BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 15

READT 032/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	HULAN FENG and JIARUI LI Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First Respondent
AND	RUOFEI WU Second Respondent
Hearing:	11 November 2020
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr T Rea, on behalf of the appellants Ms E Mok, on behalf of the Authority Mr R Wu, in person
Date of Decision:	12 April 2021

DECISION OF THE TRIBUNAL

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[1] Mr Ruofei Wu ("the complainant") lodged a complaint with the Real Estate Authority ("the Authority") on 17 September 2018 concerning the appellant who was at the relevant time, a licensed salesperson engaged by Barfoot and Thompson, Auckland City ("the agency"). In the transaction to which the complaint relates, the selling agent was Hulan (Wendy) Feng ("the appellant" or "licensee one") and she was assisted by the listing agent Jiarui (Jack) Li ("Mr Li").

[2] The complaint arose out of the purchase by the complainant of an apartment property situated 19/88 Cook Street, Auckland Central. In summary, the complaint arises from what the complainant says were misrepresentations of the property, particularly in regard to the text of an advertisement which the second respondents drafted.

[3] The licensees had described the property in the advertisement as follows:

> If you are looking for a spacious and comfortable home in the central city area then this would be the perfect for you. The beautiful freehold 3-bedroom apartment with 2 carparks is not something that you see all the time.

[4] After visiting the property to inspect it, the complainant purchased it at auction in June 2016. He said that he acquired the property with the intention of letting the apartment and both of the carparks. He said, and the licensees do not dispute, that the feature of two carparks was material to his decision to purchase the property.

[5] The complainant says that in 2018 after receiving a notice of the forthcoming AGM of the body corporate, he obtained a copy of the LIM for the property from the Auckland Council which recorded the property as having only one carpark. That is to say the title shows that there was "only one carpark on the title". He says that he discovered that rather than owning a second carpark as the freehold proprietor he, like the other unit owners, can obtain a licence from the body corporate for the use of the second carpark. One of the conditions attached to the licence in regard to the second carpark is that it must be used by a unit owner and may not be leased out.

[6] The response of the appellant is that prior to the complainant purchasing the apartment, the complainant asked her about the carparking and that she:

> Explained to him how the carparking works in this complex.

[7] Licensee one also gave evidence that she took the complainant to the body corporate onsite office and the manager of the body corporate referred to the complainant what the carparking arrangements were.

[8] The appellant also says that Mr Li sent a copy of the minutes of the annual general meeting held 19 September 2014 to the complainant on 6 June 2016 – some ten days prior to the date when the complainant purchased the property at auction. She said that it is true that the property was marketed as having two carparks but she did not think that this was misleading. She said that it is a fact that the owner had the use of two carparks despite there only being one carpark included in the owner's title to the property. She says that she and the other licensee told all interested buyers (including the complainant) that the property had only one carpark on the title but was allocated:

> Two flexible carparks according to the body corporate rules.

[9] Mr Li said that he met the complainant at an open home and that he gave the complainant detailed answers to his questions about the property and the carparking arrangements. He says that the licensees explained to the complainant on this occasion that the title to the property had only one carpark but there were two carparks allocated to the unit. He said the licensees also told the complainant that all carparks were used on a "first come first served" basis including the carpark shown on the title to the property. It was explained to the complainant that vouchers were issued by the body corporate to unit owners and they were required to display a sticker showing their entitlement to occupy carparks allocated to them. He says he showed the complainant such a label. He also said the licensees emailed to the complainant documents including copies of the title, a pre-contract disclosure statement, the AGM minutes explaining the carparking arrangements and a copy of the LIM. He confirmed that before the complainant purchased the apartment, licensee one had taken him to the body corporate office so that he could speak to the manager directly and at that meeting the complainant was given a copy of the body corporate carparking rules. Mr

Li says that the complainant told the licensees that he understood the carparking system.

