BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 19

READT 060/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	ERNEST ALBERT McNICHOLL and RETA CAROL McNICHOLL Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 416) First Respondent
AND	MARK O'LOUGHLIN Second Respondent
Hearing:	16 April 2018, at Christchurch
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Mr N O'Connor, Member
Appearances:	Mr McNicholl Ms E Mok, on behalf of the Authority Mrs K Parker and Ms A Robertson, on behalf of Mr O'Loughlin
Date of Decision:	13 May 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Mr and Mrs McNicholl have appealed against the decision of Complaints Assessment Committee 416, dated 4 December 2018, in which the Committee decided to take no further action on their complaint against Mr O'Loughlin. Mr McNicholl is authorised to represent Mr Stephen Gerald Cleaver, Ms Robyn Marie Fraser, and Mr Diego Tomas Lennon, who also appeal against the Committee's decision.

Factual background

[2] Mr O'Loughlin is a licensed salesperson engaged at Gold Real Estate Group Limited (a member of the Harcourts Group) ("the Agency"). As from 20 November 2014, Mr O'Loughlin was the sole listing agent for 13 apartments in a multi-level apartment building in central Christchurch. The apartments were initially marketed off the plans, but Mr O'Loughlin also marketed apartments after construction was completed. Mr O'Loughlin bought an apartment from the developer on 23 November 2015.

[3] Included in the apartments sold by Mr O'Loughlin before construction was completed were 302 (sold on 23 December 2014), 502 (sold on 24 January 2015, 301 (sold on 20 February 2015), and 303 (sold on 19 April 2015).

[4] The agreements for sale and purchase for each of the above sales included a number of conditions addressing the fact that the apartments were being sold off the plans: for example as to titles being issued and transferred, the vendor obtaining all necessary resource consent, approvals and permits, and the vendor's ability to make variations or alterations to the units and accessory units.

[5] A Code Compliance Certificate for the apartment building was issued by Christchurch City Council on 14 September 2016.

[6] Included in the apartments sold by Mr O'Loughlin after construction was completed were 203 (sold on 23 November 2016), 201 (sold to Mr Cleaver on 10 July

2017), 501 (sold to Mr and Mrs McNicholl on 17 August 2017), and 101 (sold to Mr Lennon and Ms Fraser on 4 September 2017).

[7] A complaint was received by the Authority on 1 December 2017, from Mr Lennon, for himself and on behalf of Ms Fraser, Mr Cleaver, Mr and Mrs McNicholl, and the purchasers of apartments 203, 301, 302, 303, and 501. The complaint alleged that Mr O'Loughlin:

[a] did not accurately identify the allocated car parking spaces when the property was shown to buyers;

[b] did not disclose that the car parking spaces did not comply with the relevant standards for off-street car parking;

[c] had promised two buyers a disabled car parking facility which was not then provided;

[d] (notwithstanding that the apartments were advertised as having "smart wiring"), did not disclose that the complex's internet and telephone cabling was incompatible with the fibre networks available on the street; and

[e] did not disclose issues the complex had with acoustic insulation.

[8] Mr O'Loughlin provided a formal and detailed response to the complaint, dated 27 July 2018, in which he set out in detail his dealings with the developer and purchasers of the apartments leading up to the sale of each of the apartments referred to in the complaint. He provided documents relevant to each sale.

[9] The complaint was not able to be resolved and was referred by the Committee for investigation.

The Committee's decision to take no further action on the complaint

[10] The Committee set out the factual background at paragraphs 3.7 to 3.11of its decision, as follows:

3.7 It is understood that the Properties were initially marketed off the plans in order for the developer to ascertain whether there was sufficient interest for the development to be financially viable. In late 2014, the Licensee obtained a sole listing agreement from the developer. The developer also retained the right to sell the apartments privately.

3.8 In December 2014, amendments were made to the carparks.

3.9 The property information at the time stated that the properties would have smart wiring and open carports. The marketing at the time (2014) stated that the Properties would be built to new Building Code standards, including with maximum soundproofing.

