BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 41

READT 011/20

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	BRUCE BELLIS Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1907) First Respondent
AND	JOHN DAVISON Second Respondent

On the papers

Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms F Mathieson, Member
Submissions received from:	Mr B Bellis, Appellant Ms E Mok, on behalf of the Authority Mr T Rea, on behalf of Mr Davison
Date of Decision:	9 September 2020

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Bellis has appealed under s 111 of the Real Estate Agents Act 2008 ("the Act") against the decision of Complaints Assessment Committee 1907 ("the Committee"), dated 22 April 2020, in which it determined to take no further action in respect of his complaint against Mr Davison.

Background

[2] Mr Davison is a licensed salesperson, engaged at Farmlands Real Estate Limited, ("the Agency"). He was the joint listing salesperson for a lifestyle property, pursuant to a listing agreement signed on 8 November 2018. The property included approximately 1200 walnut trees.

[3] At the time of the listing agreement, the registered capital valuation of the property was $860,000, comprising a land value of $475,00 and improvements of $385,000. Prior to listing, Mr Davison prepared a Comparative Market Analysis, which recommended a selling range of $1,050,000 to $1,200,000, excluding the value of the walnut trees, goodwill or associated plant. In February 2019 Quotable Value Limited issued a revised rateable valuation of $1,150,000, comprising $550,000 for land value and $600,000 for improvements ("the QV valuation").

[4] The property was marketed from April 2019. Included in the information provided to prospective purchasers was a document headed "Notes for Sale and Purchase agreement for BGG orchard operation: ... Schedule of plant, equipment, value of trees, and goodwill." The information provided under the heading "Productive trees", included the following statement:

- 1200 walnut trees (grafted cultivars – approx. 39% Meyric; 52% Rex; 8% mixed grafted and purple kernel): $209,000

A footer at the bottom of each page of the document stated as follows:

> Statement of passing over information – This information compilation has been complied primarily by the collection, classification and summarisation of records, documents, representations, and financial information ("Compilation") supplied by the Vendor or the Vendor's agents. Accordingly Farmlands Real

> Estate Limited is merely passing over the information as supplied to us by the Vendor or the Vendor's agents.

[5] Mr Bellis viewed the property with Mr Davison on 11 June 2019. On 13 June Mr Bellis emailed three questions concerning the property. Mr Davison forwarded them to the vendors, who responded on 14 June, with answers to the questions. Mr Davison forward the vendors' email to Mr Bellis with the message "Answers to your questions below".

[6] As a footer to the email, under Mr Davison's sign-off and contact and address information, was the following statement ("the passing-over footer"):

> Statement of passing over of information – This Information Compilation has been compiled primarily by the collection, classification and summarisation of records, documents, representations, and financial information ("Compilation") supplied by the Vendor's agents. Accordingly Farmlands Real Estate Limited is merely passing over the information as supplied to us by the Vendor's agents. The information has been sighted and approved by the Vendor.

[7] On 16 June Mr Bellis sent an email query to Mr Davison which included the following (as relevant to the appeal):

> I am after some clarity on the asking price for the property.
>
> Is the asking price the rateable value of the property, namely $1,150,000 with the following factors taken into account:
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> …
>
> (c) there is a figure of $209,000 as the value of the walnut trees. There is a heading of "improvements" in the rateable valuation. It would be normal for all improvements to be included under this heading, and this would include the trees. Can you comment on this.
>
> …

[8] Mr Davison referred Mr Bellis's questions to the vendors, who responded to Mr Davison the same day. Their response included the following:

> Thanks for passing on the questions from Bruce Bellis. In addition to the clarifications we discussed with you, here are some notes from us:
>
> - There is no "asking price". We have provided some indicative valuations, including the QV rateable value, and a realistic market value on the specified plant and equipment and productive trees. Any prospective purchaser needs to put their offer on the table for us to consider.
>
> …

- The value we have put on the trees is one way of putting a value on the business in terms of revenue generation. There are other ways of doing so. We are open to offers that are realistic about purchasing a revenue stream as well as the real estate. QV do not include the business assets, trees or infrastructure in their valuation of 'improved value'. They are very clear that the capital value is for the property without any reference to the orchard or its operation.

