BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 37

READT 028/16

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	BRIAN EDDY and KAREN EDDY First Appellants
AND	DONALD GORDON and PENELOPE GORDON Second Appellants
AND	CRAIG McCULLOUGH Third Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 404) First Respondent
AND	RODERICK CHRISP Second Respondent
Hearing:	24 and 25 May 2017, at Gisborne
Tribunal:	Hon P J Andrews, Chairperson Mr J Gaukrodger, Member Mr G Denley, Member
Appearances:	Mr and Mrs Eddy, for the Appellants Mr J Simpson, on behalf of the First Respondent Ms K Harkess, on behalf of the Second Respondent
Date of Decision:	7 June 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Mr and Mrs Eddy, Mr and Mrs Gordon, and Mr McCullough (collectively, "the appellants") have appealed against the decision of Complaints Assessment Committee 404 ("the Committee"), dated 17 May 2016. In that decision, the Committee decided (under s 89(2)(c) of the Real Estate Agents Act 2008 ("the Act", or "the current Act")) to take no further action on their complaints against Mr Chrisp.[1]

[2] The appellants' complaints related to Mr Chrisp's conduct as listing salesperson of lifestyle blocks in a newly developed subdivision at Gisborne, during 2007. Each of the appellants bought properties in the subdivision.

Background

[3] In 2007, Eagle Eye Development Ltd (the director of which was Mr Luke Hansen) ("the developer") subdivided a property at Kauri Park, Gisborne, into a number of rural lifestyle properties. Mr Hansen retained a 50 ha block adjoining the properties which were to be sold ("the adjoining land").

[4] Mr Chrisp prepared marketing material for the properties ("the marketing material"), based on information provided to him by the developer. The marketing material was to be signed off either by Mr Hansen or his partner, Ms Cull.

[5] The appellants' Agreements for Sale and Purchase ("ASPs"), included additional terms of sale, including clause 21, which set out covenants as to the standard of building and other amenities in the subdivision.

[6] In 2013 the developer felled large stands of native trees on the adjoining land, and planted a pine forest. The appellants say that this has adversely affected the views from each of their properties, and caused a decrease in the properties' values.

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1 Complaint C10322, re Roderick Chrisp, 17 May 2016.

The developer also prevented access through the adjoining land, and issued trespass notices on Mr Eddy and Mr Gordon.

[7] The essence of the appellants' complaints was as to the representations made in the marketing material. They say that it led them to believe that the views, and access through the adjoining land, would be protected by appropriate covenants. They learned later that no such covenants were created, and the views and access were not protected.

The marketing material

[8] The Committee, and the Tribunal, were provided with a copy of the marketing material, in the form of a brochure titled "Kauri Park – Property information". As recorded earlier, this was prepared by Mr Chrisp on the basis of information provided by the developer. As relevant to the appeal, the brochure stated:

> **[a] Introduction:**
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> The sub-division features 10 lifestyle blocks set in park like surrounds with breath taking views. Developer Luke Hansen says that while there aren't any Kauri trees on the property at present he wants to establish 100 Kauri trees over the next two years. "It's about complementing the native bush that is already there and leaving a legacy for future generations".
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> Each of the one hectare sites has views across the Manuka covered valley and out to the ranges. Five of the sites feature sea views looking out over Wainui with two sites also looking back over Poverty Bay. …
>
> The developer who owns the a [sic] further 50 hectares of land beside the sub-division wants purchasers to fully enjoy the park-like lifestyle. On this basis he is granting access for purchasers to walk the farm track which meanders through the Manuka and a new planting of Redwoods, Kauri and Macrocarpas. The track finishes at the popular "hole in the wall" swimming spot. "The farm track is a pleasant walk that will allow purchasers to further enjoy the property".
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> **[b] Property description:**
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> …
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> Land Covenants: The vendor will establish a modern and well-designed subdivision and having a tidy and attractive presentation. On this basis he has created sensible covenants to protect the ongoing value of Kauri Park as a whole and the individual value of your property.
> Talk to me to discuss these.

> General: the remaining 50 hectares is being developed as an attractive rural setting with the development of Kauri Trees and Redwood forests to augment the many native plantings already on the property.
>
> The vendor encourages the enjoyments of this area by title owners. Walk the farm tracks though these areas to the Waimata River on the bottom boundary.

[9] The Committee and the Tribunal were also referred to an article in the Gisborne Herald of 24 April 2007, to the same effect (headed "Spectacular sea views at new subdivision"). The information for this article was provided by Mr Hansen.

