BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 03

READT 017/2020

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	YANG YANG Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1905) First respondent
AND	ANWEN (MARGARET) CHEN Second respondent
Hearing:	14 December 2020
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Mr N O'Connor, Member
Appearances:	Yang Yang, Appellant Ms Lim, on behalf of the Authority Mr Rea, on behalf of Ms Chen
Date of Decision:	29 January 2021

DECISION OF THE TRIBUNAL

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[1] The second respondent is a licensed salesperson under the Real Estate Agents Act 2008 ("**the Act**"). A complaint has been made against her relating to a property which she was involved in selling in 2015. The property is situated at 264 Whitney Street, Blockhouse Bay, Auckland **(the property)**.

[2] The appellant made a complaint alleging that the Second Respondent:

[a] Advertised the property as being a five-bedroom property when it had four bedrooms only plus a study;

[b] Described the property in advertisements as having two bathrooms when only one bathroom had been consented by the local authority, the Auckland City.

[c] Concealed from buyers the fact that the property had an unconsented bathroom; and

[d] Had provided the appellant with a "partial Title without the drafts".

[3] The property was advertised as having 5 bedrooms and 2.5 bathrooms. The appellant, entered an agreement to buy the property for a price of $933,000

[4] Four years later in 2019 the appellant listed the property for sale through the agency of different licensees. Those licensees viewed the Council property file that related to the property ("**the property file**") and, having done so, told the appellant that they had discovered that the fifth bedroom was consented "as a study" and that there was no consent recorded for the second bathroom.

[5] The appellant also says that when they saw the property file they realised that the licensee had only provided them with a "partial Title without the drafts". The nature of this last complaint is not clear.

[6] The factual position in relation to the fifth bedroom/study is unclear. In the course of checking the property files of the local authority in 2019, the real estate agents whom the appellant appointed in 2019 noted that the fifth bedroom was

described not as a bedroom but as a "study". What if any legal or factual distinction there might between the two is discussed below.

[7] The appellant says there was nothing about the room in terms of the size, layout, windows and ventilation to indicate that it was not a "bedroom". She says she understands that an owner may describe a room as a bedroom so long as it complies with the Housing Improvements Regulations 1947 which this room apparently does.

[8] In regard to the bathroom, the facts establish that a second bathroom was added some time after the house had been initially constructed. The consent of the local authority had not been obtained to the addition of the second bathroom. When the appellant herself came to sell the property in 2019, the real estate agents that she appointed discovered the non-consented status of the second bathroom and determined that it was going to be necessary to obtain a Certificate of Acceptance ("COA") from the Auckland City for that part of the house before they could successfully sell the property. That was accomplished on 16 June 2019. The local authority provided the Certificate of Acceptance without requiring any additional or corrective construction in the second bathroom.

[9] In 2019, having obtained the Certificate of Acceptance, the appellant sold the property for $966,000. She claims that due to misrepresentations on the part of the licensee she and co-owner incurred the expense of obtaining a COA and lost money on the sale of the property.

[10] In relation to the complaint that she concealed that one of the bathrooms was not consented, the licensee says that she did not know that such was the case. Nor was there any basis for concern that the property contained unconsented work. She says that when she was initially engaged to market the property in 2015, she asked the vendors if they had any knowledge of unconsented work on the property to which she received a negative answer. The vendor initialled the agency agreement that she entered into with the Second Respondent confirming this was the case.

[11] The property did not display any "red flags" that might give a warning that a consent had not been obtained for the work.

The Committee's Decision

[12] In its decision the Committee expressed its satisfaction that after considering all of the evidence including photographic evidence of the bathroom there were no "red flags" that indicated to the licensee that she ought to carry out further investigation as to whether all the bathrooms at the property were consented. They further found that there was no evidence that the licensee knew about, but concealed, the unconsented works at the property.

[13] In regard to the fifth bedroom, the Committee noted that the bedroom in question is apparently described in floor plans for the property on the Council property file as being a "study". But they observed there is no evidence that the room cannot be used as a bedroom.

