant licensee
Ms C P Paterson for the Authority
No appearance or participation from the complainants

DECISION OF THE TRIBUNAL

Introduction

[1] Graeme Willson (the licensee) appeals against a 3 November 2014 decision of Complaints Assessment Committee 301 that he had engaged in unsatisfactory conduct in respect of a complaint made by Amanda Boyd and Terrence Mackel that they were not told about possible mining in the area of their property purchase. The licensee holds a salespersons' licence and works for Barfoot & Thompson Ltd, Pukekohe.

Background Facts

[2] The property is at 433 Mangatawhiri Road, RD1, Pokeno, and was listed on 4 December 2011. Barfoot & Thompson had a sole agency until 5 March 2012 and then a general agency cancellable by seven days notice.

[3] At the time of listing the property, the vendors provided the licensee with a copy of a valuation they had recently obtained from a Mr Max Adams and that valuation did not mention any nearby works.

[4] During the period 4 December 2011 to 16 November 2012, the property was marketed for sale and advertised on Barfoot & Thompson's website and on "Trade-Me". It was also advertised on various occasions in the Franklin County News.

[5] In early April 2012, the complainants (as prospective purchasers) enquired about the property and, on 16 April 2012, the licensee accompanied the complainant, Ms Boyd, to view the property.

[6] In May 2012 Ms Boyd made an offer of $920,000 for the property having contacted Suzie Causebrook, another agent at Barfoot & Thompson, while the licensee was overseas. This offer was not accepted by the vendors and further negotiations took place between the parties.

[7] In August 2012, Ms Boyd contacted the licensee and instructed him to prepare a further offer of $1,175,000 plus GST. This offer was presented to the vendors but did not proceed.

Public Notification of Proposed Mine

[8] By hand delivered letters and emails sent on 27 September and 30 September 2012, Fonterra notified the local community of a public meeting on Tuesday 9 October 2012 to discuss a proposal for *"a new coal mine located between Mangatawhiri/Rawiri Roads and State Highway 2"*.

[9] In late September/early October 2012, the complainants met with one of the vendors of the property, Mr Wadams, and discussed the possibility of a private sale and made a verbal offer. At this meeting, the complainants enquired about possible mining in the area and maintain they did not know how close it would be to the property.

[10] On 2 and 4 October 2012, Glencoal Energy Ltd published notices in the public notices section of the Franklin County News advising local residents of the meetings to discuss the mine proposal. Public notices were also placed in the Hauraki Herald on 28 September 2012 and 5 October 2012.

[11] On 3 and 9 October 2012, online articles were published at www.stuff.co.nz regarding the mine proposal. A further online article was published at www.nzherald.co.nz entitled *"Fonterra coal worries locals"*. That referred to Fonterra's plans for a coalmine on farmland between Mangatawhiri Road and the new State Highway 2 near Maramarua. The article informed readers that Fonterra

planned to apply to the Waikato District Council and the Waikato Regional Council for resource consent at the end of that month.

[12] On 7 October 2012 the licensee's brother passed away. Ms Boyd contacted the licensee the same day and had him prepare an offer of $1,050,000 plus GST for the property. This offer was conditional on a LIM report, building report, finance, and solicitor's approval.

[13] On 8 October 2012, the licensee received the signed offer from the complainants and presented the offer to Mr Wadams (one of the vendors) who accepted it. The licensee then arranged for that offer to be sent to the other trustee, a Mr Bridge, who signed and returned it the following day.

[14] Between 8 and 10 October 2012, the licensee made arrangements for his family and himself to travel to Gisborne for his brother's funeral.

[15] On 9 October 2012, public meetings were held regarding the proposed Mangatahi mine. Mr Wadams (one of the vendors) attended the noon on-site meeting.

[16] On 10 October 2012 a further online article was published at www.nzherald.co.nz regarding the mine proposal. The licensee travelled to Gisborne for his brother's funeral and the fully initialled agreement was received from Mr Bridge and dated that day.

[17] On 5 November 2012 the agreement became unconditional. A LIM report had been obtained but did not disclose the proposed mine because resource consent application had not yet been made.

[18] On 12 November 2012, a resource application was lodged with the relevant Councils.

[19] On 16 November 2012 settlement took place.

[20] The licensee states he first became aware of the mine proposal on 25 November 2012 when visiting the complainants to deliver a Christmas basket.

