BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 31

READT 026/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	LUCY & GARY DOUGLAS Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 416) First respondent
AND	TRACEY & NICHOLAAS HOEFHAMER Second respondents
Hearing:	19 November 2018, at Auckland
Tribunal:	Mr J Doogue, Deputy Chairperson Ms C Sandelin, Member Mr G Denley, Member
Appearances:	The Appellants in person Mr R W Belcher, on behalf of the Authority No appearance by or on behalf of second respondents
Date of Decision:	1 August 2019

DECISION OF THE TRIBUNAL

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[1] The appellants (the licensees) are Gary Douglas, a licensed salesperson, and Lucy Douglas, a licensed agent. They were employed by Barfoot and Thompson Limited at the time described in these events which was in October 2013.

[2] The second respondents (the complainants) allege that the licensees breached their obligations under the Real Estate Agents Act 2008 ("the Act") and under rr 5.1 and 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) as follows:

> 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
>
> 6.4 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.

[3] The complaint concerns the purchase by the complainants of a property situated at 15/14 Airborne Road, Rosedale, Auckland. It arises out of the circumstances in which the agreement for sale and purchase (ASP) was entered into. There is no dispute that the licensees supplied the complainants with a brochure leading up to the auction. Relevantly, the brochure stated:

> This two double bedroom apartment with generous warehouse facilities, consists of 123 sqm and is presently being used as a "live in" plus Consulting Rooms plus storage.

[4] It is alleged that at an open home one or other or both of the licensees showed the complainants through the property and pointed out what the latter described as an "unconsented mezzanine floor that had a temporary look about it". The complainants said that they were not concerned about the presence of an unconsented mezzanine floor in the property because they could always remove it if they did not want it.

[5] A central element of the complaint relates to the description of the property as being a "two bedroom" property. The essence of the complaint which the complainants make is that the property may have had two bedrooms but one of them had not been constructed pursuant to a building consent from the territorial authority.

[6] The complainants assert that they discovered that part of the property did not have a building consent when they themselves came to sell the property. They say that as a result the property was of lesser value than it would otherwise have been had it complied with the description given by the licensees in the brochure and elsewhere.

[7] The Complaints Assessment Committee (the Committee), in a decision which we will make further reference to subsequently in this decision, found that the conduct of the licensees had been misleading and had not met the required standard.

[8] The licensees have brought an appeal against the findings of the Committee. They assert that they did not engage in misleading conduct in relation to the sale. It is their position that the property did actually contain two bedrooms. The licensees assert that there is no dispute that there was one bedroom on the ground floor of the property. We accept that contention. The second bedroom, they say, was situated on a mezzanine floor and, again, that appears to be correct. The licensees assert that they told the complainants before they entered into the ASP that construction of the mezzanine floor, on which the second bedroom was constructed, had not been the subject of a building consent.

[9] The licensees say that they found out about the problem with the lack of building consent prior to the complainants entering into the ASP and that they acquainted the solicitor acting for the vendor with the problem. Consequently, a provision was inserted into the ASP as a further term of sale, cl 22.0, as follows:

> The purchaser acknowledges that they have been made aware that certain aspects of the property, namely the mezzanine floor, may not comply with the current building code and/or that no Code Compliance Certificate has been issued in respect of the mezzanine floor. Accordingly, the Vendor gives no warranty as to the same and as from the date of this Agreement the Vendor shall be under no obligation to the Purchaser to achieve compliance or precure a Code Compliance Certificate nor liable for any expense, loss or liability suffered by the Purchaser in relation to such non-compliance and the Purchaser agrees that they are purchasing the property on an "as is where is" basis.
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> …

[10] Prior to the auction proceeding on 31 October 2013, Barfoot and Thompson generated a document which was entitled "Residential Listing Full Report – Office Use Only". This document while undated was apparently prepared at some time prior to 27 October 2017, which is the date of the print copy contained in the bundle of evidence that was before the Tribunal at the hearing of this matter.[1] The report just mentioned contained the following text:

> Upstairs two bedroom apartment with small part as mezzanine floor not permitted.

[11] There is no evidence that the residential listing full report was provided by the licensees to the purchasers. The entry in the residential listing full report, though, does confirm that the licensees must have known about the lack of permit for the mezzanine floor.