[14] In relation to the complaint that the licensee failed to provide a "full copy of the Title to the property" the Committee observed that the appellant claimed that the licensee had "only provided a partial copy of the Title without the drafts". The Committee stated that it was unclear whether the complaint was that they had not received a full copy of the Title search or alternatively that they did not receive a copy of the Council's property file. They noted that the appellant contrasted her conduct with that of the licensees involved in 2019 when she was selling the property. The latter:

> Showed me the entire Title from Council, Margaret Chen was provide us with a partial Title without the draft.

[15] The Committee concluded that the complaint concerned the licensee's failure to provide the complainants with the floor plans for the property. That is, it was not concerned with the Certificate of Title. The Committee concluded that a licensee is not required in normal circumstances to provide prospective purchasers with the Council property file for every transaction. Further while the licensee had been involved in the marketing of the property, she was not the agent who actually sold the property and she had no communication with the appellant.

[16] Having regard to these matters the Committee decided not to take any further action on the complaint pursuant to s 89(2)(c) of the Act.

Appeal principles

[17] Appeals to the Tribunal are authorised by section 111 of the Act and are by way of rehearing[1]. Mander J in *Edinburgh Realty Ltd v Scandrett* stated[2]:

> [112] Section 111(3) of the Act provides that an appeal to the Tribunal against a determination by the Committee is by way of rehearing. Ordinarily, when applying the principles set out in Austin, Nichols & Co Inc v Stichting Lodestar, those exercising general rights of appeal are entitled to judgement in accordance with the opinion of the appellate Court. If the appeal to the Tribunal had been confined to whether the Committee had been correct in its determination that no further action be taken in regard to Ms Scandrett's complaint and the Tribunal had limited itself to a consideration of that decision and whether it should substitute a finding of unsatisfactory conduct, it would have been free to have substituted its own view of that issue.

Assessment

[18] We will now set out our evaluation of the merits of the appellant's appeal.

The "study" or "bedroom" dispute

[19] We will deal first with the question of the argument that the room which was represented as being a bedroom was limited to use as a study. If it could only be used as a study, then to include it in the number of bedrooms in the house would be a misrepresentation.

[20] A conclusion that the room in question was not able to be included in the number of "bedrooms" could only be reached if a requirement to that effect was clearly spelt out in some legislative provision.

[21] The evidence discloses that the room in question is noted on the plan which is part of the Council's records as being a "study". We have not received any evidence which would explain why the room had been so categorised and, indeed, what the

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[1] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, at [13]- [16]
[2] *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898

difference is between a room which is permitted to be used only as a "study" and one that is a "bedroom". The fact that the plan reflected such a distinction does not mean that there is a legally significant difference between the two or, if there is, what that difference is.

[22] No evidence has been put forward that explains in what respects the fifth bedroom is properly to be described as a study, rather than a bedroom. We have not been referred to any provision whether in the Council by-laws or in statute or regulations which requires us to take such a view. That being so, the contention of the appellant that the second respondent gave an incorrect description when stating that there was a first bedroom cannot succeed. There was therefore no misrepresentation which could be the basis of a complaint that the second respondent had engaged in unsatisfactory conduct pursuant to Rule 6.4 and other provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 and s 72 of the Act.

The appeal relating to the second bathroom

[23] The next ground of appeal that we deal with is that the second respondent failed to disclose, or concealed, that the bathroom had not been subject to council consent.

[24] Ms Lim in her submissions dealing with the point of the consent status of the second bathroom, reminded us that because it is conducting a rehearing of the complaint, the Tribunal is able to come to its own conclusions about whether the licensee should have made inquiries into whether the second bathroom was appropriately consented. She drew attention to the fact that the licensees who was instructed to sell the property in 2019 made some observations about the second bathroom which led them to obtain the council property file so that they could ascertain the consent status of that bathroom.

[25] The factors which persuaded them to do that included the fact that the appearance of the second bathroom was different from that of the other parts of the building. Specifically, they observed that the bathroom looked different in age from the other parts of the property. Ms Lim also referred to the opinion of the same licensees that the bathroom seemed to have been "jerry built".