The Committee's Findings

[21] The Committee determined that it was the licensee's duty to have a working knowledge of the area where he operated. The Committee also found that duty to include a requirement to be familiar with, and understand, the impact of the Fonterra mining proposal for the area as it had been extensively discussed and in the media since, at least, September 2012. The Committee found the mine to be sufficiently within the public arena for licensees operating in this area to ensure that they could explain its ramifications to people purchasing near the proposed development.

[22] Therefore, the Committee determined that the licensee's conduct breached rule 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which is set out below.

[23] That determination involved findings by the Committee that:

[a] There was insufficient evidence to establish that the second respondents (the complainants) knew that the mine was going to be built *"500 metres from the boundary of the Property"* and this was unlikely given their complaint about a lack of knowledge;

[b] Mr Willson had a duty to have a working knowledge of the area where he operated;

[c] This duty included a *"requirement to be familiar with and understand the impact of the Fonterra mining proposal for the area"*;

[d] This proposal *"had been developed over several years up to the time when the complainants signed up for the Property"* and *"had been extensively discussed and in the media since at least September 2012"*;

[e] The mine was *"sufficiently within the public arena for licensees operating in this area to ensure that they could explain its ramifications to people purchasing near the proposed development"*;

[f] If Mr Willson, who was going through *"personal trauma"* at the time, had then been given more collegial support, this complaint may never have arisen.

[24] Having found the licensee had engaged in unsatisfactory conduct, the Committee ordered him to pay a fine of $1,500; and apologise in writing to the complainants; and he was also censured.

Issues on Appeal

[25] The licensee has raised the following issues on appeal:

[a] Whether it is established on the evidence that his actions breached Rule 5.1, or any other rule; and

[b] If he has engaged in conduct which could potentially amount to unsatisfactory conduct in some respect, whether it would, nevertheless, be appropriate to exercise the discretion to take no further action in all of the circumstances of the case pursuant to s 82 of the Real Estate Agents Act 2008.

A Summary of Further Evidence Adduced to us

[26] The licensee's evidence to us was consistent with the facts as we have set them out above. He operates as a licensed salesperson at the Pukekohe branch of Barfoot & Thompson Ltd, has no prior disciplinary history, and is a very experienced real estate agent in the area.

[27] Mr Willson now knows that Fonterra notified the local community of the mine project by hand delivered letters and emails of 27 and 30 September 2012. He believes that the vendors were not residing in the property at the time but received one of the hand delivered letters in their mail box; that informed them of a public meeting to be held about the project on 9 October 2012; and the vendor, Mr Wadams, attended that.

[28] The licensee stated, inter alia, that on 2 and 4 October 2012, Glencoal Energy Ltd published notices in the public notices section of the Franklin Country News. These notified residents in the Mangatawhiri, Maramarua, and Mangatangi areas of community meetings to be held on Tuesday 9 October 2012 to discuss a proposal for *"a new coal mine located between Mangatawhiri/Rawiri Roads and State Highway 2"* before consent applications were lodged with the relevant Councils. Similar public notices were also published in the Hauraki Herald on 28 September and 5 October 2012 and there was an online article about the matter in www.stuff.co.nz on 3 October 2012 and on 9 October 2012. There was also an online article published at www.nzl.co.nz on 10 October 2012.

[29] As at October 2012 Mr Willson was not living in the Pokeno area but approximately 20 kms away in Te Kauwhata. He said he did not receive any notification of their proposed mine from Fonterra nor did he see or was aware of the said public notices and online articles over the period 28 September and 10 October 2012. Also on 1 October 2012 his younger brother suffered a stroke and passed away so that between 8 and 10 October 2012 he was engaged in funeral arrangements and returning to Gisborne for his brother's funeral.

[30] Mr Willson's evidence is detailed and he was extensively cross examined. We refer to that below.

[31] The contract of sale of the property to the complainants seems to have been negotiated and completed in the normal manner. We note that the LIM report did not disclose the proposed mine because a resource consent application had not yet been made for it. Settlement of the purchase by the complainants of the property took place on 16 November 2012. It seems that Ms Boyd (as one of the purchasers) received a visit from a Fonterra representative informing her and other residents of the mine proposal three days later.