The Committee's decision

[10] The Committee noted that the complainant did not acknowledge that the licensees sent to him the body corporate material that explained the carpark arrangements that would exist at the complex.

[11] The Committee decision said:

> 3.4 the advertising material above was obviously a persuasive influence on the complainant's decision. The licensees in their submissions by way of response each state that prior to the purchase, they provided the complainants with copies of the title, LIM, pre-contract disclosure statement and previous body corporate AGM minutes. It is in the minutes of the 2013 and 2014 AGMs, they say, that the body corporate discussed the introduction of a voucher or label system to allow the unit owners the use of a second car park (in addition to that which was incorporated in their title as an Accessory Unit). The minutes state that the extra labels are intended to allow the unit owners to fully utilise the car park and are "not supposed to be used to make money for any particular unit's owner.
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> 3.5 although the complainant does not acknowledge the receipt of the material provided by the licensees, nor does he refer at all to the previous minutes of the body corporate, the committee considers that in applying the balance of probabilities test, and having regard to the evidence submitted by the licensees in support of their written responses, it is more likely than not that the Complainant did indeed receive some copies of the material the Licensees say they provided, and that therefore he was, or at least had the opportunity to be aware of the decision made by the body corporate in 2013 and 2014 regarding the additional car parks forming part of the common property and the basis on which they would be made available to unit owners.

[12] Nonetheless, the Committee was of the view that the provision of this additional material did not exonerate the licensees. They said that the key issue was whether or not the complainant had been misled by the advertisement that the property includes two car parks, not whether the complainant knew or ought to have known that only one of the two car parks was able to be rented out.

[13] On the complaint that the licensees had failed to disclose that the complainant could not sublease the carparks for additional income the Committee again found that the licensees had engaged in unsatisfactory conduct by failing to make it clear to the complainant that the carparks could not be used as a source of additional revenue based on the rules of the body corporate. The Committee noted the further allegation

that the licensees failed to disclose to him that he was unable to "sublease" the car parks for additional income.

> Although the committee is unable to find that the licensee's failed to disclose to the complainant that the car parks could not both be used as an additional source of revenue, we nonetheless found on the balance of probabilities, the complainant was not made aware of the requirements of the body corporate in such a way that he was able to make an informed commercial decision whether to proceed with the purchase or not, and for this reason we find that the licensee's failed in their duty to disclose relevant information to the complainant or have withheld information which should, in fairness, have been provided to him

[14] In both cases, the Committee considered, the breach of Rule 6.4 amounted to unsatisfactory conduct pursuant to s 72(b) of the Act.

The approach to be adopted to appeals

[15] In *Austin, Nichols and Co Inc v Stichting Lodestar* [1] the Supreme Court described the principles relating to general appeals in the following terms:

> [16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

Misleading conduct on the part of the appellants?

[16] The allegations of unsatisfactory conduct were based primarily on the statements contained in the advertisement which the second respondents placed in the media. There is no factual dispute that arises in regard to that occurrence. The fact of the advertising and what it contained are not in dispute.

[1] *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 108

Was the advertisement misleading in regard to ownership of the two car parks?

[17] The first question that we will consider is whether the publication in its own right amounted to the making of a misrepresentation about the nature of the legal rights, if any, that the purchaser would have in regard to the two carparks.

[18] It is not in dispute that the statement that was contained in the advertisement would be misleading if it was not subject to explanation or amplification. Read on its own, it conveyed the information that the freehold ownership of the property included two car parks.

[19] The case which the appellants put forward is that the statement should not be read on its own and that the question of whether it was misleading could only be properly assessed by first taking into account that an oral explanation was given to the complainant. Secondly, there would need to be taken into account the documentation concerning the property which the appellants sent to the complainant before he entered into the contract. These factors together meant that the licensees gave the complainant an adequate explanation of what the position was in regard to the ownership of the two car parks.

