BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 48

READT 021/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	KERRY LESLIE BOWDEN Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 403) First Respondent
AND	JESSICA BLOEMENDAL Second Respondent
Hearing:	22 August 2018, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr Bowden Mr M Mortimer, on behalf of the Authority No appearance by or on behalf of Ms Bloemendal (not participating in the appeal)
Date of Decision:	10 September 2018

DECISION OF THE TRIBUNAL

Introduction

[1] On 19 January 2018, Complaints Assessment Committee 403 ("the Committee") made a finding of unsatisfactory conduct against Mr Bowden ("the substantive decision").[1] On 10 April 2018, the Committee censured Mr Bowden, ordered him to pay a fine of $1,500.00, and ordered him to complete and pass Unit Standard 23136 ("the penalty decision").

[2] Mr Bowden has appealed against both the substantive and penalty decisions. Ms Bloemendal has advised the Tribunal that she does not wish to participate in the appeal.

The complaint

[3] Mr Bowden was the listing salesperson for a property at Papakura ("the property"), owned by Ms Bloemendal. The property comprised a house (described in the marketing material as a "do-up") on a land area of 736m^2.

[4] Ms Bloemendal's complaint was that Mr Bowden misled her as to the potential to subdivide the property, by categorically telling her that it was not possible to subdivide it, as the land was less than 800m^2, unless additional land was bought from a neighbour. She said in her written complaint that while Mr Bowden told her that if her property could be subdivided they would be looking at a very different price range:

> He stated that categorically there was no chance of my property being subdivided. He said that the minimum land area required to be able to subdivide was 800 m^2 and my property is 736 m^2. … the only way we could look at that option would be if a neighbour was willing to sell me some land. …

[5] She said that she was later told that the property could be subdivided, and learned that an application had been made to subdivide it. Ms Bloemendal sold the property for $540,000, and stated in her complaint that if she had known the property could be subdivided she would never have accepted a "rock bottom" price of $540,000 for a house that needed to be done up.

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[1] Complaint C20545, re Kerry Bowden. The decision is incorrectly dated 19 January 2017.

[6] Mr Bowden responded to the complaint, saying that he did not make a categorical statement that the land was "not subdivisible". Rather, he said that he told Ms Bloemendal that it was possible to "get around the minimum size if you submitted a house plan showing compliance with all relevant aspects of the District Plan (not the new Auckland Unitary Plan) for both the existing house and the proposed development at the time".

[7] Mr Bowden further said in his response that he and Ms Bloemendal talked about subdivision and he "did my basic investigation and reported to Jessica [Bloemendal] that the available land was less than the 400m^2 minimum required mentioned on Table E38.3.2.1" for a "vacant lot" subdivision. He said that "the other option" was by way of a "joint use land subdivision" (which he described in his response as "a completely different kettle of fish and takes a lot of time, experience and money") and that he explained this to Ms Bloemendal when she first asked about subdivision. He said that he gave her an example of a property where this had been achieved.

[8] We note that while varying terminology was used both in Mr Bowden's response to the complaint (including his account of his conversation with Ms Bloemendal), it is evident from the material before the Committee that Mr Bowden was referring to the process of applying for and being granted resource consent for a subdivision.

[9] Mr Bowden said that Ms Bloemendal had earlier indicated that she did not have much cash available in relation to some renovations, and he therefore assumed that taking on a "joint use land subdivision" would also be out of her budget and there was always the risk that the proposal might be turned down.

[10] Ms Bloemendal replied to Mr Bowden's response. She said:

> All I can say is that Kerry [Bowden] categorically told me that there was no way that my property could be sub-divided without the extra land mentioned. It was even mentioned at one point with other people present".

[11] She went on to say

> Yes, Kerry did say that developers could get around the size of a section, but as I have mentioned, he said this could only be done on a vacant site not one with a house on it … he has never talked "joint use land subdivision" etc – although he did say something at one point about "cross lease" sections.