[12] The contentions of the complainants are that they interpreted the various statements that were made about the property as amounting to a representation that part only of the mezzanine floor was not consented and therefore, by implication, the part on which the second bedroom was constructed had been consented. They say that this was incorrect and that because the mezzanine floor in its entirety had not been consented, there was no consented second bedroom on the property. Therefore, the property had been misrepresented to them. The complainants arrived at their view that the non-consenting applied to only part of the mezzanine floor because they said that there were two discreet areas of the mezzanine floor, one of which had been recently the subject of construction (that being the bedroom) and another storage or vacant area which appeared to represent the building in its original "as built" state. While the contentions which we have just set out are not stated in the words of the complainants, we consider that they provide a fair summary of what the complainants are actually alleging in this case.

[13] It is incumbent upon the Committee to prove that on the balance of probabilities the licensees' conduct amounted to misrepresentation of the state of the building. The evidence which was placed before us was to some extent confusing and difficult to

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1 BoD 35.

follow. If any doubt arises from those circumstances, it must favour the position of the licensees.

[14] When they were interviewed by the investigator from the Authority, the licensees, it is alleged, made a number of statements which are relied upon by the Committee as demonstrating knowledge on the part of the licensees of the true position and their culpability for misrepresenting the same. The impression that we have is that the statement which the licensees provided in writing to the investigator was unclear and may have been addressed to more than one subject.

[15] It is clear, as we shall note shortly, that, in the course of the investigation by the Authority, the licensees did respond to the issue about whether or not the mezzanine floor was the subject of a building consent. They did not, however, restrict their reply to that aspect of the case. They seem to have understood what the complaint they were facing was, namely, that they were being criticised for their failure to understand how many bedrooms were authorised by the local planning ordinances for inclusion in a development which was the subject of the sale. They said that:

> There was genuine belief and common understanding that the residential component could be all or none of the available space and have always been marketed as how they were configured at the time by the current owner, with only the restrictions set by the Body Corporation and with a general counsel consent being unique by nature.
>
> …
>
> We concur that we now know the reality of Council regulations and yes it was an oversight on our behalf for not knowing, and brings a great deal of concern to us that this one case has the potential to create a "tidal wave" of complaints from most previous sales of these units as most previous sales would have been sold under this common misinterpretation of Council regulations.

[16] This answer does not seem to have been responsive to the question which the investigator had invited a response. The investigator had sought comments on the following matter:

> (a) Failure to disclose the second bedroom was unconsented and therefore could not legally be used as a bedroom.

[17] However, further on in their written response the licensees did actually respond to the particular matter that the investigator had put to them. They said:

> However in regard specifically to the complainants, we believe that they were well aware of the mezzanine floor and configuration and once again relying on their memory of events and discussions four years ago and can be evidenced by the previously supplied documentation by them. We went to great lengths to point out the configuration legalities and created a specific clause so that it was very clear to everyone the specifics of the unit's variations.

[18] We understand this to mean, in plain English, that the licensees say that they did tell the complainants that the mezzanine floor had not been consented and that they also took steps to have a clause included in the agreement which would deal with this aspect of the ASP. Summarising the discussion to this point, there is good reason to suppose that the licensees did in fact bring to the attention of the complainants the fact that no building consent had been obtained for the mezzanine floor.

[19] It is next necessary to deal with the contention by the complainants that they considered that the representations that were made to them were to the effect that only part of the mezzanine floor was "unconsented" and that therefore the other part was "consented".

[20] The representations are to be judged by considering the actual words used as they would have been understood by a reasonable person who had knowledge of the relevant background factual context. We do not consider that the meaning which the complainants attached to the alleged representations is sustainable when viewed in the light of the criteria just mentioned. This whole dispute concerns the status of the bedroom which was added subsequently to the building after it had been originally completed.

[21] The representations did not relate to the unimproved balance of the mezzanine floor. It can be rhetorically asked why a representation would be made in regard to that part of the floor which had never been the subject of additional construction since the original building was erected.

[22] We consider it clear that the effect of the representations which the licensees made were to convey to the complainants that the bedroom on the mezzanine floor,

which had been added after the original construction, had not been consented to. This is viewed in the context of the special cl 22, which the licensees arranged to have inserted into the contract.