[9] Mr Davison forwarded the vendors' email to Mr Bellis on 17 June, with the message "Below please find [the vendors'] answers to your questions". The passing-over footer, as set out in paragraph [6], above, was included at the bottom of the email, after Mr Davison's address details.

[10] Mr Bellis made an enquiry of the local authority, the Selwyn District Council. He received a reply on 24 June, which included the following statement:

> The rating valuation is the Capital Value of the property. The Capital Value is the most likely selling price had the property been sold on 1 July 2018. The selling price includes the improvements to the property. The Rating Valuations Handbook used by valuers states that "rural improvements include: dwellings, basements, garages, carports, landscaping, domestic water, implement sheds, hay barns, stables, milking sheds, woolsheds, yards, silos, greenhouses, fencing, water supply other than domestic, roads and tracks. For horticulture, include structures, crop trees, and shelterbelts".

[11] Mr Bellis forwarded the local authority's email to Mr Davison the same day, noting that their advice was the opposite of what the vendors had said. He also said that he had spoken to Quotable Value Limited, who had told him that "crop trees are included in the valuation of $1,150,000". He then asked Mr Davison to send him a hard copy of a Sale and Purchase agreement.

[12] Mr Davison responded on 25 June:

> Thanks for your email Bruce. My administrator will prepare the documentation this morning.

The passing-over footer again appeared at the bottom of Mr Davison's email.

[13] Mr Bellis complained to the Agency. He received responses from the regional manager of the Agency, Ms Fogarty, on 1 and 2 July 2019. She said that the information provided to Mr Bellis had been supplied by the vendors, and Mr Davison was "merely passing the information onto you", and that she did not believe he was in

breach of r 6.4. She suggested that if Mr Bellis were interested in putting an offer in on the property, he might wish to add a clause stating that the offer was subject to a registered valuation report, which would help him determine the value of the trees.

[14] Mr Bellis made a complaint to the Authority on 10 July 2019, that Mr Davison had represented to him that the QV valuation did not include the walnut trees, which was blatantly false. He claimed that this was in breach of Mr Davison's obligations under r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules").

[15] Mr Bellis claimed that Mr Davison was responsible for checking information he receives from a vendor for accuracy before he passed it on to a potential buyer. He claimed that as Mr Davison deals in the sale of farm properties and lifestyle blocks, he would know that crop trees are included under improvements in a QV valuation. He further claimed that the false information had been given to him in order to try to get him to make an offer than was $209,000 above the QV valuation, as consideration for the walnut trees.

The Committee's decision

[16] On 23 August 2019, the Committee decided to inquire into Mr Bellis's complaint pursuant to s 79 of the Act, and requested a "limited investigation", answering specific questions:[1]

[a] What due diligence did Mr Davison undertake on the property prior to marketing?

[b] What would be a standard practice in rural real estate practice with regard to crop trees relative to a rateable value?

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[1] We observe that s 79(e) of the Act provides that the Committee may "determine to inquire into the complaint". It does not provide that the Committee may "limit" its investigation.

[c] Did Mr Davison make any checks other than obtaining information from the vendor in respect of Mr Bellis's query about the trees and the rateable value? If yes, provide details. If not, why not?

[17] In its decision, the Committee accepted Mr Davison's statement that he had met with the director of an industry group "Walnuts NZ Cooperative" to gain insight into the industry. Mr Davison was unaware of any standard industry practice with regard to crop trees relative to rateable value, and had received no training in relation to the treatment of fruit trees in assessing rateable value. He had little experience in selling walnut orchards having sold only one, 15 years earlier, and walnut orchards rarely came up for sale. He also said that he had not sought to independently verify the information provided by the vendor, as the vendor appeared to be very knowledgeable regarding the issue, and Mr Davison understood that the vendor had made his own inquiries. He said there was no "red flag" raised for him to question to information supplied by the vendors.

