

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 45

READT 052/15

IN THE MATTER OF an appeal under s111 of the Real Estate Agents Act 2008

BETWEEN JANE WANG and HUIBIN ZHOU

Appellants

AND THE REAL ESTATE AGENTS AUTHORITY (CAC 303)

First respondent

AND LUYING ZHAO

Second Respondent

Hearing: 2 June 2016

Tribunal: Hon P J Andrews (Chairperson)
Mr J Gaukrodger (Member)
Ms C Sandelin (Member)

Appearances: T Rea and C Eric (on behalf of the appellants)
N Copeland (on behalf of the Authority)
No appearance by or on behalf of the second respondent

Date of Decision: 29 June 2016

DECISION OF THE TRIBUNAL

Introduction

[1] Jane Wang (Ms Wang) and Huibin Zhou (Mr Zhou) have appealed against the decision of Complaints Assessment Committee 303 (“the Committee”) issued on 20 January 2015. In that decision the Committee found that they had engaged in unsatisfactory conduct. This followed the Committee’s finding that they were in

breach of r 5.1 (failing to exercise due care and diligence when preparing advertising material) and r 6.4 (preparing misleading advertising material) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

[2] At the beginning of the appeal hearing counsel for the Authority, Ms Copeland, advised that Mr Zhou's appeal was not opposed. Accordingly, that finding will be quashed. Mr Zhou did not take any part in the appeal hearing.

[3] The second respondent (the complainant), Ms Zhao, did not appear in person, and was not represented at the appeal hearing.

Factual background

[4] Ms Wang is employed in the Panmure office of Barfoot & Thompson Ltd ("the Agency").

[5] At a meeting on 27 February 2014 the vendor of the property at 12 Ferndale Rd, Mt Wellington, Auckland ("the property") listed it with the Agency. Ms Wang was the listing salesperson. Ms Wang said that she was told by the vendor that the house on the property contained three flats, which provided a good return. She was also told that the size of the property was 1255 m², which could potentially be subdivided. Ms Wang was aware that the property was located within Residential zone 6a of the District Plan, in which the minimum site size is 375 m². Based on this, the property was potentially subdivisible. Ms Wang noted "three flats", "1255m²" and "subdivision" on the Agency agreement.

[6] An auction for the property was scheduled for 26 March 2014, and it was advertised from early March on the Agency's website and in newspapers, in both English and Chinese. The advertisements contained the following statements: "land banking or developing! Options Galore"; "Too good to miss. Calling attention to investors or developers"; and "1255 m2 corner site and in 6a Zone (375 m2 per site)".

[7] On or about 7 March 2014 Ms Wang received a copy of the LIM report for the property (“the LIM”). Under the heading “Special land feature”, the LIM included six paragraphs of comments under the heading “Flood risk”. The LIM noted that the property was potentially at risk of flooding during heavy rainfall events, the extent of which was shown on an attached “special land features map” as “100yr flood plain” and “Overland flowpath”. The LIM also noted that “the [Auckland Council] may hold a catchment or flood hazard report giving detailed flood maps and flood levels in this area”. An address was given at which such reports could be viewed. The report concluded:

Any proposed development on this site may require a detailed flood risk report to be completed by a qualified drainage engineer. This will confirm the existence of risk and action required. Proposed development must have regard for established flood flows and levels and the need to ensure that flood plains and flow paths are not impeded.

[8] Ms Wang arranged for the LIM to be included in the information on the Agency’s website, and for it to be provided to interested parties. Ms Zhao and her father were given a copy of the advertisement for the property by Johnny Bi, another salesperson employed by the Agency.

[9] An Open Home was held at the property on 15 March 2014. In her complaint, Ms Zhao said that her father attended and heard Ms Wang speaking to prospective purchasers about the property. She further said that at the open home:

Jane Wang have said the following to us about 12 Ferndale Road: “1,225 sqm large section, in 6a zoning, 375 sqm per section, total of 3 sections. Keep and not touch the existing house in the middle, build one new house at the front and one at the back.”

