BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 9

READT 030/15

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**KAREN McTERNAN AND DEBORAH ANDREW**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 302)**
	First respondents
AND	**MANDY DAWSON AND KIM ASSENBERG VON EIJSDEN**
	Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 11 December 2015

DATE OF DECISION 9 February 2016

APPEARANCES

Mr T Rea and Mrs C Eric for the appellants
Ms R E Savage for the first respondents

DECISION OF THE TRIBUNAL

[1] The facts in this appeal arise out of the sale of a property at Waiuku in South Auckland in 2013.

[2] In a decision dated 11 November 2014 the Complaints Assessment Committee found Ms McTernan, the listing agent, and Ms Andrew, her branch manager, guilty of unsatisfactory conduct. Both agents work for Barfoot & Thompson.

[3] The Complaints Assessment Committee found that both agents were in breach of Rule 10.7, (they did not disclose known defects to a customer) and Rule 5.1, (they failed to exercise skill, care and competence in not seeking to check the findings of two builder's reports). Finally the Complaints Assessment Committee found that Ms

McTernan was in breach of Rule 6.4 by not providing information that should in fairness have been provided to a customer. Both agents appeal all these findings.

The Facts

[4] Ms McTernan listed the property at 49E Martyn Street, Waiuku for sale on 23 July 2013. The vendor of this property was Eagle Property Investment Limited. One of the directors of this company was Ms McTernan's daughter and the other director was her son-in-law. Ms McTernan was therefore reasonably familiar with the property. The property had been listed for sale the previous year but had not sold and Barfoot & Thompson (Waiuku) had managed the rental contract. Ms Andrew was the branch manager.

[5] The property was advertised for sale on a window card with Barfoot & Thompson and online in these terms:

> *"Affordable investment.*
> *Zoned Waiuku Primary.*
> *You can't go wrong with this. A tidy three-bed bungalow which has polished wooden floors and spacious living with generous sliding doors opening onto the deck. Fully fenced and a double garage.*
> *Rewired, replumbed, refurbished carpet, drapes and bathroom fixtures. All expensive work is done. For sale $279,000."*

[6] Ms Mandy Dawson saw this advertisement and inspected the property first with Ms McTernan and then with another Barfoot agent. Ms Dawson and her partner then entered into an agreement for sale and purchase for the property on 25 August 2013. The agreement was subject to a building inspection. Ms Dawson obtained a building report from A B Property Inspections Limited on 28 August 2013. This report identified a number of problems with the roof including the lack of a manhole within the house to enable access to the roof cavity. The report identified:

> *"House roof covering pressed metal tiles. Heavy rust exists over many tile section tiles, tile sections are very buckled overall due to foot traffic over the roof, small pinholes now exist at buckled areas to allow moisture entry.*
> *- No roof space access found to determine whether older roof covering exists under these tiles and whether building paper exists under the roof covering to drain any moisture/leaks through pinholes to the soffit area.*
> *Allow to replace roof covering within approx. 3 to 4 years?"*

[7] Ms Dawson did not cancel the agreement following the receipt of this report but contacted Barfoot & Thompson. She contacted Ms West [the selling agent] and Ms Andrew. Ms Dawson spoke to Ms Andrew on or about 30 August and shared her concerns about the cost of replacing the roof and said that she wanted the vendor to share in the cost. She was concerned about the lack of access to the roof space and expressed her view that this had been deliberately done. Ms Andrew advised her that the agency had been unaware that there was no access to the roof cavity and she would get the vendor to rectify this. She asked for a copy of the report and said that she would discuss it with the vendor. Ms Dawson emailed this to her and also gave her an extract from the full report in the body of the email. It seems that at the time Ms Andrew did not appreciate that she had been sent a full copy of the report as well as the extract, but the Tribunal does not consider that anything turns on this. The access to the roof space was remedied and the vendors agreed to obtain a further building report. Ms Andrew told Ms West of this conclusion and also informed Ms Dawson.

[8] Ms McTernan took no active role in these discussions. She heard of the discussion concerning the roof but she did not concern herself with understanding the full details of the issues, and told the Tribunal that because her daughter was a vendor she felt that it was important to allow Ms West to handle these issues. The vendor did not in the event obtain a further building report and therefore Ms Andrew arranged for Barfoot & Thompson to organise and pay for a building inspection by Brown & Brown Builders who reported that (now having the ability to access the roof cavity):

> *"The roof frame is solid and appears to be dry but the roof needs urgent attention. The patch where the chimney was removed needs to be replaced with similar tiles or a watertight flashing installed by a registered roofing contractor. Holes need to be plugged and rust prepped, primed and painted …"*
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> They concluded:
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> *"If the roof is repaired and maintained well it should be good for another seven to nine years."*

[9] A copy of this report was provided by Ms West and/or Ms Andrew to Ms Dawson and the vendor. Ms Dawson and her partner made a request to the vendor that the cost of obtaining a new roof be shared between them and/or that they share the cost of repairs to the roof and repaint it to a certain standard.