[20] Mr Rea for the appellants summarised the issues in dispute as follows:

> 16 The principal factual disputes involved the question of what information was provided to Mr Wu in discussions with him prior to his purchase of the apartment, on the issues of legal ownership of the second carpark, and the carparking arrangements which had been put in place by the Body Corporate.
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> 17 Mr Wu denied that he had been informed that only one carpark was on the title, and he asserted also that he had not been informed of the restriction by the Body Corporate against the renting out of carparks to people who were not resident in the building. His principal complaint related to the legal ownership of the second carpark, and for this he had sought compensation, relying upon the advertisement.

[21] Whether the appellants accept that the description of the property contained in the advertisement was of a misleading nature concerning ownership of the two car parks is not entirely clear. However, it is our view that considered on its own, the description of the property was incorrect.

[22] The relevant context in which the statements in the advertisement were made include that the sale of the property was taking place in a context where a freehold apartment was being offered for sale. In our assessment it was misleading to describe accessory properties such as carparks in the same statement, without including qualifying text which would make it clear that while the apartment would be freehold the other property, the carparks, would not. To describe the property as "this beautiful freehold 3-bedroom apartment with 2 carparks" had a tendency to mislead.

[23] The advertisement would only have been acceptable if it had included two qualifying statements. The first would be that one of the carparks, although owned by the purchaser could not be rented out to other persons. In regard to the other carpark, it should have been explained that it was not owned by the purchaser and nor could it be rented out to third parties[2].

[24] In his submissions, Mr Rea said that it would have been burdensome for the vendor to have to include clarification text in the advertisement. Our response is that we do not agree that the rules can be interpreted as excusing a misrepresentation on the grounds that it would have been too difficult to publish an advertisement in a form that was not misleading. The objectives of the act would not be attained by such an interpretation.

Correction of misleading advertisement?

[25] An issue that arose in this proceeding was whether a licensee who had misled a customer or provided false information under rule 6.4 could avoid liability by following the misleading statement or representation with a subsequent statement which was intended to correct the position.

[26] In their submissions, counsel discussed academic commentary on the offence of engaging in misleading and deceptive conduct under the Fair Trading Act 1986 (FTA).[3] The discussion of the FTA cases raised the possibility that because the written material in the advertisement was subsequently explained by the licensees

[2] The additional carparks were common property owned by the body corporate
[3] D Wilson *The Fair Trading Act Handbook 2018* (online ed, 2018, New Zealand, LexisNexis) at [3.100]–[3.101].

providing further information to the purchaser, that any misleading effect of the advertisement was neutralised.

[27] The relevant parts of the commentary state that correction at the point of sale or the ability to seek legal advice at a later time do not alter the fact that misleading or deceptive conduct occurred in the first place[4]. However, the commentary also observes that the position might be different if no member of the public has carried out some action in reliance on the conduct, and where the correct position had subsequently been made clear[5].

[28] In her submissions, Ms Davies for the Authority disagreed that subsequent provision of correcting material would deprive the advertisement of its misleading effect. She noted that Heath J had pointed out in *Vosper v Real Estate Agents Authority*[6] that there are differences between the statutory objectives of the FTA, on the one hand, and the REAA Act and Rules, on the other. In regard to misleading comments, for example, there is no requirement under r 6.4 that anyone actually be misled. Under the FTA, there is such a requirement.

[29] We agree with that approach. The policy of the Fair Trading Act is to provide to persons who suffered loss because of a material misdescription or misrepresentation of goods and services purchased. If a misleading statement was made which was corrected before the representee acted on it, then the type of conduct at which the FTA is aimed, is neutralised.