[10] The Committee noted in its decision that Ms Zhao’s father had claimed he had made an anonymous telephone call to Ms Wang, and was told by her that the property could easily be subdivided.

[11] On 24 March 2014, two days before the auction, Ms Wang emailed the marketing material, pre-auction memorandum, and LIM Ms Zhao and her father. Ms Zhao purchased the property at the auction. On 2 April 2014, Ms Zhao went to the Auckland Council to get further information about subdividing the property. In her

complaint she said that she was told that subdivision of the property was impossible, because of the high flood risk.

[12] Ms Zhao and her father then sought to cancel the sale contract. After a period of discussion, an agreement was reached, the terms of which are not relevant to the appeal. In her complaint to the Authority Ms Zhao claimed that she was misled by representations made by Ms Wang that the property could be subdivided. She further claimed that Ms Wang had told her that the vendor had promised to provide a subdivision plan. She said that she had been tricked into buying the property by being told that it was subdivisible.

The Committee's decision

[13] We note that in addition to Ms Zhao's complaint and statements by Mr Bi, the Committee had before it a report from the Authority's investigator, which recorded the following:

Contact Auckland City Council. Ph. (09) 301 0101 Manukau Planning. Spoke to Kate re the Ferndale Property. Reluctant to discuss individual properties but indicated that it would be unusual for owners to be given a 'blanket' no for subdivision before land extensive tests were carried out, if the area of land was of sufficient size to permit sub-division in the right zone.

[14] The Committee found that the marketing material created an impression that the property was readily subdivisible, that a subdivision was within planning requirements, when subdivision was not necessarily straightforward (in that it was subject to Council consideration and approval).

[15] The Committee further found that it was Ms Wang's responsibility to complete further research if she wanted to make a positive representation regarding development potential, and not rely solely on representations made by the vendor. The Committee found that Ms Zhao relied on the information provided by Ms Wang. However, as Ms Zhao had been given a copy of the LIM, she should herself have made enquiry as to the flooding issue, and she had therefore contributed to her loss.

[16] In summary, the Committee found that Ms Wang had been careless in advertising the property, had failed to show reasonable skill and care, and that she had misled Ms Zhao. On the balance of probabilities, the Committee found that Ms Zhao was in breach of rr 5.1 and 6.4 and had engaged in unsatisfactory conduct.

The appeal

[17] In her notice of appeal Ms Wang claimed that the Committee had erred in finding that she had engaged in unsatisfactory conduct, in that it had failed to consider and/or give adequate weight to:

- [a] A licensee's duty to act in the best interests of the client/vendor, and therefore inform prospective purchasers of attributes of the property, including subdivision potential;
- [b] The practical limitations on a licensee when marketing a property (such as the need for brief advertisements, and for information concerning the property to be in general terms) where such information is outside their area of expertise;
- [c] The fact that the information provided by Ms Wang was correct, albeit in broad and general terms (that is, that the property was potentially subdivisible);
- [d] The fact that Ms Zhao was given a copy of the LIM, and had failed to do her own due diligence

[18] The Tribunal heard evidence from Ms Wang. As noted earlier, Ms Zhao did not appear at the hearing, nor did her father. There was no brief of Ms Zhao's evidence: in this respect, the Tribunal notes a statement by the Authority's investigator that "multiple attempts" to contact Ms Zhao were unsuccessful.

[19] The essence of Ms Wang's evidence is, in large part, reflected in the narrative set out earlier. That is, that the vendor told her the size of the property and its zoning, that it was potentially subdivisible, and that they discussed various options

for subdivision, one of which was to leave the existing building in place. She said that she was trying to attract all potential buyers, hence the reference to land banking, development, and potential subdivision. She accepted that a person reading the advertisements would assume that subdivision was one possibility for a purchaser, but said that that was not her focus.