[18] The Committee also accepted evidence from Ms Fogarty, the Regional Manager of the Agency, to the effect that she was unaware of any standard industry practice, and she believed it is a specialist issue which is outside the expertise of real estate salespeople. She also said that her experience had been that it was very difficult to obtain information from the local authority, and that requests to meet to discuss matters such as rateable values had been declined. She expressed the view that there is no standard practice in rural real estate regarding what is included in the rateable value for a property.

[19] The Committee did not obtain any evidence on this point from an independent source.

[20] The Committee found that Mr Davison's response to Mr Bellis's question whether the walnut trees were included in the rateable valuation was only passing on information from the vendor. It found that this was "clearly communicated" to Mr Bellis in Mr Davison's email, and the email included the passing-over footer. The Committee was not satisfied that in the circumstances where Mr Davison was passing on information provided by the vendor, he was required to verify the information. It

found that it was clear that the information was the vendor's response, and Mr Davison had added nothing to it, and did not seek to recommend or adopt the information. The Committee considered that the fact that Mr Bellis was able to clarify the information "relatively easily" by contacting the local authority and QV did not impose an obligation on Mr Davison to have done the same.

[21] Accordingly, the Committee was not satisfied that Mr Davison had failed to act with skill, care, competence, or diligence, and found that he was not in breach of r 5.1 of the Rules.[2]

[22] Having accepted Mr Davison's and Ms Fogarty's evidence that standard practice did not require Mr Davison to know what is included in the rateable value for a property, the Committee determined that it was not possible to find that Mr Davison should reasonably have known that the rateable value included the value of any crop trees, or that there was any information available to him that made him aware of this. The Committee also determined that while the information that the rateable value did not include the value of the walnut trees was incorrect, Mr Davison had not been in breach of his obligation under r 6.4 of the Rules not to mislead a customer or provide false information. This was because Mr Davison had only passed on the vendor's response, and the incorrect information was provided by the vendor, not Mr Davison.[3]

[23] Accordingly, the Committee determined pursuant to s 89(2)(c) of the Act to take no further action on Mr Bellis's complaint.

Appeal submissions

[24] Mr Bellis submitted that under r 5.1 of the Rules Mr Davison had an absolute obligation to ensure that information provided to members of the public is correct, and that in order to comply with r 5.1, Mr Davison was required to check the information provided by the vendor for accuracy. He submitted that Mr Davison failed to exercise care and diligence before passing on the vendor's response. He submitted that he could

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2 Committee's decision, at paragraphs 3.1–3.5.
3 Committee's decision, at paragraphs 3.6–3.11.

have exercised the required care and diligence by ringing the local authority, but did not do so.

[25] Mr Bellis also submitted that r 6.4 of the Rules does not include a defence to the effect that if false information is given to a licensee by the vendor, the licensee does not breach r 6.4 by passing it on. He submitted that a simple telephone call was all that was required to ensure that the information he was passing on was correct. He submitted that the Committee erred in finding that no further action was required because the vendor provided the false information to Mr Davison.

[26] Mr Bellis further submitted that the vendor's response to Mr Davison should have raised a red flag with him, as Mr Davison should have known that the walnut trees were an "improvement", and therefore included in the rateable value. He submitted that Mr Davison had a strong financial incentive to ignore rr 5.1 and 6.4, as he would gain a higher commission by having the customer pay an extra $200,000 for the property. He submitted that not making a finding against Mr Davison sent a message to the real estate industry that it can supply false information in the future, and blame the vendor. He submitted that such an outcome is unacceptable.

[27] Mr Rea submitted on behalf of Mr Davison that the Committee was correct to find that Mr Davison did not "provide" the information as to the QV valuation, but merely passed it on and made it clear that he had done so, He submitted that this is consistent with the "conduit" defence to claims for misleading and deceptive conduct under the Fair Trading Act 1986, and to Tribunal authority.

