

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 62

READT 087/15

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

BETWEEN PINK (ANNIE) YONG-MEWBURN
 Appellant

AND THE REAL ESTATE AGENTS
 AUTHORITY (CAC 404)
 First respondent

AND GREGORY COULTER AND JOYANN
 MOORE
 Second respondents

Hearing: At Auckland on 22 June 2016

Tribunal: Ms K Davenport QC – Chairperson
 Mr G Denley – Member
 Ms N Dangen - Member

Appearances: Mr T D Rea for the appellant
 Ms K Lawson-Bradshaw for the first respondent
 No appearance by or on behalf of second respondents

Date of oral decision: 22 June 2016

Date of issue: 2 September 2016

Date of re-issue: 13 September 2016

ORAL DECISION OF THE TRIBUNAL

[1] On 11 June 2014 Mr Coulter and Ms Moore purchased a property at 6 Blacks Street, Greenhithe. After purchase they complained about the actions of the agent Ms Yong-Mewburn. They complained, [according to their initial complaint] as follows:

- After moving into their house they had a Policeman arrive at their door to warn them that “there were undesirable people visiting houses in our street and that they should expect a visit from these people as their residence was a known drug house.” They said that this was unsettling to them and a complete surprise to them. They spoke to the agent immediately and were told that there had been rumour and gossip in the neighbourhood about this but nothing was done as the agent “did not think it was necessary to react to this type of information”. They then questioned the agent’s insistent on having a drug test performed on the front house (the property being two dwellings) before they moved in.
- Their complaint was determined by the Complaints Assessment Committee and the decision of the Complaints Assessment Committee is dated 15 September 2015. They found that Ms Yong-Mewburn breached Rules 6.4 and 10.7. These two Rules provide:

Rule 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.

Rule 10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either –

- a) obtain confirmation from the client, supported by evidence or expert advice, 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.

[2] As a result of this finding Ms Yong-Mewburn was censured and fined the sum of \$3,000. She has appealed this decision.

[3] Ms Yong-Mewburn has provided evidence that she was told of the rumour that there had been drug use in the house and she was told of this while she was overseas

in Canada. She subsequently discussed it over the telephone with her manager and then there was an email exchange with Mr Rose. She was instructed to talk to the vendor's solicitor to get a clause prepared by the solicitor to insert in the agreement for sale and purchase addressing the issue. Mr Rose's email also told her to disclose this to potential purchasers. Ms Yong-Mewburn did talk to the solicitor and a clause was drafted by the solicitor and inserted in the agreement. This is clause 21 in the agreement for sale and purchase. The Tribunal note that this clause was not particularly well drafted as it did not provide that the purchaser could cancel the agreement if there was in fact any contamination in the house. Ms Yong-Mewburn understood from the vendor's solicitor that a purchaser could cancel if there was such contamination. Thankfully there was no contamination found in testing as the Tribunal doubt that the clause as drafted definitely allowed for this. However it is not the job of an agent to question the drafting of a lawyer for her vendors.

[4] Ms Yong-Mewburn did not tell the purchaser of the potential risk and this rumour. Her view was that she should not spread rumours without knowing the facts as this might potentially be detrimental to the vendor. She believed that the information that she had was simply that there was such a rumour and she believed that the clause in the agreement was a proper and adequate discharge of her obligations to fully inform the purchaser. Given that the vendor's lawyer drafted the clause it was not Ms Yong-Mewburn's job to redraft it or question whether it was effective to achieve what she understood it was designed to do. Ideally the purchasers would have had an opportunity to take legal advice on this clause, but given the multi-offer situation we understand why there was some haste. The Tribunal also note that there was a period of approximately one day before the agreement was accepted in this multi-offer situation. During this time, if the purchasers had been concerned about the lack of legal advice they could have withdrawn their offer.

[5] The Tribunal need to determine if these facts constitute a breach of Rule 10.7 and 6.4. We discuss Rule 10.7 first. In this case the Tribunal agree with Mr Rea when he submits [at paragraph [35] of his submissions] that Rule 10.7 is only engaged when the circumstances are such that it should appear likely that the property may be subject to a hidden or underlying defect. The term "likely" plainly

envisages an assessment on the balance of probabilities and is not intended to refer to a mere possibility, and, we would add, rumour. This is clear from Rule 10.7(b) which provides that circumstances must be such that there is a significant potential risk. In our opinion clause 21 in the agreement for sale and purchase does address any potential breach of Rule 10.7. Further the defects with this house were not known but only allegations. In our opinion these facts would struggle to meet the test of even the balance of probabilities. As a matter of fact there were no defects and we therefore consider that Ms Yong-Mewburn was not in breach of Rule 10.7.

[6] Rule 6.4 in summary obliges an agent not to mislead or withhold information to a purchaser or vendor that in fairness ought to be given to them. As the Real Estate Agents Authority submit this is always a fact-specific question. Ms Lawson-Bradshaw submits at paragraph [7.7] of her submissions that whether or not the rumour on these specific facts is information that in fairness should have been disclosed in accordance with the Rules is not an issue that the Tribunal need to determine. She submits that the decision was made to treat the information as requiring action in terms of adding a clause to the sale and purchase agreement and disclosure. Thus, the information was treated as information that needed to be provided and disclosure was required under either or both Rule 6.4 and 10.7. She submitted that because the rumour was not disclosed there was a breach of Rule 6.4. She submitted that the Committee's assessment on this point ought to be upheld.

[7] The Tribunal do not agree that in this case Rule 6.4 was breached. The agent, the manager and the agency took the issue seriously, considered what to do and took legal advice. There is a fine line between over-disclosure of facts that may damage a vendor's right to sell their property at a fair market price and under-disclosure which is unfair to a purchaser. In this case we consider that Ms Yong-Mewburn appropriately achieved the right balance. To disclose a rumour would potentially have breached the agent's fiduciary duty to her vendor in this case. We therefore conclude that Ms Yong-Mewburn did not breach Rule 6.4 and that obtaining legal advice from the vendor's solicitors, and inserting in the agreement the clause that was drafted by both solicitors, addressed appropriately her obligations under Rule 6.4.

[8] The other issue that we need to consider on this appeal is whether or not Ms Yong-Mewburn disobeyed the instructions of her manager to make a verbal disclosure of the rumour to the purchasers. The facts show that Ms Yong-Mewburn did not do this. The Tribunal conclude that she did not knowingly disobey Mr Rose. Having heard her evidence the Tribunal consider that she was a conscientious agent who had thought about her obligations. In these circumstances the Tribunal conclude that she did not disobey the instructions of her manager. The Tribunal uphold that part of the appeal.

[9] Accordingly the Tribunal allow the appeal. It sets aside the Complaints Assessment Committee's findings and the penalty imposed on Ms Yong-Mewburn.

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

Ms K Davenport QC
Chairperson

Mr G Denley
Member

Ms N Dangen
Member