[32] There seems to be no dispute that Mr Willson, the licensee, first became aware of the mine proposal on Sunday 25 November 2012 when he called on Ms Boyd with a gift and she raised the issue with him. He immediately contacted the vendors and states that, at a meeting with him on 29 November 2012, Mr Wadams told him he had met with the purchasers prior to the final offer, which resulted in the agreement for sale and purchase, to discuss a possible private sale and during those discussions the proposed mine had also been discussed and that Ms Boyd indicated then that she was aware of the proposal. That is recorded in undated diary notes kept by Mr Wadams which were exhibited to us. The licensee is adamant that, curiously, neither vendor nor purchaser told him about the proposal and they do not now assert that they did.

[33] Inter alia, the licensee emphasised that, although Ms Boyd asserts that the project was general knowledge in the area, no one ever mentioned it to him, the

licensee, and he observes from October 2012 media articles that the local mayor had then only been aware of the project for a few weeks. The licensee asserts that other salespeople for the area at Barfoot & Thompson were similarly unaware of the mine proposal. It seems that, at the time of listing, the vendor was unaware of it also.

[34] Mr Willson's attitude is one of sincere regret that the purchaser complainants had suffered stress as a result of learning of their location near the proposed mine but that he was unaware of that proposal at the time the property was sold and asserts that, had he known of it, he would have made enquiries and discussed it with both parties and any other third parties who might have been interested in the property.

[35] The licensee clarified that, with him being based in Pukekohe, the Mangatawhiri area was not actively serviced by him and his office. He said he would spend two to three days a week in his Pukekohe office and the rest of the week in his home office at Te Kauwhata about half an hour's drive away. He mentions that over the previous five years he had sold about 100 properties of which only four were in the Mangatawhiri area.

[36] The licensee stated that it was his practice to talk with a vendor to obtain as much information as possible about the property being marketed and he would seek from the vendor any semi-relevant local information. He has worked in the Franklin area for 40 years and is well aware of the character of the land where the mine is proposed to be and it is simply fairly flat rolling farm land for cattle. It is the licensee's practice to immediately examine the certificate of title for a property he is to market, and to talk to neighbours (as well as the vendors as already mentioned). He makes a point of reading local newspapers such as *"the Franklin County Times"*, a North Waikato newspaper, and the NZ Herald but would not necessarily read every local newspaper. He keeps an eye on what happens in the area but would probably not attend public meetings and, in particular, until this complaint he did not usually read public notices in newspapers. However, he said that he and his colleagues at Barfoot & Thompson, Pukekohe, meet on Thursdays to discuss what is going on in their extended area and, for instance, would discuss any new subdivisions in that area. Mr Willson observes that, since this present complaint experience of 2012, he and his colleagues read much more widely in terms of local news, and including public notices, but do not think they have been alerted to any more information than previously.

[37] Under cross examination, the licensee agreed with Ms Paterson (counsel for the Authority) that part of his work would be to keep abreast of local issues, such as subdivisions and roading changes in the area and, of course, proposals for mining. He felt he had always done that in a sensible way. Ms Paterson took the licensee through the facts as covered above and particularly that, at material times, he was distracted with arranging and attending his late brother's funeral in Gisborne.

[38] Inter alia, the licensee pointed out that the neighbours of the property did not seem to know about the proposal at material times. He accepted that, had he not been distracted by his brother's death, he may have read the public notices in the relevant newspapers and adverted to the mine proposal himself.

[39] To Mr J Gaukrodger the licensee responded that the vendor did not mention the mine proposal to him at material times and never has and he and his office simply did not know of the proposal at material times.

[40] An affidavit was filed by Mr I J Croft, a licensed salesperson colleague of Mr Willson, confirming that he also had no prior knowledge of the mine proposal until he read media articles about it in early October 2012.

[41] An affidavit has also been filed with us from Ms S M Causebrook, another licensed salesperson in the Papakura branch of Barfoot & Thompson Ltd, as the listing salesperson of the property. She first became aware of the mine project in about mid January 2013 when she received a telephone call from the complainant Ms Boyd whom she knew. She avers that Ms Boyd then said that she had just found out about the proposal. That is inconsistent with hearsay evidence that vendors and purchasers spoke about the proposal prior to settlement. Ms Causebrook immediately contacted Mr Wadams as a vendors of the property who said that he was unaware of the mine proposal and that the purchasers should be immediately informed of it; and he also offered to release them from the agreement if they did not want to proceed; so that the purchasers were contacted and informed accordingly but the purchasers subsequently decided to proceed with the purchase as agreed.