[30] However, the jurisdiction under the Real Estate Agents Act is directed to preventing, amongst other things, misleading conduct on the part of licensees. Rule 6.4 was enacted because a rule of that kind would be consistent with the purposes of the Act set out in s 3. Those purposes include promoting public confidence in the performance of real estate agency work and also raising industry standards. The objectives of s 3 of the Act are not confined to situations where such an agreement for

[4] Citing *St Lukes Health Insurance v MBF* (1995) ATPR 40,820 and *MacIntyre and Williamson v Fonterra Cooperative Group Ltd* [2015] NZHC 3012.
[5] Citing *Knight v Beyond Properties* (2007) 71 IPR 466 and *Quinn Group v Quin Workforce* HC Auckland CIV-2007-404-3469, 26 October 2007.
[6] *Vosper v Real Estate Agents Authority* [2017] NZHC 453

sale and purchase is entered into. Misleading conduct on the part of licensees needs to be prevented if the objectives of section 3 of the Act are to be attained.

[31] The point under discussion is whether a statement followed by a subsequent statement that modifies the first one is to be sensibly treated as one transaction which in substance results in only one relevant representation being made. If, for example, a person makes a statement to a person that she is meeting with and then no more than a few minutes later in the course of the same meeting makes a further statement that modifies the original utterance, common sense would suggest that the two statements should be treated compendiously as only one representation rather than a series of separate representations. In that circumstance, any error which was made in the first statement could be corrected; it would no longer be treated as having separate effect. If the second statement, had the effect of effectively retracting any misrepresentation contained in the first statement, then it could not reasonably be supposed that the representor was adhering to the first, misleading, statement.

[32] If, on the other hand, a person makes a statement that contains an inaccuracy without correcting it for several days, then, depending on the factual circumstances, that statement would be more likely to be analysed as the making of a representation followed by a later correction of that representation. If proceedings under the act were brought, the representor could not reasonably expect that the original offending misrepresentation should be viewed as having merged with the second correcting statement bringing about the consequence that it was therefore no longer available as a basis for a prosecution. The situation would be viewed by reasonable listener as one where there had been two separate representations and that the first of those had effect from the time when it was made until it was effectively withdrawn by the second statement. The lapse of time would appear to be a relevant consideration in the factual context which we have just been discussing.

[33] In the present case, the first representation was contained in the advertisement. It is not clear when the advertisement was placed. The material which the appellant claims corrected any misunderstanding was attached to an email that Mr Li sent to the complainant on 6 June 2016. This is likely to have been some days after the placing

of the advertisement. Similarly, any attempts to clarify the position about the car parks at the open home on 5 June would have occurred sometime after the advertisement had been published.

[34] Our conclusion therefore is that if the advertisement in this case was misleading, its effect as such was not cured by later corrective statements.

[35] The fact that the licensees took steps subsequent to the advertising to provide information which accurately described what had been the subject of a misrepresentation in the advertisement, could have been a matter that effected penalty. There is however no appeal against penalty that we are required to consider. Further, the Committee expressly considered the fact that the licensees subsequently provided "a significant quantity of general information on the property". The Committee considered that was a partial mitigation of the seriousness of the unsatisfactory features of their conduct in publishing an inaccurate advertisement which stated the purported features of the apartment.

Failure to advise purchasers that the second car park would not be rented

[36] The complainant alleged that the licensees failed to disclose to him that he was unable to "sublease" the car parks for additional income. The committee upheld that complaint. The appellant appeals against this finding as well.

[37] The Committee's findings concerning what the appellant told the second respondent that the second car park would not be rented out were as follows.

> 3.11 While we accept that it is quite possible that the licensees did indeed provide the information[7] by email as they claim we were not provided with clear evidence such as copies of accompanying emails (to which the information had been attached) to persuade us that it was likely they had done so.
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> 3.12 Although the committee is unable to find conclusively that the licensees failed to disclose to the complainant that the car parks could not both be used as an additional source of revenue we nonetheless found that on the balance of probabilities, the complainant was not made aware of the requirements of the body corporate in such a way that he was able to make an informed commercial decision whether to proceed with the purchase or not, and for this reason we find that the licensees have failed in their duty to disclose relevant information to the complainant or have withheld information which should, in fairness, have been provided to him.