3.10 In January 2015 the Licensee purchased one of the apartments, the remainder of the Properties were sold to the respective Complainants by either the developer, the Licensee or other Harcourts salespersons between January 2015 and September 2017, with specific Agreements for Sale and Purchase (ASPs) with further terms relating to the development and completion of the units. It is understood that, during the listing, marketing and sale of the Properties, the developer contacted the Licensee several times advising of plan changes including with respect to the carparks.

3.11 The Code of Compliance Certificate [sic] for the development was issued by the Christchurch City Council on 14 September 2016.

[11] The Committee's findings on each of the complainants' issues were as follows:

Carparks

3.14 The Committee notes that, while the apartments were advertised as having open carports, the issues of the carparks are illustrative of the problems that can arise when purchasing off plans. Requirements could, and did, change along the way and the Committee is satisfied that the Licensee did not represent to any of the Complainants that the carparks would be of a particular width. Further, the Committee is satisfied that the Licensee told the purchasers (once the apartments were built) which carpark belonged to which apartment.

3.15 In addition, the Committee notes that the carparks comply with resource consent RMA92029274 and its conditions.

Facilities for disabled people

3.17 In the absence of any evidence corroborating the Complainants' allegations here, the Committee cannot find this allegation to be made out and, accordingly, the Committee is satisfied the Licensees made no representations to any of the Complainants as to the provision of facilities for disabled persons.

Smart wiring

3.19 The Committee acknowledges that the apartments were advertised as having smart wiring. At the time, the Category 6 UTP wiring used was the gold standard in internet cabling. Any subsequent issues with the internet appear to the Committee to have been due to the failure of the developer to provide good access once fibre became available after the development of the Properties. The wiring used was top of the line and the Committee considers there are no issues

> with broadband which can be sheeted home to be the responsibility of the Licensee and, indeed, were beyond the control of the Licensee who advertised the Properties with the standard wiring that was in place at the time. All apartments have, since mid-2018, had fibre installed at no cost to the owners.
>
> 3.20 The Committee notes that the Complainants were advised by Enable Networks Ltd in October 2017 that when the building was constructed the building contractor completed construction in a way that prevented fibre running to individual apartments. This is not an issue that the Licensee has any control over, or responsibility for and the Committee accepts that he did not have knowledge of widespread internet issues,

Acoustic insulation

> 3.23 The Committee accepts from the documentation provided that the acoustics met the required NZ Building Code standards and the Committee fails to see how any shortcomings in the acoustics can be attributed to the Licensee. These are issues for the developer who, in turn, has carried out testing which shows minimum standards were met or exceeded.

Appeal

[12] The appeal was brought by Mr and Mrs Nicholl, Mr Cleaver, Mr Lennon, and Ms Fraser, each of whom bought their apartment after construction was completed. They contended that the Committee was wrong to decide to take no further action on their complaint. They submitted that:[1]

[a] Mr O'Loughlin misled the Committee into believing that all of the apartments were bought off the plans;

[b] there was no "smart wiring", or indeed any landline or internet connection capability; and

[c] Mr O'Loughlin misled them regarding carparks, by virtue of his having shown them his own carpark.

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[1] There was no appeal against the Committee's findings concerning facilities for disabled people, or acoustic insulation.

Did Mr O'Loughlin mislead the Committee into believing that all apartments were bought off the plans?

Submissions

[13] Mr McNicholl submitted that the Committee wrongly assumed that all of the complainants had bought their apartments off the plans, as each of them bought their apartment after the apartment and carpark buildings were fully completed and consented and, in some cases, had been occupied by other owners. He submitted that the Committee's error arose out of misrepresentations by Mr O'Loughlin.

[14] Mrs Parker submitted that Mr O'Loughlin had made no misrepresentations. She submitted that he had gone to great lengths to set out the individual circumstances of each of the complainants' purchases, and had specifically noted that the appellants' apartments had been completed before they purchased them. She further submitted that the Committee recognised this in finding (at paragraph 3.14) that Mr O'Loughlin "told the purchasers (once the apartments were built) which carpark belonged to which apartment".

