

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 32

READT 001/2021

IN THE MATTER OF charges laid under s 91 of the Real Estate Agents Act
2008

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE
1907

AGAINST MARY TAPU
Defendant

Hearing 31 May – 1 June 2021, at Hamilton

Tribunal: Hon P J Andrews, Chairperson
Mr N O'Connor, Member
Ms F Mathieson, Member

Appearances: Mr S Waalkens and Ms E Bergin, on behalf of the
Committee
Mr R Hern on behalf of Ms Tapu

Date of Decision: 22 June 2021

DECISION OF THE TRIBUNAL

Introduction

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

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.

[2] Complaints Assessment Committee 1907 (“the Committee”) has charged Ms Tapu with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 (“the Act”). The Committee alleges that Ms Tapu’s conduct in the course of marketing a property for sale in Te Kuiti (“the property” or “Ms Drummond’s property”) constituted a wilful or reckless contravention of r 6.4, in that she failed to disclose to a prospective purchaser of the property (Ms Drummond) that the neighbouring property was used as a Mongrel Mob headquarters. We will refer to the neighbouring property as “No. 105”.

[3] The Tribunal understands that the building at No. 105 was once a bottle store. It comprises a large red building at the rear with a single-storey “shop-front” construction at the front. There is a tall wooden fence to one side of the front and a tall wire fence with a gate in it on the other side. The building and its surroundings appear derelict.

[4] No. 105 was variously described in the evidence and submissions to the Tribunal as “the gang headquarters”, “a gang headquarters”, “a gang pad”, and as having a “gang presence”, “gang affiliations” or “gang connections”. It was common ground at the hearing that the essence of the charges against Ms Tapu is that she failed to disclose to Ms Drummond the connection of the Mongrel Mob to No. 105. We will refer to this as “No. 105’s gang connection”.

[5] In the alternative, the Committee charges Ms Tapu with misconduct under s 73(b) of the Act, alleging that her conduct constituted seriously incompetent or seriously negligent real estate agency work, and with unsatisfactory conduct under s 72(b) (conduct that contravenes a provision of the Act or Rules).

[6] At the beginning of the hearing of the charges, Mr Hern advised the Tribunal that Ms Tapu acknowledged that she had not personally or explicitly told Ms Drummond of No. 105's gang connection. She denied that her conduct amounted to misconduct, under either s 73(c)(iii) or s 73(b).

Agreed facts

[7] The parties agreed on a summary of the relevant background facts. All relevant events occurred between June and August 2018.

[8] Ms Tapu is a licensed salesperson and at the time of the relevant conduct was engaged by Property Brokers Ltd in Te Kuiti ("the Agency"). She was engaged by the owner of the property, Mr Denton, to market it for sale.

[9] In early June 2018, Ms Drummond contacted Ms Tapu and advised that she was looking for a property that would be safe and secure for herself as an older single woman and her two specialist truffle detection working dogs. Ms Tapu took Ms Drummond to the property on 26 June but as Mr Denton was not available, Ms Drummond had only a brief look at the property. Ms Tapu was aware of No. 105's gang connection but did not advise Ms Drummond of it.

[10] Ms Drummond and Ms Tapu visited the property on 29 June. There is a dispute as to what was said to Ms Drummond about No. 105.

[11] Ms Drummond signed an agreement for sale and purchase of the property on 2 July and settlement occurred on 2 August.

Evidence as to the visit to the property on 29 June

[12] Ms Drummond's evidence was that neither Ms Tapu nor Mr Denton told her about No. 105's gang connection, although Mr Denton said that he thought the building on the property had been condemned by the local Council, but youths would sometimes sleep there and hold parties there. She said that at the time Mr Denton said this, Ms Tapu, Mr Denton and herself were standing on a deck looking away from the property up the driveway towards the street. She said she pointed to No. 105 and

asked about it as it looked run down. She said that if the word “gang” had been used she would have asked what that meant. She also said that Mr Denton offered to introduce her to neighbours to the side and rear of the property, and said that one of them would go and sort out the youths if they caused any problems. Ms Drummond said she was not alarmed at being told that youths from time to time slept at No. 105 and held parties there; she regarded that as “kids being kids”. She said that was not the same as No. 105 being used by gang members.