[28] He submitted that in the present case, the relevant information was not contained in marketing material, but in an email from the vendors, forwarded by Mr Davison to Mr Bellis. He submitted that it was clear from the communication that the vendors were the source of the information and Mr Davison did not endorse or adopt it. He further submitted that the information was expressly caveated in the passing-over footer.

[29] Mr Rea also submitted that the Committee was correct to find that Mr Davison did not deliberately mislead Mr Bellis by passing the information on. He accepted that

there will be situations where a licensee will not be excused of liability for passing on information provided by a vendor, regardless of any caveat. He gave as examples situations where a licensee passes on information the licensee knows to be incorrect, or has reasonable grounds to believe is incorrect but does not seek to verify it. He submitted that neither of those situations applies in this case.

[30] He submitted that there is no evidence Mr Davison knew the correct position as to the QV valuation. He also submitted that Mr Davison had no reason to doubt the accuracy of the information. He submitted that Mr Davison was not trained regarding the preparation of rateable valuations, and did not have experience of the issue, having not encountered any issue of this nature in his 18 years of experience in selling rural real estate, and being unaware of any standard practice as to crop trees relative to rateable value, as was his manager Ms Fogarty.

[31] Mr Rea submitted that the Committee was correct to conclude that licensees should not be expected to be experts in the area of rural valuations, and that no "red flag" had been raised that would have caused Mr Davison to question the accuracy of the vendors' information. He also submitted that it did not follow from the fact that Mr Bellis was able to "clarify" the information from his own enquiries that Mr Davison had a duty to verify it before passing it on.

[32] In the alternative, Mr Rea submitted that the Tribunal could properly determine to take no further action under s 80(2) of the Act, on the grounds that the evidence establishes that Mr Davison did not "provide" the information to Mr Bellis, and that there was an absence of fault on the part of Mr Davison.

[33] On behalf of the Authority, Ms Mok referred to relevant authorities as to rr 5.1 and 6.4. She submitted that the Tribunal has accepted that a licensee may breach the rules and be guilty of unsatisfactory conduct if the licensee gives answers to questions, or provides information that is misleading, even if the licensee had no intention to mislead. She also set out general principles distilled from Tribunal decisions as to the provision of information to others, including when this information is based on advice from the vendor of a property.

[34] Regarding the present case, Ms Mok noted that it is not disputed that the information that the walnut trees were not included in the QV valuation of the property was incorrect. She submitted that the key issue is whether Mr Davison breached his obligations when providing that information to Mr Bellis.

[35] Ms Mok submitted that the Committee was correct to find that Mr Davison had not made a positive misrepresentation as to the QV valuation. This was because Mr Davison's response to Mr Bellis's question was to forward an email from the vendors in which it was made clear that it was the vendors' response to the question, and did not adapt, endorse, or add to the vendors' response, and where Mr Davison's email included a "rider" (the passing-over footer).

[36] Ms Mok further submitted, again on the basis that the source of the information was clear, and Mr Davison was not adopting the statement as his own, that the Committee was correct to find that Mr Davison was not obliged to take steps to verify it. She submitted that the position would have been different had there been any evidence before the Committee to suggest that Mr Davison knew, or ought reasonably to have known or been put on notice that the information was incorrect.

[37] Ms Mok observed that when forwarding the vendors' email, Mr Davison did not advise Mr Bellis that he may wish to take legal or professional advice as to whether the trees were included in the valuation. She submitted that as a matter of best practice, and taking into account the consumer-protection purposes of the Act, it would have been prudent to do so, given the apparent importance of the value of the trees to Mr Bellis.