[20] Ms Wang further said that it was normal practice to advertise a property before she received a LIM, because the time taken to obtain it would delay marketing. She said that when the LIM is received she loads it onto the Agency's website, and sends copies to all potential purchasers, so that they can make their own enquiries. She said she would not make any specific comment as to what would be required before consent was given for subdivision, as that would be outside her area of expertise.

[21] Ms Wang denied having received an anonymous telephone call. She did not recall having any detailed conversation with prospective purchasers at the open homes, as her priority was to obtain the names and addresses of all attendees for her register. Further, she had no record of, and did not recall, Ms Zhao's father or Mr Bi attending an open home.

Submissions

[22] On behalf of Ms Wang, Mr Rea noted that Ms Zhao's complaint had not focussed on the advertising, but on the alleged anonymous telephone call and the alleged conversation at an open home. He submitted that in the absence of any evidence by or on behalf of Ms Zhao, Ms Wang's evidence, that there had been no anonymous call, and no conversation at an open home, was unchallenged and should be accepted. The only issue for the appeal was, therefore, whether the advertising was misleading.

[23] As to the advertising, Mr Rea submitted that there was no evidence that subdivision of the property was not possible, or that it could not be subdivided into three units. He submitted that the only evidence as to the possibility of subdivision was in the LIM, which did not say that subdivision was "impossible", or exclude subdivision. He referred to Ms Wang's evidence that a LIM in these terms would

not “kill” a sale for development, although it might involve additional costs, and additional drainage. He also referred to the report from the Investigator, noting the Council’s statement that “it would be unusual for owners to be given a ‘blanket no’ for subdivision...”

[24] On the basis of these submissions, Mr Rea submitted that the advertisement was factually correct, and could not be said to be misleading, or that it should have included more information. In particular, he submitted that the advertisement did not need to have a qualification after the word “subdivision” such as “subject to Council consent”, as it was “blatantly obvious” that Council consent is required for any subdivision.

[25] While acknowledging that the Tribunal’s decision in *LB and QB v REAA* had set out the obligations of licensees,¹ Mr Rea also submitted that it has never been held that a licensee must obtain a LIM and provide it to potential purchasers. He referred to the Tribunal’s decision in *Gallie v REAA*, in which the Tribunal said that “[i]n the normal course real estate agents are not expected to undertake research or display the knowledge of a lawyer or surveyor”.² Mr Rea submitted that Ms Wang had disclosed all that she was required to disclose.

[26] Mr Rea then submitted that there are practical limitations on what can be included in an advertisement. If a licensee was required to go into every detail concerning a property, and include every conceivable adverse point, an advertisement would be either unduly long and detailed, or unduly short and bland. He submitted that it is always the case that a potential purchaser should make his or her own enquiries.

[27] Mr Rea also submitted that this is not a case where it is alleged that a licensee has provided misleading information; rather, it is alleged that Ms Wang failed to give detailed disclosure regarding a property. He went on to submit that this may raise an issue as to when a licensee should make such disclosure but in this case Ms Wang properly disclosed more detailed information (such as the LIM, which included

¹ See *LB and QB v REAA* [2011] NZREADT 39, at [18].

² *Gallie v REAA* [2015] NZREADT 5, at [67].

reference to flood risk³) when she received it, and when she became aware of Ms Zhao's interest. He noted Ms Wang's evidence that she referred to the flood plain issue to anyone who made enquiry of her. Mr Rea also pointed out that Ms Zhao had earlier been dealing with Mr Bi, another salesperson at Ms Wang's agency.

[28] Ms Copeland submitted for the Authority that the emphasis of the advertisement was on the attributes of the property as an investment. Ms Wang had accepted that its purpose was to provide potential purchasers with a full picture of those attributes, and the word "development" would include subdivision. She further submitted that Ms Wang had accepted that in many cases (or indeed normally) where her marketing of a property was targeting developers, the first bullet point in the description of its attributes would be qualified by, for example, "subject to Council consent". This particular advertisement, she submitted, was clearly addressed to developers.