Relevant Legislation

[42] The Committee found that the licensee had engaged in "unsatisfactory conduct" which is defined in s 72 of the Act as follows:

> *"**72 Unsatisfactory conduct***
>
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
>
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
> *(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
> *(c) is incompetent or negligent; or*
> *(d) would reasonably be regarded by agents of good standing as being unacceptable."*

[43] There is no suggestion that the conduct of the licensee could amount to misconduct as defined in s 73 of the Act. It is put that the relevant Rules from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 are, in particular, Rules 5.1 and 6.4 which respectively read:

> *"5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.*
>
> *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.*
> *6.5 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely, on the basis of the licensee's knowledge and experience of the real estate*

market, that land may be subject to hidden or underlying defects, the licensee must either—

(a) obtain confirmation from the client that the land in question is not subject to defect; or

(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses."

Authority's Submissions on Appeal

[44] It seemed to be put for the Authority that the complainants accept that they knew that there could be a new mine opening in the area prior to the vendors accepting their offer, having been told that by an acquaintance who also had her property at Maramarua for sale at the time; and that the complainants discussed the mine proposal with the vendors who had seen an article in the Waikato Times about the proposal of an open cast mine. While there is some dispute as to what exactly was said at this meeting, it seems that the complainants thought any mine would be some distance from the property.

[45] Counsel for the Authority (Ms Paterson) submits it is not necessary to prove loss or detriment to the complainants for a finding of unsatisfactory conduct (or indeed misconduct) to be made. We agree. Disciplinary proceedings are concerned with the conduct of the professional person or entity concerned, not with questions of detriment which might be central to civil claims for damages. As a full bench of the High Court said in *Complaints Assessment Committee v C* [2008] NZLR 105 at [50]: *"In a professional disciplinary context of course the focus is on the conduct of the practitioner, and not upon its consequences."*

[46] We agree with Ms Paterson that the extent of the research and disclosure required of a licensee (independent of any request for information by a purchaser) will depend on the facts of the case, including the nature of the information at issue. In the present case, should a reasonably competent salesperson in the licensee's position have known about the mining proposal and provided information to the complainants? Have any of the Rules been breached?

[47] The Committee had before it newspaper articles discussing the mining proposal and a copy of the public notice in the Franklin County News on 4 October 2012. This is the same newspaper (the Franklin Country News) that the licensee used to advertise properties. The Committee found the mine to be sufficiently within the public arena for licensees operating in the area to ensure that they could explain its ramifications to people purchasing near the proposed development.

[48] Ms Paterson noted that the licensee has submitted further evidence to us from Suzanne Causebrook and Ian Croft (both licensees at the agency) which supports the licensee's position that he did not know about the mining proposal until November 2012. The Authority accepts that the licensee may not have known about the mining proposal until after settlement and that there is some relevance that at least two other licensees in the area did not know of the proposal in September 2012. Mr Croft learnt of it in early 2012 and Ms Causebrook in mid January 2013.

[49] Ms Paterson observes that it will be a matter for us what weight to place on this new evidence but submits that it still leaves the question whether the licensee should

have known about the mining proposal given all of the publicity including a public notice placed in the Franklin County News. She put it that public notices in local newspapers have long been used by government agencies, legislative bodies, and private companies/individuals to allow members of the public to make their opinions on proposals known. Ms Paterson submits for the Authority that, quaint though it may seem to some in this electronic age, licenses need to keep abreast of public notices in communities they are serving.

[50] The Authority accepts that no matter how notorious the matter, if the licensee was wholly ignorant of the mining proposal, then Rule 6.5 of the Rules will not be breached. However, Ms Paterson submits it is then inevitable that Rule 5.1 of the Rules is breached (if the matter is sufficiently well-known) as the licensee has not exercised the skill, care, competence and diligence when carrying out real estate agency work and this may, similarly, amount to a breach of ss 72(a) and (c) of the Act.

The Stance of the Licensee

[51] As Mr Rea and Ms Eric put it, the broad issue is whether the appellant ought to be found guilty of unsatisfactory conduct; and the narrower issues are whether it is established that Mr Willson breached Rule 5.1 or any other Rule and that, if he potentially has in some respect (which is denied), whether we should exercise our discretion to take no further action pursuant to s 80(2) of the Act in all the circumstances of the case.