[7] That is, advice that it was not possible for owners to rent out car parks.

[38] The first point that arises concerning this aspect of the case of, whether there was any obligation on the appellant to disclose the position about non- subleasing of the car parks. It is not disputed that there was such an obligation. The second issue is whether the appellant satisfied that obligation. The submissions of her counsel were that the obligation was satisfied by Ms Feng providing the information, by Mr Li doing so as well and by Mr Li emailing copies of relevant documents to the purchaser. It was further asserted that the complainant was given the same information by the vendor's son, Mr Su, and by the manager of the apartment complex, who was identified by the name of "Coco".

[39] In a prosecution before the Committee or the Tribunal, it is not incumbent upon the person charged to prove that she has not infringed the relevant rules. The burden of doing so rests with the Authority as the prosecuting agency. She is not required to give evidence. But if she does, the Tribunal is required to assess such evidence as she puts forward for the purpose of determining whether that evidence casts doubt upon the case that the Authority puts forward which results in the Authority not proving the matters that it is required to on the balance of probabilities.

[40] The Committee apparently took the view that the appellant did not establish that she informed the complainant about the restrictions on the use of the carparks by relying upon a combination of the oral evidence of Mr Wu and documents that were produced by the licensees involved in the sale of the property.

[41] The appellant asserts that the car park arrangements, including that there was one car park only on the title and the question of the non-rent ability of the second car park, were both discussed at the first open home. Mr Li's evidence is to the same effect.

[42] We do not propose to set out a detailed analysis of the evidence to establish whether the case that the authority puts forward establishes that it is more likely than not that the appellant did not tell the complainant about the restrictions on renting out the car parks.

[43] Some aspects of the evidence can be briefly referred to.

[44] We did not regard the complainant as a convincing witness. He was not a conscientious, careful witness. He exhibited a lack of spontaneity in answering the questions and on occasions provided answers that were unresponsive to the question that counsel actually asked.

[45] The position that the appellant took was that she and Mr Li explained to the second respondent at the first open home he attended that there was only one car park on the title and that car parks could not be rented out to non-residents of the development.

[46] The appellant had to be reminded during the course of her evidence to answer the question that had been put to her rather than making a statement about some other matter. We did not view her as a compelling witness either.

[47] Mr Li gave evidence that he advised Mr Wu at the first open home that car parks could not be leased out to non-residents of the development. Mr Li said that people with whom he discussed the property were, as a matter of general practice, told about the car parking arrangements. That included the rule against subleasing. He said it was quite a simple matter to explain the rules to Mr Wu, the complainant, in Mandarin. Mr Li was cross-examined about why he had not mentioned in the statements given to the Authority the fact that he had explained the restrictions on non-owners using the car parks. His explanation was that he was answering questions from the Authority and that issue had not come up. The position was described by Mr Rea as being that the focus of the complaint which the REA was dealing with was the matter of how many car parts were on the title to the apartment and not the "peripheral" issue of whether the complainant had been given the required information in regard to prohibition on non-residents using the car parks.

[48] We accept that this may well explain why Mr Li did not volunteer information on this topic at the commencement of the Authority's enquiries.

[49] As we have already mentioned, it is Mr Li's evidence that he also sent an email to the complainant 6th June 2016 which had a number of links to documents that explained the position about the car parks.

[50] The documents, though, are all in English and they are numerous in number. It is correct that one of the documents contains an oblique reference to the basis upon which the second car park is provided.

[51] In our assessment, the documents that Mr Li sent to the complainant after the first visit that he made to the property do not directly establish that he did advise the complainant that there was a restriction on subleasing the car park to non-residents. Those documents do not contain a direct reference to that rule. Their overall effect, though, is not very clear. The email has some indirect relevance in that it shows that Mr Li was candid about other restrictions on the car park use.

[52] We note that Mr Li was not present when the complex manager is said to have explained the restrictions on subletting the second car park.