[10] The vendors did not agree and the contract between Ms Dawson, her partner and the vendors was ultimately cancelled by the vendors for lack of fulfilment of the other conditions of the agreement.

[11] The vendors then made unconditional a backup agreement which had been entered into on 12 September 2013. The purchasers were a Mr and Mrs Dunsmuir. Ms McTernan was involved as the selling agent in this sale. Prior to the parties signing this agreement Ms McTernan advised the Dunsmuirs that there was a problem with the roof. They arranged their own inspection of the property. The Dunsmuirs confirmed in writing that they were aware of the roof defects prior to purchase.

[12] Ms Dawson was unhappy with the service that she had received from Barfoot's and made a complaint. The Complaints Assessment Committee found that the advertisement set out above at [5] was misleading. They found that the advertisement was not altered following the receipt of the advice from Ms Dawson that there had been a defect identified in the roof, or after the second building report was obtained by Barfoot & Thompson. It was not until Ms Dawson complained, and following intervention from Barfoot & Thompson head office that the advertisement was changed.

[13] The advertisement was changed online on or about 25 September 2013 after the backup agreement was entered into. That second agreement became unconditional on 30 September 2013 and duly settled. The new advertisement altered the last line to read: "*New plumbing and wiring, great first home, a must see*".

[14] The second issue considered by the Complaints Assessment Committee was whether or not the agent and agency had an obligation to ensure that a copy of the building report was provided to (subsequent) purchasers. The Complaints Assessment Committee found that Rule 6.4 had been breached as the agent withheld information that should have been provided to the purchasers. This finding

can only relate to the second sale and must be a reference to the fact that Mr and Mrs Dunsmuir were not given a copy of the report obtained by Barfoot's. The agency did not have any right to provide a copy of the A B Property Inspectors report as this was Ms Dawson's report.

[15] Ms McTernan told the Tribunal that she had drafted the advertisement. She considered that it was a fair representation of the extensive work that had been done on the property by her daughter and son-in-law. She had personal knowledge of the work and considered that the advertisement properly reflected this. She told the Tribunal that she considered that further renovations might need to be done as the property had been rented. She said she advised potential purchasers of this, including repairs to doors and painting. She said that she had no further dealings with the purchase after Ms West drafted the Dawson agreement, although she was vaguely aware that there were issues concerning the roof. She did not see a copy of the A B Property Inspections report and nor did she obtain a copy of the Brown & Brown builder's report. However, she said that when Mr and Mrs Dunsmuir wanted to view the property she told them that there were concerns about the condition of the roof and recommended that they put a building inspection clause into the agreement. Ms McTernan did discuss with the Dunsmuirs the roof "*issues*", although it would be fair to say that she was not completely familiar with all of the details. Mr and Mrs Dunsmuir inspected the roof, were content with its state and made an offer which became unconditional.

[16] Ms McTernan did not change the advertising after she became aware of the issues with the roof at the end of August 2013. She said that she did not consider that the advertisement was misleading as she did not understand that a new roof was required, just that it needed to be patched or repaired. She considered that the advertisement stated correctly all the work that had been done on the property.

[17] Ms Andrew also gave evidence. She impressed the Tribunal with her early appreciation of the issues after they were raised with her by Ms Dawson at the end of August, and by her focus on involving the agency in resolving the issues. The Tribunal commend Ms Andrew for organising at Barfoot & Thompson's expense a second report and making this available to both parties. She discussed the issues with the selling agent Ms West and kept both the vendor and the potential purchaser advised of the steps being taken.

[18] Ms Andrew took all necessary steps to ensure that Ms Dawson and her business partner were not misled by the roof issues and arranged to have the roof cavity opened so that it could be inspected by Ms Dawson and her partner. She pro-actively kept both parties fully informed of details.

[19] Ms Andrew did not authorise the amendment of any advertising until it was suggested by Barfoot & Thompson's head office. She told the Tribunal that she had no intention of misleading any potential purchasers and genuinely believed (and continues to believe) the advertisement was correct and not misleading.

[20] For the sake of completeness we note the supplementary affidavit of Ms McTernan, which includes an email from Mr Dunsmuir saying that he was aware that the purchaser under the previous agreement had concerns about the condition of the roof based on the builder's report.