The Committee's decision

[10] It was not disputed that Mr Chrisp represented to the appellants that the blocks had "spectacular" views. The Committee accepted that the views were "outstanding". Nor was it disputed that Mr Chrisp represented to the appellants that they would enjoy recreational access over the adjoining land. The Committee also accepted that the marketing material was intended to induce, and did induce, the appellants into buying their properties by the views and purported right to enjoy access over the adjoining land.

[11] The Committee noted Mr Chrisp's assertion that the reference to "sensible covenants" in the marketing brochure related only to the protection of buildings and other amenities in the subdivision. However, the Committee commented that:[2]

> 3.4 It must have been apparent to [Mr Chrisp] that the protection of the views and access over the adjoining lot were significant factors in the [appellants'] decision to purchase their properties. Of course the Developer may have simply refused to adopt such protective measures, in which case [Mr Chrisp] should have drawn the [appellants'] attention to the fact that the views and access over the adjoining lot were not protected and at the benevolence of the Developer.

[12] The Committee continued:[3]

> 3.5 [Mr Chrisp] by his own admission simply followed the instructions of the Developer, who provided all the advertising details and insisted all advertising was to be authorised by him or his partner. …

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2 Committee decision, at para 3.4.

3 At paras 3.5 and 3.6.

> 3.6 [Mr Chrisp] should have been more diligent in bringing the lack of protection of the views and access to the attention of the [appellants] and as a consequence there may have been a breach of the Rules. …

[13] The Committee went on to to say in paragraph 3.6 that it faced a "jurisprudential conundrum", of:

> … either applying current professional standards to an historical event or adopting the view that [Mr Chrisp] had done all he could reasonably have been expected to do at the time and that it was for the [appellants'] lawyers to have advised them about the lack of protective covenants. The Committee after prolonged and careful deliberation decided on the latter. …

[14] Although the Committee considered that Mr Chrisp's conduct was "less than ideal", it decided that, given the date of the conduct in question, and subsequent decisions of the Tribunal, it would exercise its discretion under s 89(2)(c) of the Act to find that there was no unsatisfactory conduct.

Submissions

[15] The submissions for the appellants, made by Mrs Eddy, focussed on whether the appellants reasonably understood from the marketing material that the views and access would be protected. She pointed to the outlined sale points of "native bush", "leaving a legacy for future generations" and "sensible covenants to protect Kauri Park as a whole", and submitted that there is now no native bush, nor legacy for future generations, nor access over the adjoining land.

[16] She also submitted that Mr Chrisp did not adequately explain the additional clauses in the ASPs, in particular that they did not protect the views and access.

[17] Mrs Eddy submitted that the Committee was wrong to find that Mr Chrisp had "done all that he could have reasonably been expected to do at the time", and wrong in not upholding their complaints.

[18] Ms Harkess submitted for Mr Chrisp that the Committee was correct to find that he had done all that he could reasonably have been expected to do at the time, that he was entitled to rely on the details provided by the developer, and that the marketing material could not reasonably have been interpreted as representing that

the views and access would be protected in perpetuity. She also submitted that the appellants' complaints had to be considered and determined under the standards and rules regulating the real estate industry at the time, and that under those standards and rules the appellants' complaint could not lead to a disciplinary finding against Mr Chrisp.

[19] Mr Simpson's submissions for the Authority focussed on the application of the statutory provisions as to considering conduct which occurred before the Act came into force in November 2009.

Discussion

The Committee's findings

[20] We do not accept Mrs Eddy's submission that Mr Chrisp did not adequately explain the additional terms of the ASPs. She acknowledged that the appellants signed unconditional ASPs before consulting their solicitors. Mr Chrisp had recommended that they get legal advice before signing the ASPs, but they did not do so.

[21] We agree with the Committee's finding that Mr Chrisp must have been aware that the views and access over the adjoining land were significant factors in the appellants' decisions to buy sections. It is fair to say that these would be significant factors for any potential purchasers. We also agree with the Committee's finding that Mr Chrisp "should have been more diligent in bringing the lack of protection of the views and access to the attention of the [appellants] and as a consequence there may have been a breach of the Rules", and that "[Mr Chrisp's] conduct was less than ideal". Further, we agree with the Committee's implicit finding that Mr Chrisp should have asked the developer about protection of the views and access and, if the developer indicated that such protections would not be given, drawn the appellants' attention to that.