Discussion

[15] It is evident from paragraphs 3.7 to 3.11 of the Committee's decision that while it was aware that apartments were sold up to September 2017, it did not appreciate that not all sales of apartments (and in particular, those to the appellants) were off the plans, and the agreements for sale and purchase of the appellants' apartments (as contained in the bundle of the material before the Committee) did not contain the "further terms relating to the development and completion of the units" referred to by the Committee.

[16] The Committee's decision proceeds on the basis that the appellants bought their apartments off the plans. They did not do so. The Committee should have distinguished between complainants who bought off the plans and complainants who did not, as the factual circumstances for each were different. No such distinction was made. We do not accept that in saying that Mr O'Loughlin identified carparks to purchasers "once the apartments were built" the Committee recognised that some apartments had been bought after construction was completed. To the contrary, the

finding that purchasers were told something after construction was completed demonstrates the Committee's misunderstanding as to when the apartments were bought.

[17] We accept Mrs Parker's submission that Mr O'Loughlin's response to the complaint referred to each sale to the complainants, and attached the relevant agreements for sale and purchase. It is clear from Mr O'Loughlin's response, and evident on the face of the documents he submitted, that the sales to the appellants occurred after construction was completed, and titles were issued. However, Mr O'Loughlin's response was summarised in the investigator's report as being that apartments were bought off the plans (without any clear distinction being made as to those sold after completion), and that error was reflected in the Committee's decision.

[18] While it is clear that the Committee did not appreciate that the appellants had not bought their apartments off the plans, we are not satisfied that that arose from any misrepresentation or attempt to mislead the Committee by Mr O'Loughlin.

Did Mr O'Loughlin deliberately misrepresent the carpark allocated to each apartment by showing the appellants his own carpark?

Evidence before the Committee

[19] It was accepted that Mr O'Loughlin showed prospective purchasers the carpark allocated to his own apartment. At issue was whether he made it clear to the appellants which particular carpark was allocated to the apartment they were interested in buying/

[20] Mr and Mrs McNicholl's evidence was that they did not see their own carpark, or have it identified to them, until the day they settled their purchase. At the hearing, Mr McNicholl said that there was no copy of the Title and Flats Plan annexed to their agreement for sale and purchase, identifying his allocated car park.

[21] Mr Lennon and Ms Fraser's evidence was that Mr O'Loughlin showed them a carpark (which had internal access) before purchasing their apartment. However, they also said that just before they signed their agreement for sale and purchase, they were shown their (different) allocated carpark, which was uncovered. A copy of the Title

and Flats Plan was annexed to the agreement for sale and purchase signed by Mr Lennon and Ms Fraser.

[22] Mr Cleaver told the Authority's facilitator that Mr O'Loughlin had shown him a carpark and said it would be his, but the carpark turned out to be Mr O'Loughlin's. However, Mr O'Loughlin said in his response to the complaint that he showed Mr Cleaver's sister (who signed the agreement for sale and purchase for his apartment) the allocated carpark for the apartment. While this was an uncovered carpark, he said that Mr Cleaver's sister was happy with it, as Mr Cleaver did not drive and did not own a car.

Submissions

[23] Mr McNicholl submitted that the Committee was wrong to find that Mr O'Loughlin told the appellants which carpark belonged to the apartment they were interested in buying. He submitted that he showed each of the appellants the covered carpark allocated to his own apartment (which had the best access) without identifying it as such, and led them to believe that it would be theirs.

[24] Mrs Parker submitted that Mr O'Loughlin showed the appellants the carpark allocated to his apartment as a "benchmark", and it was his standard practice throughout the marketing process. She also submitted that Mr O'Loughlin had shown Mr and Mrs McNicholl their allocated carpark before they signed an agreement for sale and purchase, and that the carparks were consented, and legal.

[25] Ms Mok submitted that there was no independent evidence to corroborate the appellants' claim that Mr O'Loughlin deliberately sought to mislead them about the width of their allocated carparks by showing them his. She submitted that in the light of the competing accounts, the Committee was correct in concluding that the appellants had not established this claim.