[29] Ms Copeland further submitted that while the advertisement was factually correct, as far as it went, it still required a qualification along the lines set out above, and that would not be particularly onerous. She pointed out that the advertisement included the phrases "handy to all the shopping centres and minutes to motorway access" and "Walking to Stanhope Primary which is just around the corner" and submitted that it was just as important (and no more onerous) to qualify the claim to "Land banking or Developing! Options Galore".

[30] As to Mr Rea's submission that it was "blatantly obvious" that subdivision would be subject to Council consent, Ms Copeland referred to the Tribunal's comment in *Anderson v REAA*, that it:⁴

... [was] not attracted to the submission that because the type of interested prospective purchaser could be regarded as "sophisticated" in terms of property dealings, that agents could allow them to look after themselves to some degree. While the experience or sophistication of a party or prospective purchaser could be a factor, we think that the highest and strictest standards in terms of the Act and its regulations must be applied.

³ See [7], above.

⁴ *Anderson v REAA* [2014] NZREADT 15, at [52].

[31] She also referred to *Tesar v REAA*, in which the Tribunal held that r.6.4 may be breached by a licensee even without any intention to mislead,⁵ and to *McCarthy v REAA*, where the Tribunal held that an innocent misrepresentation will still breach r 6.4.⁶ She submitted that Ms Wang could not necessarily assume that *every* purchaser was an experienced developer: one might be a “first time” developer, to whom the need for Council consent is not “blatantly obvious”.

[32] Ms Copeland was given leave to make further submissions on the issue of when detailed disclosure should be made, as Mr Rea’s written submissions had not covered this point. Ms Copeland submitted that the advertising gave the impression the subdivision was the main attraction of the property. Disclosure of the flood risk was therefore a necessary qualification. She submitted that Ms Wang should have specifically drawn potential buyers’ attention to the flood risk when distributing the LIM, raised the issue at open homes, and ensured that the advertising material stated that subdivision was subject to Council consent and/or a flood assessment risk. She submitted that Ms Wang’s level of disclosure was not sufficient to meet her professional obligations.

Discussion

[33] In this appeal, Ms Wang must establish, on the balance of probabilities, that the Committee was wrong to find that:

- [a] Ms Wang had been careless and had failed to exercise reasonable care and skill in marketing the property (by relying on claims by the vendor and failing to research those claims) (r 5.1); and that

- [b] Ms Wang had misled Ms Zhao as to the potential for subdivision, by way of the marketing materials and in conversations overheard by Ms Zhao’s father (r 6.4).

⁵ *Tesar v REAA* [2014] NZREADT 18, at [38]-[39].

⁶ *McCarthy v REAA* [2014] NZREADT 94, at [27].

[34] The Committee’s reasoning on each of the findings set out above cannot sensibly be separated and can be seen from the following paragraphs of its decision (references to Mr Zhou are omitted):

[a] (at para 4.4):

The Committee discussed the tone of the advertising and agreed that, despite the veracity of the information, an impression that the land was readily subdivisible was created when this was not necessarily a straight forward option.

[b] (at para 4.5):

The Committee finds that the advertising was intended to suggest that a subdivision was more than possible; it was clearly intended to convey that a subdivision was within the planning requirements and should be considered as part of the appeal of the Property. What is in doubt is what part [Ms Wang] played in conveying that advertising or providing this information to [Ms Zhao].

[c] (at para 4.10):

The Committee was concerned that [Ms Wang] made the comment on more than one occasion in her evidence that she would never “guarantee” or say “for sure” that the Property could be subdivided. It disturbed the Committee that [Ms Wang] did not understand that a guarantee is not required to be made to be found guilty of unsatisfactory conduct. It would be sufficient for [Ms Wang] to have conveyed the impression that subdivision would be “likely” and if that was not the case [Ms Wang] would be guilty of misleading [Ms Zhao].

[d] (at para 4.12):

The Committee is more concerned with the truth of the situation. It appears to us that the vendor did suggest to [Ms Wang] that the Property was subdivisible, hence the note on the listing agreement “subdivision” and on the balance of probabilities, the suggestive advertising and comments to potential purchasers followed through with that representation.