[12] The Authority's investigator noted in his Investigation Report that:

> Acquired through the course of this investigation are the decisions of the Auckland Council with respect to Resource Consent applications made by the buyer proposing 1) Land Use consent to construct a second dwelling on site and 2) Subdivision Consent for a 2-lot subdivision around the dwellings to create free hold titles, namely Lot 1 – 328.2m^2 & Lot 2 – 407.8 m^2. The Council granted both applications on 10 August 2017.

[13] A copy of the Council's "Restricted discretionary – land use consent (s 9)" granted to the purchaser of the property was included in the material before the Committee. This was referred to Mr Bowden, who referred to his statement as to having told Ms Bloemendal of a subdivision he had completed "down to 250 m^2". He also referred to a record on the Council file that Ms Bloemendal had been told by an Auckland Council staff member that any vacant lots needed to be at least 400 m^2, but that it was possible to subdivide where resource consent had been granted where the application showed compliance to the standards.

The Committee's decision

[14] The Committee recorded that:[2]

> The complaint in essence relates to a single question. Did the Licensee tell the Complainant that sub-division of the Property was not possible when as events subsequently showed, that advice was incorrect?

[15] The Committee stated that Mr Bowden had admitted that:[3]

> … he did have the discussion with the Complainant as she alleges. He agrees that he did tell her about the section size requirements as he then understood them, and says that he "did my basic investigation and reported to [the Complainant] that the available land was less than the 400 m^2 required mentioned on Table E38.3.2.1."
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> In fact there are a number of options which a potential sub-division may fall within and the Property was in fact sub-divisible with consent from the local authority.

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2 Substantive decision, at paragraph 3.1.
3 At paragraphs 3.2 and 3.3.

[16] The Committee then referred to "a number of explanations" offered by Mr Bowden and concluded:[4]

> With respect the explanations provided miss the point. None of the explanations detract from the fact that both the Complainant and the Licensee agree that in answer to a direct question he told her without qualification that the Property was not sub-divisible when in fact it was.
>
> A prudent licensee exercising appropriate care and skill and taking care not to mislead his client would not have given so unequivocal an answer to a client. The Licensee gave his advice without making any inquiries at the Council or consulting any experts, nor did he suggest that the Complainant should make those inquiries.
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> The Complaints Assessment Committee finds that his conduct in providing unequivocally incorrect information to the Complainant breached Rule 5.1 (care and skill), 5.2 (sound knowledge), 6.4 (not to mislead) and 9.1 (act in best interests) and is unsatisfactory.

Appeal issues

[17] This appeal is against the Committee's determination that Mr Bowden engaged in unsatisfactory conduct. The Tribunal must arrive at its own assessment of the merits of Ms Bloemendal's complaint. If the Tribunal concludes that the Committee's decision was wrong, then it must act on its own view.[5]

[18] The issue for the Tribunal to determine is whether the Committee was wrong to find that Mr Bowden gave an "unequivocal" answer "without qualification" to a direct question from Ms Bloemendal that the property was not subdivisible, when in fact it was.

Submissions

[19] Mr Bowden submitted that he did not state "categorically" that the property was not subdivisible. He agreed that he told Ms Bloemendal that there was insufficient land area for a complying subdivision as a vacant lot subdivision unless she purchased more land. He submitted that this is what the District Plan provided, and was correct.

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4 At paragraphs 3.4 – 3.13.

5 See *Austin, Nichols & Co Ltd v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141, at [3] and [5]. See also, for example, *Aldred v The Real Estate Agents Authority (CAC 413)* [2018] NZREADT 32.

[20] Mr Bowden submitted that he then went on to explain to Ms Bloemendal how a subdivision could be done by applying for an "joint land use consent", and explained that he had done this in a subdivision he had undertaken, and linked this to Ms Bloemendal's property. Accordingly, he submitted, his response was not unqualified, and not unequivocal. He noted that Ms Bloemendal had agreed that he had talked about other options.