Discussion

[38] In *Tesar v Real Estate Agents Authority (CAC 20004)*,[4] the Tribunal said, in relation to the predecessor of r 6.4 under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009:

> [39] Rule 6.4 … provided that a licensee must not mislead a customer or client. We accept that a wilful to reckless breach of rule 6.4 (which would

[4] *Tesar v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 18, at [39], [40], and [42] (citations omitted).

include an intentional misrepresentation) may amount to misconduct under s 73(c)(iii) of the Act. A breach of r 6.4 which is not committed wilfully or recklessly (including an unintentional misrepresentation) may amount to unsatisfactory conduct under s 72(b) of the Act.

[40] Given the purpose and context of the Act and the Rules, several of our decisions have emphasised the importance of licensees ascertaining the accuracy of information before passing on that information to consumers.

…

[42] Importantly, we held that a licensee could not rely on having acted merely as a conduit from seller to purchaser in order to exonerate him or herself from responsibility for a misrepresentation. We said that a licensee should not "place sole reliance and credence on advice or assurances from a vendor", even if there are given in good faith.

[39] In *Donkin v Real Estate Agents Authority (CAC 10057)*,[5] the Tribunal referred to the "consumer protection aspect of s 3 of the [Act]" and said in relation to advertising which incorrectly said that a property was a "legal home and income":

> [8] … In our view the issue is simply that when advertising includes a positive representation such as in this case … then the agent must ensure that either:
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> (a) they have made proper enquiries to ensure the property is a legal home and income; or
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> (b) they make it clear to any purchaser that this is a statement from the vendor and will need to be independently verified by the purchaser; or
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> (c) they clearly inform a purchaser that there may be issues regarding this and they need to obtain independent legal advice.
>
> [9] The point is that an agent should make sure before a positive representation is made that they have taken at least some precautions to check the veracity of the representation. … The agent's job is to ensure that the purchaser is not misled. In this particular case if the agent had bothered to obtain a LIM or had called the Council to ask, or even obtained a rates report then there would have been no misrepresentation. The difficulty here was that without checking further the agent accepted the vendor's words and made no effort to alert anyone of any potential risk in accepting this statement.

[40] We agree with Ms Mok's statement of the general principles as to licensees' providing information to prospective purchasers, including when the information is based on advice from vendors, that is:[6]

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5 *Donkin v Real Estate Agents Authority* [2012] NZREADT 44, at [8]–[9].

6 See *Fitzgerald v Real Estate Agents Authority (CAC 20007)* [2014] NZREADT 43, *Tesar*, above fn 4; *McCarthy v Real Estate Agents Authority (CAC 20007)* [2014] NZREADT 94; *Masefield v Real Estate Agents Authority (CAC 301)* [2015] NZREADT 30, *Kek v Real Estate Agents Authority (CAC 409)* [2019] NZREADT 26, at [35]-[36]; and *Eade v Real Estate Agents Authority (CAC 1903)* [2020] NZREADT 37, at [71]-[72].

[a] Licensees must "know what they are selling". They must make every effort to know the product they are selling.

[b] Licensees have an active role in conveying information about a property to a prospective purchaser, and must be cognisant of that role and carry it out to the best of their ability. If asked about particular aspects of a property, licensees are obliged to make proper enquiries, or to advise the prospective purchaser that they do not know the answer, and the prospective purchaser should obtain appropriate advice.

[c] An "innocent" misrepresentation, or provision of incorrect information will constitute a breach of r 6.4, and may amount to unsatisfactory conduct.

[d] Licensees cannot simply pass on information from a vendor to prospective purchasers. Prior to any positive representation being made or information being passed on, licensees should at least have taken some precautions to check the veracity of the representation or information.

[e] Licensees cannot rely on having acted merely as a conduit from vendor to purchaser in order to absolve themselves from responsibility for a misrepresentation.

[f] Where licensees are conveying information provided by a vendor, the licensee must make it clear that the licensee is not the source of the information, that it comes from the vendor, and that it has not been verified. In certain cases, licensees should also recommend that the prospective purchaser seek professional advice.

