

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 36

READT 053/14

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

BETWEEN **DANE BROWN**

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20005)**

First respondent

AND **MARK IRVING & ROHIT D'CUNHA**

Second respondents

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Ms C Sandelin – Member
Mr J Gaukrodger – Member

HEARD at AUCKLAND on 2 May 2016

DATE OF DECISION 30 May 2016

APPEARANCES

D R Bigio – for the appellant
M J Hodge – for first respondent
Second respondents in person

DECISION OF THE TRIBUNAL

[1] Mr Brown appeals the decision of the Complaints Assessment Committee which found him guilty of unsatisfactory conduct. Mr Brown is an agent at Mike Pero Real Estate. In 2012 he was acting as agent for the vendors on the sale of 22B Waipa Street, Birkenhead. Mr D’Cunha and Mr Irving were the purchasers. This property was to be auctioned on 30 September 2012. 22B Waipa Street is at the end of a long right of way in a relatively new and small subdivision. The house was surrounded at the back and the sides by bush. At the front of the property there was a concreted area, two garden areas with bark and paving stones and then two gates

which closed over the long driveway but did not extend into a fence around the property.

[2] The facts are straightforward and were the subjects of finding in a District Court case between the parties and the vendors. Mr Brown prepared promotional material for the property which included photographs of the gates and front of the house, along with the description contained in the advertising material “*come home to relaxing setting of birdlife and native bush, even a tree-lined peak of the harbour, inviting you to sit back and enjoy your own slice of Kiwi paradise, **landscaped for easy care***” (emphasis added). When they came to an open home (or thereafter) Mr Irving and Mr D’Cunha were provided with an aerial photograph of the property and the Land Information Report from the Council, together with a copy of the Certificate of Title. They purchased the property at auction.

[3] After the auction they discovered that the gates, which appeared to mark the front boundary of the property together with the gardens, were not in fact on the title to the property. The area of land excluded was approximately 257 m². The District Court found that Mr Brown did not know where the exact location of the boundaries to the property were. This was confirmed by emails to the vendor after the sale asking where the boundaries were. There is no suggestion that Mr Brown pointed out the boundaries to the purchasers.

[4] The Complaints Assessment Committee found that Mr Brown was guilty of unsatisfactory conduct because the marketing material that he used to promote the property, (the photographs and the advertising text) were misleading. The Complaints Assessment Committee found that Mr Brown failed to take reasonable steps to make himself aware of the nature and location of the boundaries to the property. The Complaints Assessment reached this decision on 11 February 2014.

[5] Mr Bigio, counsel for Mr Brown submits that Mr Brown’s conduct cannot be unsatisfactory conduct. He says that Mr Brown was not put on enquiry by the purchasers as to the location of the front boundary. Mr Bigio submitted that Mr Brown’s duty was only to obtain all relevant information about the property and ensure that the prospective purchaser was provided with that information and if there was uncertainty or question about the boundary to advise the purchasers to obtain surveying or legal advice.

[6] Mr Bigio submitted that when the marketing material was prepared Mr Brown did not know that the area behind the gates did not form part of the title. Thus it was reasonable for him not to check the position of boundaries when preparing the marketing material. He referred to the decision of the Tribunal in *Fitzgerald v the CAC & Ready* [2014] NZREADT 43. Further, Mr Bigio submitted that Mr Brown cautioned all prospective purchasers that he and the vendor were unsure as to where the boundaries were as the property was irregularly shaped and in a bush setting.

[7] Mr Brown accepts that he had a duty not to mislead prospective purchasers under Rule 6.4. However he says that he did not mislead the purchasers as he was unaware of where the boundary was, and the marketing material (which appears to show the boundary) cannot be viewed in isolation. He submitted that the marketing material was not misleading because it showed the actual presentation of the property. Further Mr Brown supplied the parties with a number of documents that showed the legal boundary. Mr Bigio submitted that when the marketing material was viewed in context and with other circumstances at that time, the marketing material was not misleading. Finally, Mr Bigio submitted that Mr Brown had not

engaged in unsatisfactory conduct because even if he had been on notice as to the issues with the front boundary he took all steps he could to advise the purchasers to inspect the boundaries and to ascertain for themselves where the boundaries were.

[8] The Real Estate Agents Authority submitted that the Tribunal should consider the decision of *Fitzgerald* in which the Tribunal affirmed that “*an agent has an active role to play in conveying information about the property to a potential purchaser and must be cognisant of that role and carry it out to the best of his and her ability*” and further that *Fitzgerald* establishes (that):

“There is an obligation on an agent to be pro-active where they are asked or might reasonably be expected to be asked about a boundary, for example where there is no clearly marked fence or where the boundaries appear to be in bushland or where a title is limited as to parties. However we have cautioned against obligations which require agents to become lawyers and we extend this to surveying. An agent must make every effort to know the product that they are selling but they are not required to anticipate problems where a problem might not exist.”

[9] Mr Hodge submitted that *Fitzgerald* is an authority for the proposition that agents are not required to verify boundaries unless they are put on notice that there may be an issue with the boundaries. However if they are on notice they should either check the boundaries or declare to all parties that they do not know where the boundaries are and recommend that the purchaser obtains a survey. In light of these statements the Authority submitted that licensees must make sure that marketing material does not make inaccurate representations about the boundaries or makes it clear that there is uncertainty about the boundaries. They identified the following factors as factors which may have put Mr Brown on notice about possible boundary issues:

- (i) A gate (but no fence) on the driveway.
- (ii) An aerial photograph which seems to show that there may be uncertainty as to where the boundary was. The aerial photograph appeared to show the boundary closer to the house than the advertising photographs.
- (iii) The vendors were able to advise the licensee as soon as they were asked that the gate was not within the front boundary of the property.

