BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 42 READT 057/16

UNDER	THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF	AN APPEAL UNDER SECTION 111 OF THE ACT
BETWEEN	MARK IRVING AND ROHIT D'CUNHA Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC) First respondent
AND	DANE BROWN Second respondent

Hearing: 3 May 2017

Tribunal: Ms K Davenport QC – Chair
Ms N Dangen, Member
Ms C Sandelin, Member

Appearances: Mr M Irving and Mr R D'Cunha, self represented
Mr M Mortimer for the Complaints Assessment Committee
Mr D Bigio for second respondent

Decision: 23 June 2017

DECISION OF THE TRIBUNAL

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[1] In 2012 Mr Irving and Mr D'Cunha purchased a property at 22 Waipa Street, Birkenhead. Mr Brown was the agent who acted on the sale. After the agreement became unconditional Mr D'Cunha and Mr Irving made an enquiry about the whereabouts of the boundaries. They discovered that it was not the gate at the bottom of the driveway nor was it on the property.

[2] The Tribunal has already dealt with aspects of this complaint before. In [2016] NZREADT 36 Mr Brown's appeal against a finding of unsatisfactory conduct was dismissed by the Tribunal. This appeal was made shortly after the initial appeal and

as a result of documents which were discovered by the appellants. This complaint arose from an email which the vendor had sent to Mr Brown. Their objection was to the fact that Mr Brown in preparation for the earlier complaint did not send this onto the appellants. On 4 October 2012 the appellants asked the agent to find out exactly where the boundaries were. Mr Brown contacted the vendor and asked where the front boundaries were. The vendor replied on 8 October at 1.19 pm "(the boundary is) *in line with the concreted section the gate has no relation to any boundaries, if in doubt refer to the title and plans".* Mr Brown did not send this on to the appellants and instead sent another email dated that day which did not convey this message as clearly. He said *"... the owner assumes it is at the gate but is not 100% sure, it may be a metre one way or the other. They say that the front bit up by the gate has been a "no man's land" with the others not doing anything with it due to the contour of the land and distance from the others etc. As there is not much that can be done with the area 22b are looking after it/weeding bark etc"*. The appellants claim that the failure to provide the email as sent was misleading and deceptive. They complained to the REAA.

[3] The Complaints Assessment Committee determined to take no action on this complaint. In their decision of 10 October 2016 they found at [3.2] that the *"complainant's view that the agent deliberately withheld vital information was not a conclusion that they could draw from the evidence before it".* They concluded at [3.6] *"the Committee is satisfied that the licensee did not seek to mislead the complainant about the position of the boundaries in his email after the sale but could have worded his email more precisely".* They went on to say that the licensee was *"not purposely deceptive and blatantly dishonest".*

[4] The appellants appeal from this decision and assert that the Committee erred in finding that there was no evidence to prove that Mr Brown deliberately withheld the email. They submit that the failure to disclose the 8 October 2012 email misled the appellants or the earlier Complaints Assessment Committee. They submit that the Committee has failed to address other misleading communications from Mr Brown to the Authority and the appellants.

[5] Further, the appellants submit:

- Agents are the main information channel in real estate transactions. They have a duty of care to treat all parties fairly and where information is provided (to ensure that) it is communicated with accuracy and diligence.
- The email of communication from Mr Brown on 8 October was misleading and is in breach of Rule 5.1 and 6.4. The licensee had clear information from the vendor that the boundary was in line with the concreted section and the gate had no relation to the boundaries but did not give that clear information to the appellants. In a statement to the Complaints Assessment Committee Mr Brown clearly contradicts this evidence.
- A failure of the licensee to disclose to the appellants and the Authority exactly what the vendor had said was further evidence of his misleading conduct.
- The fact that Mr Brown did not disclose the emails until 11 February 2014 meant that the licensee deliberately withheld this evidence.