[41] We reject Mr Rea's submission that in forwarding the vendors' email, Mr Davison was not "providing information" to Mr Bellis. Mr Davison was responding to a request for information by Mr Bellis in the course of his marketing the property to Mr Bellis. The fact that Mr Davison chose to respond to the request by forwarding the vendors' email does not lead to the conclusion that by doing so, he was not providing information to Mr Bellis.

[42] We also reject Mr Rea's submission that there was no "red flag" raised that should have alerted Mr Davison to the need to verify the accuracy of the information supplied by the vendors. The "red flag" was the specific request from Mr Bellis. That, combined with Mr Davison having little or no experience in selling walnut orchards, and no knowledge as to whether the QV valuation would include the trees, meant that he would have no basis for forming any view as to whether the information he was providing to Mr Bellis was correct.

[43] Further, we reject the submission that the email to Mr Bellis was not a "positive representation". It was a positive representation that the QV valuation did not include the value of the walnut trees.

[44] In accordance with the principles set out earlier, Mr Davison was obliged to take at least some precautions to verify the accuracy of the information he was passing on. He could not simply rely on a statement that the information came from the vendors. As was the case in *Donkin*, Mr Davison could have called the local authority, or Quotable Value Limited, to verify the accuracy of the information. We do not consider that this would have placed an unreasonable burden on him. Mr Bellis's experience shows that the information was easily checked. Mr Davison did not take any steps to do so, and he did not tell Mr Bellis he had not verified it.

[45] We note the Committee's finding that standard industry practice does not require licensees practising in rural real estate to know what is included in the rateable value for a property, or to undertake relevant training. However, as that finding was based solely on evidence from Mr Davison and Ms Fogarty, it must carry less weight than if it had been made on the basis of evidence from sources completely independent of the parties to the proceeding.

[46] With respect to the passing-over footer, it is apparent from the material before the Committee, which included several emails from the Agency, that the passing-over footer appears on all emails from the Agency, even those where no information is "passed over", such that the footer is irrelevant. As a result, any weight which can be given to the passing-over footer is reduced.

[47] The facts considered by the Tribunal in *Grindle v Real Estate Agents Authority (CAC 20004)* were analogous to those in the present case.[7] There, a licensee marketing a dairy farm passed on to the purchaser incorrect information as to milk production, supplied by the vendor, when the information could have been checked, and the correct information obtained, from Fonterra. The Tribunal upheld a finding of unsatisfactory conduct against the licensee. In the present case, in the same way that the licensee in *Grindle* could have checked information provided to him by the vendor of the farm, and as Mr Bellis did, Mr Davison could have checked the vendors' statement in the present case by way of a telephone call

[48] We therefore find that Mr Davison provided false information to Mr Bellis, in breach of r 6.4 and, in the absence of any caveat that he had not verified the information and did not himself know whether the information was correct, and a recommendation that Mr Bellis take independent advice on the point, his stating that the vendors were the source of the information did not absolve him from any liability for it.

[49] In the light of that finding, we turn to consider whether we should reverse the Committee's decision to take no further action, and make a finding of unsatisfactory conduct.

[50] Our finding that Mr Davison breached r 6.4 should make it clear to him, and others in the industry, that they cannot simply rely on a passing-over footer, or disclaimer that information has come from a vendor, without taking steps to verify the information or advise the recipient that the information is unverified, and recommend that the recipient takes independent advice. However, we have concluded that it is not necessary to take any further action.

[51] In reaching this conclusion we have taken into account Ms Fogarty's evidence that she had tried, but had not been able, to obtain information from the local authority, and that there was some uncertainty as to the position of crop trees relative to rateable valuations. Further, we are not persuaded that Mr Davison's forwarding the vendors' email to Mr Bellis was done with the ulterior motive of securing a higher commission by way of a higher sale price. It was an unintentional misrepresentation.

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7 *Grindle v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 85.

[52] Accordingly, the appeal is dismissed.

[53] 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 F Mathieson
Member