[23] While the licensees had made a representation that there were two bedrooms in the property, that was clearly on the basis that one of those bedrooms had been constructed without a building consent. The complainants were never misled about that aspect of the matter. Whether the person who constructed the bedroom had contravened the Building Act 2004 and regulations made under it by constructing the bedroom without consent is irrelevant. All that the licensees were doing was stating the fact that part of the property was used as a bedroom which had not been the subject of a building consent. They accepted no responsibility beyond that point.

[24] Because the appeal in this case is a hearing de novo, we are not required to expressly critique the reasoning which the Complaints Committee relied upon in coming to a different view on whether there had been a breach of the Act and the regulatory regime. Out of deference to the views of the Committee, though, we make the following brief comments.

The decision of the Committee

[25] The nub of the decision which the Committee came to is described in paragraph 3.2 of their decision on orders dated 30 April 2013. The Committee says the licensees had misrepresented what they were selling which caused the complainants to purchase a property they might not have purchased had they had all the information.

[26] The complainants, the Committee said, emphasised that while they were not concerned about the temporary storage mezzanine that was pointed out to them at the time, they doubt that they would have bid and purchased at auction had they known the second bedroom was unconsented. These contentions were upheld by the Committee.

[27] For the reasons that we have already given, we consider that the plain and straightforward factual position was that the representees/complainants ought

reasonably to have understood that the mention of a lack of consent applied to the second bedroom.

Not knowing the "reality of the Council regulations"

[28] In its earlier decision of 19 February 2018 when it gave its reasons for finding the charges proved, the Committee made a number of additional points.

[29] The Committee was critical of the licensees for, as they put it, "not knowing the reality of the Council regulations".

[30] We are not convinced that this is an issue that bears upon the question of whether the charge against the licensees is proved. The licensees were charged with essentially misrepresenting the number of bedrooms in the property. They can only have been liable if they did actually materially represent that there were two bedrooms when there was only one.

[31] It is correct that initially when they prepared advertising material the licensees included an assertion in that material that the property was a two-bedroom property. In a literal sense, that was correct.

[32] There is no explicit evidence about the basis upon which the licensees publicised the property as being a two bedroom one. It is clear that they visited the property. No doubt if they were shown the property they would have noticed that there were two bedrooms. We consider on the balance of probabilities that they had grounds for asserting that there were two bedrooms in the property. They would not have known that that was a misrepresentation unless they had additional knowledge about the consent status of the level on which the second bedroom was located.

[33] In regard to this last step in the chain of reasoning, the Committee appears to have concluded that while the licensees may not have known about the absence of a building consent, they could have found out that fact by making enquiries of the local territorial authority. It is implicit in the decision of the Committee that because the

licensees did not make enquiries, they became liable for a misrepresentation about the bedroom numbers.

[34] However, we are in no doubt that the licensees did find out about the lack of consent for the second bedroom and did bring it to the attention of the complainants, and arranged for a clause to be inserted into the ASP to cover the situation. Any discussion about how they might have discovered this matter at an earlier stage by checking the council's records seems to us to be irrelevant.

[35] Even if this was a relevant aspect of the case, we do not consider that it has been proved that the licensees breached their obligations.

[36] Rule 6.4 which is the specific rule contained in the Rules provides that a licensee must not mislead a customer, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client. That rule appears in the part of the rules which establish standards of professional conduct and which includes an obligation to act in good faith and deal fairly with all parties: r 6.2.

[37] The obligation not to mislead does not make a licensee liable where he or she has acted reasonably and in good faith. The licensee does not assume an unconditional liability in regard to all statements that he or she makes about a property on behalf of their principal. A licensee will be liable where he or she knowingly, recklessly or carelessly makes a misstatement about a property.

[38] It is not, however, the obligation of a licensee to research background facts and circumstances where there is no ground for believing that the information which has been provided to the licensee, in which he or she passes on, is not correct. It is not consistent with the objectives of the Act that licensees should have such an obligation. To assume an obligation exists in such circumstances is to confuse the obligations of licensees with those of solicitors and other persons who are routinely required to advise intending purchasers about the transaction into which they are intending to enter.

[39] On the face of it, a licensee who is given information that a property contains a number of bedrooms is not required, in the absence of any apparent reason why there might be doubt about whether consent has been obtained for the construction of a bedroom, to check the position further. For example, by making enquiries of the Council.