[6] The appellants did not agree with the Committee's conclusion that the relationship between the gate to the boundary was only a part of the later email discussion. The appellants submitted that the licensee deliberately withheld this information and it was not credible that he did not turn his mind to the issue that not providing the actual email was misleading. They concluded that Mr Brown had been guilty of misconduct under s 73 and urged the Tribunal to reach this conclusion too.

[7] Mr Bigio submitted:

> *"Mr Brown did not mislead or intend to mislead the REAA regarding his discussion with the vendors regarding their knowledge of the boundaries. Rather, his post-sale emails are consistent with his statement to the CAC when viewed in the overall context of the purchase of the property, including his previous discussions with the vendors regarding the location of the boundaries:*

(1) The vendors had previously told Mr Brown they were not sure where the boundary was. They had also provided advice regarding the ownership of and use of the barked areas;

(2) During open homes, Mr Brown has told the complainant he was not 100% sure where the boundary was and they should obtain legal and professional advice about it;

(3) Mr Irving/Mr D'Cunha made an enquiry regarding the front boundary after they had unconditionally purchased the property and paid the deposit. Mr Brown responded to their enquiries based on his understanding of the location of the boundary. His understanding was based on previous discussions with the vendors regarding the boundary, ownership of and responsibility for the barked area out the front of the property; and the information contained in the LIM and title. Mr Brown responded in this manner because he wanted (to) be as helpful as he could and provide them with his understanding of the boundary, rather than just simply forwarding the vendor's email. His email is not inconsistent with the vendor's: it does not suggest that the boundary was located where the gate is situated;

(4) The wording used by Mr Brown in his statement to the CAC does not simply quote the vendor's email to him and it was never intended to be a quote. Rather, his statement reflects his understanding of the location of the boundary (as described above) and his thoughts when he sent the second email to Mr Irving/Mr D'Cunha. The explanation in his statement was provided in good faith and tried (as best he could) (to) accurately reflect all of the relevant circumstances surrounding the purchase of the property and information conveyed to Mr Irving/Mr D'Cunha regarding the boundary, including:

(a) All of his discussions with the vendors regarding their knowledge of the boundary and ownership of and responsibility for the barked area and not just the one post-sale email; and

(b) His discussion with Mr Irving/Mr D'Cunha pre and post-sale regarding his uncertainty of the location of the boundary, and his recommendation that they obtain professional advice."

[8] Mr Bigio urged the Tribunal to find that Mr Brown had not attempted any deception. Mr Bigio also submitted that Mr Cope, the vendor, had been cross examined at the District Court about his evidence of the boundaries and had said in evidence that he was unsure of the boundaries. See paragraph 4 of the letter from McElroys to the REAA dated 1 September 2014.

The issues

[9] This is an appeal from the decision of the Complaints Assessment Committee not to take any further action. The question the Complaints Assessment Committee submitted that the Tribunal should consider in determining this appeal for the Tribunal was as follows:

(a) Did the Committee err in determining that there was insufficient evidence to show that Mr Brown deliberately withheld relevant information from the Committee that should have been disclosed?

(b) If the answer is yes then did Mr Brown engage in unsatisfactory conduct? Or should the matter be referred back to the Complaints Assessment Committee to consider whether a charge should be laid?

Discussion

[10] The Tribunal have not heard from Mr Brown as he did not appear at the hearing. The Tribunal have heard from Mr Irving and Mr D'Cunha but they were unaware of the email until many months after the event. The only information therefore that the Tribunal has as to why the email was not sent on in its entirety is the explanation in the letter dated 1 September 2014. The Tribunal have to therefore determine the questions on the basis of the email, and on the 1 September 2014 letter of explanation and the extract from the judgment in the District Court concerning this evidence.