[e] (at para 4.14):

The Committee finds that [Ms Zhao] and Mr Bi relied on information provided by [Ms Wang] that the Property was a development option. On that basis, [Ms Zhao] bid at the auction. The Committee notes in mitigation that [Ms Zhao] was supplied with a copy of the [LIM].

[f] (at para 4.16);

Our investigation showed that the Council was unlikely to have given a “blanket no” to the subdivision of the Property and, therefore, it may have been possible rather than “impossible” as submitted by [Ms Zhao]. The Council concluded that extensive tests would be required if the land was subject to flood.

[35] It is clear from para 4.12 of Committee’s decision that in deciding that Ms Wang’s conduct was careless and misleading (and therefore that she had engaged in unsatisfactory conduct) that it relied on:

[a] The word “subdivision” in the listing agreement;

[b] The “suggestive” wording of the advertisement; and

[c] Ms Wang’s “comments to potential purchasers”.

We consider each of these in turn.

[36] The listing agreement: There was no evidence that Ms Zhao (or any other potential purchaser) saw the listing agreement. Therefore, the word “subdivision” could not be said to have added to any impression gained by potential purchasers. On its own, the presence of the word on the listing agreement contributes nothing to deciding whether Ms Wang was careless or misled Ms Zhao. Accordingly, the listing agreement does not support a finding that Ms Wang engaged in careless or misleading conduct.

[37] The advertisement: While the wording may “suggest” a potential, for subdivision, that on its own does not lead to a conclusion that Ms Wang was conveying information that the property was “readily subdivisible”, as the Committee found at para 4.4. In fact, at para 4.14, the Committee recorded that Ms Zhao “relied on the information ... that the Property was a development option”, and the Committee noted at para 4.16 that the Council was “unlikely to have given a ‘blanket refusal’ to the subdivision”. There is no evidence that subdivision is not possible: the investigator’s evidence is to the contrary. The advertisement does not support a finding that Ms Wang engaged in careless or misleading conduct.

[38] Ms Wang's "comments to potential purchasers". There is no statement from Ms Zhao as to comments made to her; in her complaint she referred only to comments said to have been made to her father in an anonymous call, or overheard by her father being made to other potential purchasers. The assertion that Ms Zhao's father had made an anonymous call was later retracted, and there was little, if any, evidential support for the alleged "overheard" comments. Nor did the Committee have the benefit of an investigator's interview of Ms Zhao, as the investigator was not able to contact her. The Committee could give little, if any, weight to Ms Zhao's allegation of "comments made" by Ms Wang.

[39] We have considered the supplementary submissions as to when, and to what extent, Ms Wang should have disclosed that there was a flood risk which could affect the property's potential subdivision. We accept Mr Rea's submission that she provided relevant information to Ms Zhao in a timely manner, when she became aware of her interest. It is relevant that Ms Zhao was dealing with Mr Bi (a salesperson at the same agency as Ms Wang) before she met Ms Wang. He had access to the same information as Ms Wang had.

[40] As to the extent of information provided, we also accept Mr Rea's submission that Ms Wang fulfilled her obligations as to providing information concerning the property to Ms Zhao.

[41] We conclude:

- [a] There was insufficient evidence before the Committee on the basis of which it could find that Ms Wang had engaged in careless or misleading conduct.
- [b] After further considering the evidence, we find that Ms Wang was not careless, did not fail to exercise reasonable care and skill in marketing the property, and did not mislead Ms Zhao as to the potential for subdivision.

[42] The Committee's decision cannot be sustained, and the appeal must therefore be allowed.

Decision

[a] Ms Wang's appeal is allowed and the Committee's finding that she engaged in unsatisfactory conduct, and its penalty orders, are quashed.

[b] As recorded earlier, Mr Zhou's appeal is allowed and that Committee's finding that he engaged in unsatisfactory conduct, and its penalty orders, are quashed.

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

Hon P J Andrews
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member