[10] Mr Hodge submitted that the marketing material was strictly misleading. He submitted that a reasonable purchaser would from the photographs believe that the “*excluded area*” at the front of the property was within the boundary. The Real Estate Agent’s Authority submitted that in this case where there was some uncertainty about the boundary the photographs should have had a disclaimer clearly marked on them indicating that the boundary location was unverified. Finally the Complaints Assessment Committee drew the parties’ attention to the fact that the Court found as a matter of fact that it was highly likely that Mr Brown told the second respondents that he did not know where the boundaries were and recommended that they obtain their own advice.

[11] The second respondents submitted that the photographs were in fact misleading and that they were misled by them. They also referred to the evidence that it was only the side boundaries of the property which they had been told might

be uncertain. They told the Tribunal of the distress this case has caused them since they purchased the house.

Discussion

[12] In *Fitzgerald* the Tribunal reasserted that one of the matters which an agent must be aware of or make proper enquiries about is the location of the boundaries, especially in circumstances where the boundaries appear uncertain. This is all part of an agent's obligation to know the property that they are selling and to ensure that potential purchasers are not misled by a deliberate omission, or failure by an agent to advise them of information that they might reasonably wish to know.

[13] The underlying principal is that for many purchasers this may be the first or second time that they enter into such a major financial transaction. Some of the potential pitfalls, especially when purchasing at auction, may not be immediately apparent to them. Thus an agent must take special care to identify the areas in which they must take advice or advise purchasers to exercise caution.

[14] We have critically examined the marketing material that Mr Brown prepared. If, as the District Court found, he was unaware of the boundaries this was not clear from the marketing material that he prepared. In fact it seems from the reference to the "easy care landscaped gardens", [which could only have applied to the front gardens], that he actually considered that the front gardens were part of the property. Certainly the photographs of the front of the property contained in the marketing material appears to show that all of the land behind the gates was the exclusive property of the purchaser. This was not the case. We think despite the findings of the District Court, that in these circumstances the agent has a positive obligation to ensure that any marketing material that he or she prepares which might indicate a boundary where the agent is not certain of the boundaries clearly reflects the fact that that particular part of the property is either not within the boundaries of the property, or that the agent is uncertain as to where the boundaries are. The fact that Mr Brown had to email the vendor after the auction had taken place would seem to suggest that he had not turned his mind to the location of the boundary at any time during the marketing campaign. This is not a proper discharge of his obligations. As we have said on numerous occasions, an agent is not required to be a surveyor but in cases like this; where the front boundary, was not where it appeared to be, and the back boundary was in bush we consider that the agent should have been on notice that a disclaimer may have been required in the marketing material. Alternatively he should have required the vendor to provide information as to the position of the boundaries prior to the marketing campaign beginning. Mr Brown did not do this. Even though the District Court found that he may have conveyed that he did not know where the boundary was to the purchasers during the course of the marketing campaign, his subsequent email to the vendor enquiring as to where the boundary was suggests that he had not turned his mind to this point. An agent must at least consider where the boundaries are, especially where part of the boundary was in bush.

[15] The Complaints Assessment Committee reached the correct decision in finding Mr Brown guilty of unsatisfactory conduct. The Tribunal therefore determine that Mr Brown was in breach of Rule 5.1 (failure to exercise skill, care, competence and diligence) and Rule 6.4 (a licensee must not mislead a customer or client nor provide false information nor withhold information that should by law in all fairness be provided to a customer or client). Contrary to the submissions of Mr Brown's counsel the Tribunal consider that Mr Brown's lack of attention to detail before marketing this

property has led to the difficulties that were experienced. Mr Bigio has submitted that Mr Brown was not put on notice that there was an issue with the location of the front boundary but the Tribunal has said that an agent must make enquiry as to the location of the boundaries where it is clear that they should do so. In this case, given the fact that the property was in bush and that there appeared to be a partial gate at the front of the property over the end of the common driveway Mr Brown should have been aware that he needed to understand more about the boundaries from the vendor prior to the start of the marketing process.

[16] He did not do this and this amounts to unsatisfactory conduct. Accordingly the Tribunal uphold the decision of the Complaints Assessment Committee.

[17] The Complaints Assessment Committee then determined to:

- (i) penalise Mr Brown by the imposition of reprimand under Section 93(1)(a) of the Act;
- (ii) require him to enrol in a number of national unit standard courses on ethics and misleading and deceptive conduct;
- (iii) pay the sum of \$3,500 as a fine to the Tribunal under Section 93(1G).

[18] Having considered the submissions of Mr Bigio as to the penalty the Tribunal determine that there is no evidence that Mr Brown is in need of education, either in ethics or on deceptive conduct. Accordingly they remove this requirement from the penalty decision of the Complaints Assessment Committee.

[19] Mr Bigio also challenged the fine. An appeal as to penalty, especially a fine is an appeal against the exercise of a discretion. The Tribunal may award a maximum fine of \$10,000 and this fine is approximately one third of that. We consider in this case that that fine was probably at the top end of what was appropriate but not so manifestly excessive that we would allow the appeal on the exercise of a discretion to change the fine and impose a fine of our own. Accordingly the Tribunal upholds the balance of the penalty decision of the Complaints Assessment Committee.

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

Ms K Davenport QC
Chairperson

Ms C Sandelin
Member

Mr J Gaukrodger
Member