Discussion

[26] We accept that when a Complaints Assessment Committee is faced with competing accounts, and there is no independent evidence supporting one of those accounts, it may be appropriate for the Committee to conclude that the complainant has not established the claim. However, it is evident from paragraph 3.14 of the Committee's decision that while it found that the appellants "had not established" their claim that Mr O'Loughlin had misrepresented the carparks allocated to the appellants by showing them his own carpark, it went on to find that Mr O'Loughlin "told the purchasers (once the apartments were built) which carpark belonged to each apartment".

[27] This was an express finding in favour of Mr O'Loughlin, and adverse to the appellants. However, the evidence before the Committee did not support a positive finding that Mr O'Loughlin told each of the appellants which was their allocated carpark when marketing the apartments to them.

[28] There is no dispute that Mr O'Loughlin showed the appellants his own carpark in the course of marketing the apartments. We are concerned at his submission that he did so only as a "reference point" or "benchmark".

[29] It would have been reasonable for Mr O'Loughlin to use his carpark as a reference point when he was marketing the apartments to prospective purchasers off the plans, before allocations were settled, and titles issued. At that time it may have been the only carpark which would not be changed. However when that was no longer the case, as with the appellants, there would be no good reason to use a "reference point". The allocation of carparks had been finalised. The only carpark that Mr O'Loughlin should have shown to any of the appellants was that allocated to the apartment they were interested in buying.

[30] It is not the case that there was no independent evidence corroborating the appellants' claim. Mr and Mrs McNicholl signed their agreement for sale and purchase on 17 August 2017. There was no copy of the Title or Flats Plan (which would have identified the allocated carpark as an accessory unit) attached to the agreement. Four

days later, on 21 August 2017, the vendor advised Mr O'Loughlin of the carpark allocated to the McNicholls' apartment. Mr O'Loughlin could not have clearly identified the McNicholls' apartment to them when he was not told which it was until four days later.

[31] On the evidence, we find that by showing the appellants his own carpark Mr O'Loughlin, at the least, created confusion by not making it sufficiently clear that what he was showing them was the carpark for his own apartment, which was not going to be their allocated carpark.

[32] We are not satisfied that Mr O'Loughlin deliberately misled the appellants as to the carparks allocated to their apartments. However, we are satisfied that his conduct in not making clear to the appellants which carpark was allocated to the apartment they were interested in buying fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee. It is therefore unsatisfactory conduct under s 72(a) of the Act.

Did Mr O'Loughlin deliberately mislead the appellants as to "smart wiring" in the apartments?

Submissions

[33] Mr McNicholl submitted that the Committee was wrong to dismiss the appellants' complaint on this point. He accepted that the "Category 6 UTP cabling" referred to by the Committee in paragraph 3.19 of its decision is widely recognised as appropriate internet cabling, but submitted that the problem was that the Category 6 cabling was incompatible with fibre, so that fibre could not be connected to the apartments. He submitted that there was no landline or internet connection capability via any wall plate, socket, or outlet in any apartment for some 10 months after appellants took possession.

[34] Mr McNicholl also submitted that the Committee was wrong to find (at paragraph 3.19 of its decision) that "all the apartments have had fibre installed in them at no cost to the owners", as that implied that Mr O'Loughlin or the vendor/developer arranged it and met the cost. He submitted that in fact the Body Corporate arranged,

for the installation, the provider met the cabling costs, and apartment owners met the cost of new ceiling panels which were required.

[35] Mrs Parker submitted that the apartments had smart wiring as advertised, and there was no misrepresentation. She submitted that Mr O'Loughlin correctly told the appellants that he had an internet connection in his own apartment. Although he had had some issues with the connection, those issues had been resolved, and he was not aware of any general issues. She submitted that Mr O'Loughlin was entitled to assume there was no building-wide issue as to internet connection, and the Committee was entitled to find likewise.

[36] Ms Mok submitted in the light of the competing evidence, the Committee was not wrong to conclude that Mr O'Loughlin did not know of a general issue, and therefore did not fail to disclose it.

Discussion

[37] The apartments were advertised as having "smart wiring". The apartment complex had Category 6 internet cabling installed in its "communications" (or "comms") room.