[21] Mr Mortimer accepted that it was tolerably clear from Ms Bloemendal's complaint and Mr Bowden's responses that the conversation between them was not a simple question "is the property subdivisible", which was answered "no". The Authority accepted that there were two stages: first, that the "basic rule" was that 400 m^2 vacant land was required for subdivision and, secondly, that there might be another course available (as Mr Bowden had himself undertaken) where the land might be able to be subdivided by way of "joint land use consent".

[22] However, he submitted, this had not been communicated sufficiently to Ms Bloemendal, and the "takeaway message" for her was that she could not subdivide her property, and that Mr Bowden's reference to his own subdivision was a "war story". He submitted that Mr Bowden failed to link his own subdivision to Ms Bloemendal's property: he should have gone on to say that that process might be a possibility for her.

[23] Mr Mortimer also referred to Mr Bowden's statement that he assumed, from a comment made by Ms Bloemendal as to the cash available for renovations to the house, that a "joint land use consent" might be beyond her budget. He submitted that Mr Bowden's phrasing was unclear, and did not clearly state what he said to Ms Bloemendal.

Discussion

[24] Mr Bowden was correct in saying that an area of less than 400 m^2 could not be subdivided as a vacant lot. That was the requirement under the then District Plan. Mr Bowden was also correct in saying that Ms Bloemendal had the option of buying more land to make her available land to 400 m^2.

[25] Further, consent to a subdivision could be achieved by way of an application for a resource consent for a subdivision, as Mr Bowden said in his response to the Committee. As noted above, resource consent for a subdivision was granted to the buyer of Ms Bloemendal's property.

[26] It is apparent from both Ms Bloemendal's and Mr Bowden's statements (and acknowledged by the Authority) that the conversation between them did not consist solely of a direct question "is the property subdivisible" and an unqualified, unequivocal, answer "no". It is apparent from Ms Bloemendal's reply to Mr Bowden's response to her complaint, recorded at paragraph [11] above, that (notwithstanding her denial that he mentioned a "joint land use consent"), after saying that the property was not subdivisible as a vacant lot, Mr Bowden went on to talk about the way in which a subdivision could be achieved notwithstanding the size of the section, as he had himself done.

[27] While the Committee correctly recorded that Mr Bowden admitted that he had told Ms Bloemendal about the minimum size requirement of 400 m^2 for a vacant lot subdivision, its finding that "in answer to a direct question [Mr Bowden] told [Ms Bloemendal] without qualification that the property was not subdivisible when in fact it was", did not take into account the evidence as to the "second stage" of the conversation. That is, what Mr Bowden went on to say to Ms Bloemendal as to the process by which the property could be subdivided. Similarly, the Committee's finding that Mr Bowden had agreed that he had said "without qualification" that the property was not subdivisible failed to take that evidence into account, as did its later finding that Mr Bowden's answer was "unequivocal".

[28] We have considered the evidence that was before the Committee. We are satisfied that the conversation was in two stages. First, Mr Bowden told Ms Bloemendal, correctly, that the land could not be subdivided as a vacant lot subdivision, as the available land was less than 400 m^2. Secondly, he went on to say that a subdivision could be achieved by way of buying more land to make the available land up to 400 m^2, and that there was a further option of undertaking a subdivision of less than 400 m^2, by way of the consent process he had undertaken himself in the past.

It is also evident from the material before the Committee that Mr Bowden explained the process he had gone through.

[29] Accordingly, we have reached a different conclusion from the Committee as to the merits of Ms Bloemendal's complaint. We are not satisfied that in answer to a direct question Mr Bowden told Ms Bloemendal "without qualification", or in "unequivocal" terms, that the property was not subdivisible, when in fact it was. The result is that the Committee's finding of unsatisfactory conduct, and its penalty orders, must be quashed.

Outcome

[30] Mr Bowden's appeal is allowed. The Committee's finding against him of unsatisfactory conduct is quashed, as are the Committee's penalty orders.

[31] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. 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 G Denley
Member

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Ms C Sandelin
Member