[21] This is essentially a factual dispute. The Tribunal have listened to the evidence of Ms McTernan and Ms Andrew, read the written material provided by the Complaints Assessment Committee and listened to the submissions of counsel.

[22] The Tribunal therefore conclude that with respect to Ms McTernan and Ms Andrew:

(i) The Tribunal do not find that the advertisement was misleading per se. The house had been extensively renovated following its re-siting on to the section at Waiuku. The advertisement correctly listed the work done on the property and said "*all expensive work is done*". Advertisements are a mixture of puffery and fact and our conclusion is that no one reading this could conclude that **no** money would need to be spent on the house. The renovations were unaffected by any questions which subsequently arose concerning the condition of the roof.

(ii) Ideally Ms McTernan and Ms Andrew should have reconsidered the advertisement after the problems were identified but all parties appear to have been caught up with identifying the defects with the roof and obtaining further information concerning the extent of the defect and providing this to the parties.

(iii) We agree that all roofs need maintenance and it seems from the reports that the roof could be fixed by repainting and repair. The question of whether this was an expensive item is debatable.

(iv) No actual person was misled by the advertisement. Ms Dawson was fully aware of the defects and the subsequent purchasers were aware as well. There has been no evidence to suggest that any other person was potentially misled by this advertisement. This supports our conclusion that there was no misleading conduct.

(v) The CAC found that the agents were also in breach of R 5.1 in not amending the advertising after the defects became known to the agents. We have given our view that the advertising was not actually misleading but agree that as a matter of practice the agency should review all advertising when previously unknown defects are discovered. The Tribunal has in several previous cases recognised that advertisements often contain puffery[1] and that the test to determine whether an advertisement is misleading is whether there is misleading conduct such as would be caught by the Fair Trading Act.

(vi) Having considered the facts in this case the Tribunal do not consider that the advertisement was in breach of the Rules. It is important to note that both agents actually considered this point and concluded that there was no misleading copy.

(vii) We therefore dismiss the Complaints Assessment Committee's findings on this issue.

[1] See Dixon v REAA [2014] NZREADT 98 at [19]; Middleditch v REAA [2014] NZREADT 90 at [38] and Goode v REAA [2014] NZREADT 64 at [118].

Disclosure of known defects to a customer – Rule 10.7

[23] The Tribunal cannot find any evidence that there was any failure to disclose known defects to any customer. Obviously the defects were not known by any party until Ms Dawson completed her first building report. The contents of the building report were then known to Ms Dawson. A second report was obtained by Barfoot & Thompson and this was provided to Ms Dawson and the vendor.

[24] The subsequent purchasers were not given a copy of the A B Inspections building report (because this did not belong to Barfoot & Thompson) and were not given a copy of the Barfoot & Thompson report. This could have been provided and in hindsight Ms McTernan should have done this. However all that is required by the Rules for an agent is to make sure that the known defects are drawn to the attention of the customer. This was clearly done and Mr and Mrs Dunsmuir in fact obtained a copy of the first building report from the vendor. They then inspected the roof themselves, were satisfied as to what needed to be done and in full possession of all the facts, made the purchase unconditional. This is all that the Rules require. An agent is not responsible for ensuring that a copy of all building reports are made available to purchasers. If this is possible clearly it is ideal but the critical point is that the Rule requires the defect to be identified and clearly brought to the attention of the purchaser. They were and there is no breach of the Rules.

[25] The CAC were critical of the fact that Ms McTernan did not read a copy of the building reports and that in not doing so she failed to exercise due skill and care (R 5.1). In our view an agent needs to understand the concerns raised in the reports so that he or she can adequately educate and inform the purchaser. The agent is exercising due skill and care if they are aware of the issues, are informed enough to answer any questions on the defects and understand their obligations to report concerns and defects to potential purchasers. It may not always be possible to access building reports and especially when the defects are only identified after the agreement for sale and purchase is signed – an agent may have limited ability to discover the problems. Ms Andrew was sufficiently informed and did take steps to disseminate the information appropriately.

[26] Rule 6.4 again does not require that a copy of the report(s) be given to any purchaser – just that they are fully informed of the issues. There is no suggestion that the Dunsmuirs were in anyway misled by Ms McTernan. Rule 10.7 was also complied with as the defects were clearly disclosed.

[27] Accordingly the Tribunal dismisses the findings of unsatisfactory conduct against both Ms Andrew and Ms McTernan and sets aside the penalty orders made by the Complaints Assessment Committee on 5 May 2015.

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

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Ms K Davenport QC
Chairperson

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Mr G Denley
Member

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Ms N Dangen
Member