[40] A further ground upon which the Committee concluded that the marketing of the property had been misleading was that:

> A read of the Body Corporate Rules would also have quickly established that only the upstairs of the building could be used as residential.

[41] The first matter of concern is the way the complaint made against the licensees was conveyed to them by the investigator. The case against the licensees was not put to them for comment in a way that would suggest that they were to be criticised for failing to have regard to the content of the Body Corporate Rules and whether those rules permitted the use of part of the ground floor for the purposes of a bedroom.

[42] We consider that by taking the course that it did with regard to the Body Corporate Rules, the Committee was assessing the liability of the licensees on a ground which was not squarely put to them during the investigation process. We therefore make that consideration because of the likelihood of procedural unfairness.

[43] This type of point is typically one that would be taken in judicial review proceedings. But we consider that we have power to consider the issue pursuant to s 111 of the Act in the context of an appeal. That section confers on the Tribunal wide powers to confirm, reverse or modify the determination of the Committee with regard to the reliance upon the Body Corporate Rules, if we consider that to be appropriate.

[44] The orders that the Tribunal is entitled to make under s 111(4) of the Act are wide enough to permit it to reconsider the issue of the Body Corporate Rules and their relevance, if any, on this appeal. In our view, we have the power to decline to confirm a finding or conclusion of the Committee which could only be reached in circumstances involving procedural unfairness to the licensees.

[45] In any event, we consider that references to the Body Corporate Rules do not assist in the resolution of this case. We are not persuaded that, in the absence of any indications to the contrary, that the licensees were required to ensure that the current usage of the property that they were selling was in conformity with the Body Corporate Rules.

[46] No doubt a licensee should ensure that a copy of Body Corporate Rules is available for persons who are interested in purchasing a Unit Title. But that is a different thing from a requirement on licensees to obtain and review the Body Corporate Rules, and, having familiarised themselves with the content of those rules, make a judgement as to whether the vendor was complying with the rules and to disclose any non-conformity with them to interested parties. In our view, to require such an approach would be to impose a duty of unjustified extent upon the licensees.

Admissions by the licensees

[47] The Committee also considered that the apparent admission by the licensees, to which we have already made reference to earlier in this judgment, was relevant to whether there had been a breach of obligation on their part. For convenience, we will set out again the apparent concession made by the licensees to the investigator:

> … they now know the reality of Council Regulations and yes it was an oversight on their behalf for not knowing and they worry this will create a tidal wave of complaints as most previous sales of these units have been sold under this common misinterpretation of Council Regulations.

[48] The problem that the Tribunal has with these words which apparently accept some fault on the part of the licensees is that it is not clear to what part of their conduct it applies. There is a lack of precision in the record of the context in which the comments were made as recorded by the investigator. It would appear that the licensees had formed the view that this particular type of warehouse/residential development could be used in its entirety for residential purposes. It is apparently this understanding on the part of the licensees which they accept was a misunderstanding. They stated:

> We now know the reality of Council Regulations and yes it was an oversight on our behalf for not knowing.

[49] However, the statement does not appear to have any direct relevance to the proceedings brought against the licensees. We remind ourselves that the charge against them was concerned with whether they had misrepresented that the property was a two-bedroom property, but the alleged misrepresentation arising from the fact that the second level bedroom was not consented. We are not at all clear that the comments which the investigator has recorded, and which we have quoted above, actually amount to an admission on the part of the licensees that they were culpable in regard to the misrepresentation which was the subject matter of the charges.

Conclusion

[50] We consider that the licensees ought not to have been found liable in regard to the charges which the Committee brought against them. The findings of the Committee in their decision 19 February 2018 that the licensees engaged in unsatisfactory conduct under s 89(2)(b) of the Act are set aside.

[51] Following the end of arguments that we heard on 19 November 2018, the Tribunal enquired whether the licensees had intended to appeal against the penalty as well as the decision on liability which the Committee came to. The licensees replied in the affirmative. They had not, however, formally submitted an appeal against penalty.

[52] Mr Belcher for the Authority did not oppose the licensees bringing an appeal against penalty at a late stage by leave. He submitted, fairly, that because the Authority had not had an opportunity to consider what grounds an appeal would be brought on and its response to any appeal, time should be extended so that the Authority could formulate submissions in reply to the appeal.

[53] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, 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 2016.

Mr J Doogue
Deputy Chairperson

C Sandelin
Member

G Denley
Member