[38] On 29 November 2016, Mr O'Loughlin was advised by the rental manager of his apartment as follows:

> You may have had some info about the issues around fibre internet connection. Long and short is that fibre has been taken into the building as far as the comms room but rest of the cabling into each individual apartment is copper so 2 different systems that are not compatible. So I have emailed [the developer] about what he intends to do as I believe it is his responsibility to sort this out or we will have 14 different owners all getting holes being made in walls to get connections made. Bit of a nightmare.

[39] The rental manager's advice was a clear indication to Mr O'Loughlin that there was a problem with internet connectivity (and therefore "smart wiring") that extended beyond his own apartment and affected "each individual apartment", and "14 different owners" would be getting holes made in their walls to get connections made. This advice was given to him well before any of the appellants bought their own apartments.

[40] Mr O'Loughlin's rental manager provided a "fix" for the tenant of his apartment, first by providing him with a "hotspot", and then by way of a 12-month contract. However, that was temporary, and in respect of his own apartment, only.

[41] We therefore reject Mrs Parker's submission that issues with internet connection had been resolved, Mr O'Loughlin was not aware of any general issues, and he and the Committee were entitled to assume that there was no building-wide issue as to internet connection. The Committee was wrong to accept (at paragraph 3.20 of the decision) that Mr O'Loughlin did not have knowledge of widespread internet issues.

[42] We find that Mr O'Loughlin did not have any reasonable basis to assume that there was no longer an incompatibility issue between fibre and the internet cabling in the communications room, and that apartments other than his own would be affected.

[43] We accept that the incompatibility issue between fibre and the Category 6 internet cabling was not under Mr O'Loughlin's control, but once he was aware of it, he was obliged to make prospective purchasers aware of it. The fact that it was a problem that was another person's fault or responsibility did not absolve him from meeting his obligations. Mr O'Loughlin was aware of the issue before apartments were marketed to the appellants.

[44] Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 provides that:

> A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

[45] The incompatibility between fibre and the Category 6 internet cabling was information that should in fairness have been provided to the appellants. We are not satisfied that Mr O'Loughlin deliberately withheld this information. However, he should have advised them of the issue, but did not do so. He did not correct the advertising that the apartments had "smart wiring". His failure to disclose the issue to the appellants was in breach of his obligation under r 6.4. It was also conduct that fell short of the standard that a reasonable member of the public is entitled to expect from

a reasonably competent licensee, and was therefore unsatisfactory conduct under s 72(a) of the Act.

[46] We add that we accept that if the Committee understood that the developer and/or Mr O'Loughlin paid for fibre to be installed, then it was a misunderstanding. The Body Corporate arranged for the installation, the internet provider paid for the cabling, and individual owners paid for replacement ceiling panels where required. However, we do not consider that the issue is germane to the appeal.

Decision

[47] We have found that the Committee erred in:

[a] reasoning on the basis that the appellants bought their apartments off the plans;

[b] finding that Mr O'Loughlin showed the appellants their allocated carparks before they agreed to buy their respective apartments; and

[c] finding that Mr O'Loughlin did not have knowledge of a building-wide issue of incompatibility between fibre and the Category 6 internet cabling, therefore did not breach any obligation as to disclosure of the incompatibility.

[48] We find that Mr O'Loughlin is guilty of unsatisfactory conduct under s 72 of the Act in:

[a] not clearly identifying to the appellants which carpark was allocated to the apartment they were interested in buying; and

[b] not disclosing to the appellants that there was an incompatibility between fibre and the Category 6 cabling in the building.

[49] We consider it appropriate that the issue of what penalty orders (if any) should be made is determined on the basis of written submissions by or on behalf of the

parties. In the event that the parties agree to follow this course, then submissions for the appellants are to be filed and served within 14 days of the date of this decision, then submissions on behalf of Mr O'Loughlin within a further 14 days, and submissions on behalf of the Authority within a further 14 days.

[50] If any party seeks an oral hearing, the Tribunal's case manager must be advised accordingly. A hearing by video link may be possible.

[51] 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

_____
Mr N O'Connor
Member