[26] She also referred to the fact that the installation of a shower in proximity to a laundry tub in the same room is capable of being seen as an indication that the second bathroom had at some earlier point being used for a different purpose, namely, a laundry.

[27] On the other hand, the second respondent apparently did not have any concerns of that kind about the building. Nor did another licensee who was working with the second respondent on the marketing of the property, Mr Yuan. As well, the point is made on behalf of the Second Respondent by counsel, Mr Rea, that the building report condition in the agreement was ultimately deemed by the purchaser to be satisfied.

[28] We interpolate that the significance of this last point would seem to be that the licensee considered that if there was a problem with consenting for the second bathroom, the building inspector would have picked it up. We observe that this last point is equivocal. It would depend upon what instructions the building inspector had been given. It might not have been part of that person's role to report on consent compliance issues.

[29] The essence of the submissions on behalf of the Authority was that a licensee may be culpable even where he/she did not know about a hidden defect in the property which is being sold: Rule 10.7. The effect of that rule is that even if the licensee did not know of the defect, he/she is required to make disclosure to a purchaser:

> Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects[3],

[30] It is correct that the selling agents in 2019 concluded that the bathroom showed signs of having been added post-construction of the house because of differences in the style of construction and the fact that it was "jerry built". The fact that another licensee took a different view about the presence of indicators that the property had been modified to add the second bathroom does not however establish the elements required by Rule 10.7. It does not in other words establish that the second respondent

[3] R 10.7

as “a reasonably competent licensee” should have appreciated that the project for the addition of the second bathroom had not been consented.

[31] However, the view that the second bathroom appeared to be “jerry built” is the opinion of one person only. It conflicts with the view of Mr Yuan who was the vendor’s agent on the sale of the property to the appellant in 2015. He said that none of the bathrooms raised any questions or concerns or looked any different from the rest of the property[4].

[32] Further, even if the bathroom showed signs of having been added later, that begs the question of whether it had been consented. The fact that the bathroom had been added later, in other words, does not give rise to an inference that it had not been consented.

[33] We accept, though, the observations of the selling agents that the second bathroom appeared to have been “jerry built” provides a stronger logical basis for inferring that consent had not been obtained. An appearance of substandard construction could be an indicator that the work had not been the subject of an application for consent because if it had been, there was the possibility that the council inspector, having reviewed the works, would decline to support consent for them.

[34] At the same time, it turned out that the inference that the 2019 selling agent drew from his observations of the property did not provide an accurate guide as to whether the addition of the second bathroom had been consented. That is because notwithstanding the supposed “jerry built” construction, the works were retrospectively consented without any changes being required to them.

[35] The appellant has the onus of establishing that the second respondent should have noticed potential problems with the second bathroom. We do not consider that it has been proved that a reasonably competent licensee would have understood that further investigation needed to be made of the approval status of the second bathroom.

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[4] BoD 217

[36] The observations of the Committee in this case that there had been no "red flag" essentially captures the same points that we have made in this section of our decision.

[37] Our conclusion therefore is that second respondent did not breach any obligation to disclose that the consent had not been issued by the Council in regard to the alterations to add the second bathroom.

Providing title "with drafts"

[38] The last aspect of the case which we deal with is the complaint which the appellant made to the effect that she had not been provided with a title "with drafts". We agree with the committee that that appears to amount to an assertion that the second respondent breached her obligations under the Act in not obtaining a copy of the floorplans and providing them to the appellant. We understand that it is common ground that the floorplans would have been obtained from the Council, presumably at the point where construction was passing through the consent stage. We agree with the committee that there is no obligation on the part of licensees to routinely obtain copies of the floorplans from the council files and to provide them to purchasers. That being so, this part of the complaint cannot succeed, either.

[39] For the foregoing reasons we consider that the Committee came to the correct decision when it concluded that no further action should be taken on any of the complaints.

[40] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, 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.

Mr J Doogue Deputy Chairperson	Mr G Denley Member	Mr N O'Connor Member