[53] The evidence of Mr Su, who is the son of the vendor of the property whom Mr Rea accurately described as a neutral witness, was rather hard to assess. Mr Su, gave evidence from his home in China that he was present at the first open home and that the appellant had informed the second respondent that only one car park is on the title. There is, however, some doubt about what parts of the exchanges between the licensees and the complainant that Mr Su actually heard. While we consider Mr Su was a truthful witness the evidence he actually gave was of limited value.

[54] Our overall conclusion on this part of the charges is that we do not believe that the evidence establishes that it is more likely than not that the appellant withheld information about the restriction on the sublease of car park or their use by non-residents. The question of whether she withheld information is affected not just by the statements that she made to the complainant, but also what her co-licensee said in this

area. She did not have to repeat what Mr Li said to the complainant. It is our view that it cannot be ruled out that Mr Li passed on to the complainant all of the information that he had obtained, and could reasonably obtain, on the subject of the car parking restrictions. We consider that it has not been established as more likely than not that the complainant's account of what happened is the correct one.

[55] We are not satisfied that this charge has been proved.

Unsatisfactory conduct

[56] The next matter to be considered is whether the mis-description of the property in the advertisement amounted to unsatisfactory conduct on the part of the appellant.

[57] Ms Davies made the following submissions when summarising this part of the argument:

> 1.44 (b) The misrepresentation would need to be serious enough to warrant a disciplinary response (for example, if the misrepresentation related to an important feature of the property and/or if a purchaser had taken steps in reliance on the misrepresentation).
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> (c) If the circumstances of the misrepresentation are serious enough to warrant a disciplinary sanction, then if a licensee has taken steps to correct the misleading information, this may be a factor which is relevant to the issue of penalty (along with other factors, such as whether there has been reliance on the misleading information by the recipient of the information).
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> ….
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> [2.5] The key issue in determining whether a breach of r 6.4 requires a finding of unsatisfactory conduct is whether the conduct is serious enough to warrant a disciplinary response. This will depend on an assessment of the circumstances of each case. Factors such as a licensee's intent to mislead, the nature of the conduct (i.e., the nature and form of the misleading information and who has been the recipient of the information), the effect of the misrepresentation and whether there have been steps taken in reliance on the misrepresentation, are each relevant to whether a finding of unsatisfactory conduct is warranted.

[58] Mr Rea did not disagree with the above summary. The Tribunal accepts that the propositions put forward correctly state the position.

[59] The issue of whether the actions and omissions of the appellant amounted to unsatisfactory conduct was not part of the arguments put forward by the appellant. The defence position centred on the question of whether there had actually been a misstatement of the specifications of the car parks in the advertisement.

[60] The view of the Tribunal is that it is a serious matter to cause, contribute to or fail to dispel uncertainty and doubt about the extent of the property which is being offered for sale. Where that occurs, there has been a fundamental failure on the part of the licensee to comply with his/her ethical obligations.

[61] Even though the unusual nature of the car park arrangements in this case had the potential to cause confusion, the appellant does not assert that she herself misunderstood what those arrangements were. It would have been apparent that care would be needed with the advertising of the property to ensure that there was no misunderstanding about the car parks.

[62] We have already referred to the contention that Mr Rea put forward which was to the effect that it would have been difficult to draft suitable text for the advertisement which would ensure that there was no confusion. We repeat our earlier observation to the effect that a licensee is not justified in proceeding with Fair-Trading a misleading advertisement on the grounds that it would be too difficult to draft a form of advertisement that would state the position accurately. The licensee is required in this circumstance to give priority to the interests of customers who could potentially be misled.

[63] For these reasons, we consider that the conduct in question did not meet the required standard established by the rules and that the appellant did engage in unsatisfactory conduct.

Result

[64] The result is that the appeal is dismissed.

[65] 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.

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Mr J Doogue
Deputy Chairperson

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G Denley
Member

_____
C Sandelin
Member