[22] We also agree with the Committee's observation, regarding Mr Chrisp's admission that he "simply followed the instructions of the Developer" (and acted

merely as a conduit from the developer to potential purchasers), that it is now established that a licensee cannot simply rely on information provided by a vendor. As the Tribunal said in *LB and QB v The Real Estate Agents Authority (CAC 10058)*:[4]

> [20] Also, we observe that acting merely as a conduit from seller to purchaser may not exonerate a licensee from blame. We do not think that a licensee should place sole reliance and credence on advice or assurances from a vendor, even though given in good faith.

[23] We reject the submission for Mr Chrisp that the brochure cannot reasonably be understood as representing that the views and access would be protected. To the contrary, phrases such as "leaving a legacy for future generations", and "sensible covenants to protect the ongoing value of Kauri Park as a whole" are readily understood as representing that the "legacy" and "protection" relates to the significant factors of the view and access.

The applicable disciplinary regime

[24] If the facts and circumstances of the appellants' complaint had arisen after the Act and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") came into force,[5] there may have been grounds for a disciplinary finding against Mr Chrisp.

[25] But in this case, the Tribunal is not required to consider whether there are grounds for a disciplinary finding under the current Act and Rules. In this case, the conduct complained of occurred in 2007, at which time the Real Estate Agents Act 1976 ("the 1976 Act") was in force.

[26] Section 172 of the current Act makes provision for Complaints Assessment Committees to consider complaints, and for the Tribunal to hear a charge, in respect of conduct alleged to have occurred before the Act came into force. Section 172 was

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4 *LB and QB v The Real Estate Agents Authority (CAC 10058)* [2011] NZREADT 39, at [20]

5 The current Act came into force on 16 November 2009. The current Rules came into force on 8 April 2013.

explained by the Tribunal in its decision in *Gallie v The Real Estate Agents Authority (CAC 303)* as follows:[6]

> [17] The effect of s 172 is to create a three step process in respect of allegations about a licensee's conduct which occurred prior to 17 November 2009, namely:–
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> (a) Could the licensee have been complained about or charged under the Real Estate Agents Act 1976 in respect of the conduct?
>
> (b) If so, does the conduct amount to unsatisfactory conduct or misconduct under ss 72 or 73 of the 2008 Act?
>
> (c) If so, only orders which could have been made against the licensee under the 1976 Act in respect of the conduct may be made.

[27] The Tribunal went on to explain how it can make the determination whether the conduct amounts to unsatisfactory conduct or misconduct under ss 72 or 73 of the 2008 Act, as follows:[7]

> [20] In determining whether this conduct is unsatisfactory conduct under s 72(a), (c), or (d) of the 2008 Act, … we take into consideration the obligations upon licensees at the time the conduct took place, rather than the new standards that have been set under the 2008 Act. Given that the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 did not apply at the time, unsatisfactory conduct could not be found under s 72(b) of the Act (which covers contravention of the Act or any of its Regulations or Rules).

[28] While the 1976 Act contained disciplinary provisions,[8] they applied to matters such as supervision of businesses and handling of clients' money (including dishonesty). Section 99 of the 1976 Act set out the grounds on which an application could be made to the the Real Estate Agents Licensing Board ("the Board") to cancel or suspend a salesperson's certificate of approval. These were that the salesperson had been convicted of a crime involving dishonesty, or that the salesperson had been shown to be of such a character that it was in the public interest that the Certificate of Approval should be cancelled or suspended. Neither of the above grounds exists in this case.

[29] Pursuant to s 70 of the 1976 Act, the Real Estate Institute of New Zealand Inc ("the Institute") was given the power to, and did, prescribe "a code of ethics for

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6 *Gallie v The Real Estate Agents Authority (CAC 303)* [2015] NZREADT 5, at [17].
7 *Gallie*, at [20].
8 Real Estate Agents Act 1976, Part 7 (ss 94–111).

regulating the professional conduct of members of the Institute and the conduct of salespersons and branch managers employed by members" ("the code of ethics").[9] The Institute was also given the power to, and did, make rules establishing procedures to deal with matters relating to the discipline of persons engaged in real estate business, and to impose fines on members for any breach of the Institute's rules.[10]

[30] The Committee did not expressly go through the three step process set out by the Tribunal in *Gallie*. Nor did the Committee refer itself to the code of ethics, which set out licensees' obligations at the relevant time, or the Institute's disciplinary provisions, before concluding that it would exercise its discretion not to take further action. However, we are not persuaded that it would have reached a different conclusion had it done so.

The first step: could a complaint have been made against Mr Chrisp under the 1976 Act?