[11] The information that the Complaints Assessment Committee had is set out in paragraph [1.9] which is:

"1.9 In particular, the Licensee commented (through his solicitor) that:

a) *The Licensee emailed the Complainant after the sale had been concluded based on his understanding of the boundary, which he was uncertain of. His understanding was based on his previous discussion with the vendor about the boundary and the barked areas, as well as the LIM and title.*

b) *The Licensee has been cleared by the District Court of wrongdoing or misleading conduct and that the District Court has heard the parties and has concluded that it was plain that none of the parties knew precisely where the boundaries were.*

c) *The Licensee did not mislead or intend to mislead the Authority regarding his discussion with the vendor regarding their knowledge of the boundaries. Rather, his post-sale emails are consistent with his statement to the previous Committee when viewed in the overall context of the purchase of the Property, including his previous discussions with the vendors regarding the location of the boundaries.*

d) *The Licensee's email is not inconsistent with the Vendor's: it does not suggest that the boundary is located where the gate is situated.*

e) *The Licensee's statement to the CAC200005 reflects his understanding of the location of the boundary and was provided in good faith taking into account various discussions with the Vendor and the Complainant and not just the email from the Vendor."*

[12] The reason that the Complaints Assessment Committee's decided to take no action is that the CAC found:

(i) there was little evidence to show that the licensee deliberately withheld the email.

(ii) that the Committee must be aware of the entire context of all the emails sent on that day before reaching a conclusion on the narrow reading of two pieces of email correspondence.

(iii) that there was considerable confusion about the position of the boundaries even after 8 October as the vendor was not 100% sure.

(iv) The CAC said that the relationship with the gate to the boundary position was only part of the email discussion relating to the boundary position. They found that there was no suggestion that the other parts of the email relating to the barked area were wrong or incorrectly conveyed to the complainant. They concluded that the licensee could have worded his 8 October email more precisely but they were not persuaded on the balance of probabilities that there was purposely deceptive and dishonest conduct.

[13] This is a case where doubtless both the Complaints Assessment Committee and the Tribunal would have been assisted by the opportunity to assess the evidence of Mr Brown as to the circumstances surrounding the email he received on 8 October and the email he sent later that day.

[14] Serious allegations such as an intention to mislead or deceive require a higher level of proof[1] although the civil standard is still required. In such cases a Tribunal or Court must look carefully at the evidence presented to it before making a finding of fraud or deceit to ensure that misconduct.

[15] On the face of it, the contrast between the vendor's email and the email that Mr Brown sent to the appellant is significant and does appear to paint a more confused picture than the rather stark email from the vendor. However the Tribunal does not know whether there were any other discussions between Mr Brown and the vendor on the 8th October (or before) and cannot explain the discrepancy between the emails and the conclusion made by the District Court Judge that the vendor himself was confused about the exact whereabouts of the boundary. The Judge heard evidence from the vendor before reaching this conclusion. The Tribunal cannot reach a different conclusion as to the facts from the District Court but can draw a different conclusion as to the disciplinary implications of the facts. Thus the Tribunal cannot find that the vendor was not confused about the boundaries but can find facts as established amount to misconduct or unsatisfactory conduct. Further that this request was made after the sale after the complainants had already purchased the property. Therefore there does not seem to be any logical reason for any agent, even if he was trying to be deceptive, to not pass on the information from the vendor, unless there

was another call or email on the same day. However, the Tribunal cannot speculate as the evidence before us cannot support any conclusion other than that reached by the District Court.

[16] Finally there is insufficient evidence for the Tribunal to reach the conclusion that the Complaints Assessment Committee erred in determining itself that there was insufficient evidence. The Tribunal does consider that Mr Brown should have forwarded this email to the appellants as it may have assisted them. However, this is because it was a direct answer to the question they posed. The failure to send it on does not mean Mr Brown was deceptive or fraudulent. There is simply not enough evidence to draw that conclusion. The appeal must therefore fail.

[17] The Tribunal have already dealt with one case by the appellants relating to the property that they purchased in Birkenhead. It has clearly been a most unhappy experience for them. The Tribunal wish them the best in the future..

[18] Accordingly the Tribunal dismisses the appeal.

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

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Ms K Davenport QC
Chairperson

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Ms N Dangen
Member

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Ms C Sandelin
Member

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1 *Z v CAC* [2007] NZSC 45