[52] Broadly put, Mr Rea submitted in some detail that there is no evidential foundation for the Committee's findings of fact, and that various very relevant factors have not been given proper consideration such as the limited extent and timing of publicity regarding the mine proposal, the transient source of information available – i.e. through the media; that there is no record of the mine proposal in the LIM report at the time; and the apparent lack of general knowledge of people in the area. Relevant facts are canvassed by counsel in some detail as are some of our decisions.

[53] Counsel for the licensee submit that, all in all, Mr Willson did not engage in any unsatisfactory conduct.

Discussion

[54] In his final oral submissions, Mr Rea emphasise that much more evidence has been adduced to us than was available to the Committee and submits that the mine proposal was not well known in the area at material times. He accepts it would have been good practice for the licensee to have checked public notices in each issue of local newspapers but submits that there cannot be a positive duty on real estate agents to do that so long as they make their usual enquiries of the vendor and neighbours of the property. Mr Rea emphasised that, normally, a LIM report would have referred to the mine proposal but the proposal was in its early stages and only some of the people in the area had received a letter drop about it from the developers.

[55] Mr Rea submitted that at material times, because of the letter drop from the developers to local residents, the vendor knew of the proposal well prior to the sale and, indeed, had attended a public meeting about the proposal but did not tell Mr Willson his real estate agent. Mr Rea also submitted that the purchasers knew of the proposal from the vendors prior to settlement. Frankly, we cannot be satisfied from the evidence as to the respective knowledge of vendors or purchasers about the mine proposal at material times. In any case, our concern is the conduct of the licensee.

[56] Mr Rea submits that although best practice would have been that the licensee had read the public notices in local newspapers and so, presumably, have averted to this proposal, best practice is not the threshold for conduct becoming *"unsatisfactory"* under s 72 of the Act; and that the licensee's general practices described above are normal and adequate.

[57] In her final oral submissions, Ms Paterson added that an important aspect which had not come clear before us is whether the vendor and the purchasers knew of the proposal prior to settlement of the sale and purchase of the property. We have adverted to that above. We also observe that, whether or not that is so, there is some evidence that the purchasers were given the opportunity to withdraw. However, (as we have indicated above) the issue before us is the conduct of the licensee so that we should confine ourselves to whether at material times, the licensee knew of the mine proposal or should have. We accept that he did not know of it at material times.

[58] Ms Paterson referred to the precise wording of Rules 5.1, 6.4 and 6.5, which Rules are set out above. We agree with her that we are not concerned about the consequences of the licensee not having known at material times of the mine proposal but whether he should have known and whether that failure was a lack of skill, care, competence, or diligence as a real estate agent in terms of Rule 5.1.

[59] Certainly, in terms of Rule 6.4 we could not find that the licensee misled anyone or provided false information or withheld information.

[60] In terms of Rule 6.5 it seems to us that the licensee was not at fault in failing to discover that the mine proposal existed at material times to the sale and purchase transaction referred to above. We accept, as Ms Paterson put it, that the mine proposal was to quite some extent in the public arena at material times but, in our view, not to such an extent that the licensee can be said to have failed in his conduct as a competent real estate agent in not knowing about it. We realise that the contrary is submitted for the Authority which puts it that the licensee's conduct was *"inadequate"* in failing to know of the mine proposal.

[61] An agent is required to market property honestly and skilfully to the best of his or her ability. That involves taking sensible endeavours to obtain a grip on matters relevant to the site and surrounding area of the property. However, such an agent is not expected to know all that other people might know. Of course, agents must be alert at all times about what is happening or likely to happen in the area in which they operate.

[62] When we stand back and objectively consider the evidence adduced to us, and to the standard of the balance of probabilities, we do not find the conduct of the licensee to have been unsatisfactory. We feel that the licensee has not failed in any particular way and the overall circumstances were such that he did not know about the mine proposal at material times but that was not due to any inadequacy on his behalf. We appreciate that, had he read the public notices column of the local newspapers, he may well have learned of the mine proposal. However, that is relevant to a desirable high standard of alertness. If an agent has read local newspapers for such relevant information, talks with the vendor, neighbours, and his colleagues and uses his (or her) common sense, it would be unjust to find unsatisfactory conduct.

[63] We respect the high standards required from agents by the Committee but, for the above reasons, the findings of the Committee are quashed; this appeal is allowed; and there is to be no further action taken against the licensee as far as we are concerned.

[64] 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.

_____
Judge P F Barber
Chairperson

_____
Mr J Gaukrodger
Member

_____
Ms N Dangen
Member