[31] Rule 16 of the Institute's Rules was headed "Discipline". Rule 16.2, headed "Complaints", provided, at r 16.2.2, that "… any person may lodge a complaint with the Institute, alleging a breach of the rules, the Act, or regulations, concerning … a salesperson". … It appears not to be disputed that Mr Chrisp was a salesperson (holding a certificate of approval) in 2007, rather than having any different status under the 1976 Act (that is, as a licensee, officer of a licensee company, or branch manager). We are, therefore, satisfied that a complaint could have been made against Mr Chrisp in 2007, under the then current regime. Accordingly, the first step of the procedure set out in *Gallie* is satisfied.

The second step: does Mr Chrisp's conduct amount to unsatisfactory conduct or misconduct under ss 72 or 73 of the current Act?

[32] Mr Chrisp's conduct must be examined according to the obligations applying in 2007. The only provision of the code of ethics that may have been applicable to the present case was r 13.13:

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9 1976 Act, s 70(m).
10 1976 Act, s 70(m)–(p).

> 13.13. A member must be fair and just to all parties in negotiations and the preparation and execution of all forms and agreements, and protect the public against unethical practices in connection with real estate transactions.

[33] As its wording makes clear, r 13.13 applied to "members" of the Institute. Mr Chrisp was not a member: he was a salesperson. However, r 13.4 provided that:

> 13.4 It shall be the responsibility of licensed members to ensure that salespeople or employees engaged or employed by them are of good character and repute, and that their conduct is no less than that required of a member.

[34] Accordingly, r 13.13 should be construed as applying in this case by substituting "salesperson" for "member".

[35] We consider, first, the Committee's observation as to whether Mr Chrisp would have been considered to be "a mere conduit" for the developer (with the result that a disciplinary finding would not have been made against him). It appears from the use of quotation marks in the marketing material, and referring to Mr Hansen personally (that is, "Luke Hansen says"), that Mr Chrisp was acting as a conduit in passing on information to the Developer. At the time, it could be inferred from the judgment of Court of Appeal in *Harvey Corporation Ltd v Barker* that if a licensee acted as no more than "a mere conduit", no professional obligation arose from passing on information.[11]

[36] We observe that that may not be the case now, following the Tribunal's decision in *Li and QB*, decided under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.[12]

[37] However, in the light of the Committee's comments at paragraphs 3.5 and 3.6 of its decision,[13] we are satisfied that, if a complaint had been made in 2007, there would have been grounds on which a Disciplinary Committee could properly have considered whether, in the circumstances where the views and access were such a significant factor in the decision to buy sections, Mr Chrisp may have breached r 13.13. That is, a Disciplinary Committee could have considered whether Mr Chrisp

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11 *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213.
12 *Li and QB v Li*, above, fn 5.
13 Set out at paragraph [12], above.

had failed to be "fair and just" to all parties (in particular the appellants). If a Disciplinary Committee found that Mr Chrisp had breached r 13.13, a disciplinary finding may have been made against him.

[38] As it is uncertain whether that such a finding would have been made, we cannot conclude that Mr Chrisp's conduct amounts to unsatisfactory conduct under s 72 of the current Act. Therefore, the second step of the *Gallie* test is not satisfied.

The third step: what penalty could have been ordered against Mr Chrisp under the 1976 Act?

[39] For completeness, we consider the third step of the process set out in *Gallie*, which is what penalty could have been imposed under the 1976 Act.

[40] Rule 16.1 of the Institute's Rules, headed "Liability of Licensees" provided:

> Where a … salesperson's … course of conduct, if attributed to a licensee, or a licensee company, would mean that the licensee or the principal officer of the licensee company has breached these Rules or the [1976 Act], the licensee or or principal officer of the licensee company shall be deemed to have breached these rules or the [1976 Act].

[41] The Tribunal assumes that the reference to "attribution" is intended to be a reference to r 13.4, under which licensees have a responsibility to ensure that salespersons' and employees' conduct is no less than that required of members. Thus, in the event that Mr Chrisp was found to to have breached r 13.13 of the code of ethics, any disciplinary finding would have been made against the licensee or licensee company that employed him.

[42] Rule 16.13 went on to specify the orders that could be made following a final determination of a complaint. These were to determine not to take any further action against the member, or to reprimand or censure the member. Clearly, that would not have permitted any penalty order to have been made against Mr Chrisp.

[43] We therefore conclude that even if a finding of unsatisfactory conduct could have been made against Mr Chrisp, no penalty order could have followed.

Outcome

[44] Having gone through the three step process set out in *Gallie*, we conclude that the Committee was not wrong to exercise its discretion not to take any further action on the appellants' complaint against Mr Chrisp. The appeals are therefore dismissed.

[45] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

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Mr J Gaukrodger
Member

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Mr G Denley
Member