[13] Ms Drummond said that she had not seen the front of No. 105 on either of the occasions when she went to view the property as it was obscured by a bend in the street and her view of No. 105 would have been affected by the fact that she was in the passenger seat of Ms Tapu’s car. She also said that she was not able to see the front of No. 105 when standing on the deck with Ms Tapu and Mr Denton, as there was a tall fence at the front of No. 105. She did not see anyone at No. 105 and if she had, she would have asked who they were and what they were doing. She said she saw nothing about No. 105 that suggested it was anything but a derelict building.

[14] Ms Drummond learned about No. 105’s gang connection in early August, after she had settled the purchase, when servicemen who came to work at the property asked why she had bought a house next door to a gang pad. She said she visited Ms Tapu the same week to challenge her about failing to tell her about No. 105’s gang connection. She said Ms Tapu did not confirm or deny the gang connection, but said that homeless people occasionally stayed there overnight as No. 105 had a shower and toilets, and that they were not a problem.

[15] Ms Drummond said that she had had a number of problems with No. 105, which she had described in correspondence with the Real Estate Agents Authority. She said she wishes Ms Tapu had been upfront and disclosed the gang connection, as there were a couple of other properties in Te Kuiti she was also interested in at the time she bought the property. She said she would not have ignored the issue or been comfortable with buying the property if she had known of No. 105’s gang connection. She does not consider the property is safe for herself and her dogs, but she told the Tribunal that she cannot afford the increased cost of buying a replacement property, even if she could sell the property.

[16] Ms Tapu accepted that Ms Drummond told her that she wanted a place that was safe and secure for her and her specialist dogs, and as a single middle-aged woman living alone.

[17] Her evidence was that she saw patched gang members outside No. 105 when she visited with the property with Ms Drummond. She clarified her evidence at the hearing, saying that she saw two or three boys outside No. 105, doing work on the motor of a car, whom she recognised as patched gang members, but not wearing gang patches. She accepted that because of the direction from which they approached the property (the most direct route from her office, which meant that they did not go past No. 105) and her position in the car, Ms Drummond would not have seen them, and if she had seen them, would not have known who they were.

[18] Ms Tapu said that she and the vendor did not discuss No. 105's gang connection; there was no need to do so as they were both aware of it. She also said that people in Te Kuiti would have known of the gang connection. She accepted that the gang connection would not have been known to people from outside Te Kuiti.

[19] Ms Tapu accepted that No. 105's gang connection was a matter that she, herself, should in fairness have disclosed to Ms Drummond, as a prospective purchaser of the property, but was adamant that the vendor, Mr Denton, did so. She said that Mr Denton said to Ms Drummond, in her presence, that No. 105 was derelict, that youths stayed there, and that from time to time, patched gang members were there. She also said she believed that Mr Denton told Ms Drummond that No. 105 was a "mongrel mob pad".

[20] Ms Tapu said that when Ms Drummond raised the issue of No. 105's gang connection with her she offered to re-sell the property free of commission but Ms Drummond did not accept the offer. When questioned about the impact of No. 105's gang connection on the value of Ms Drummond's property she suggested that the price at which it was marketed during a previous agency¹ may have been the reason why it did not sell during at that time, but accepted that the fact that a property has a gang connection could have an impact on the value of a property that is next door to it.

¹ Evidence of Ms Rendall, referred to in paragraphs [26] and [27] of this decision.

[21] The Tribunal records that neither party was able to make contact with Mr Denton for the purpose of giving evidence to the Tribunal, with the result that the Tribunal was not able to receive evidence from him. However, the Tribunal has been provided with two communications as to his evidence.

[22] In an unsigned statement dated 16 May 2019, Mr Denton said:

[Ms Tapu], [Ms Drummond], and I were all standing together on the driveway outside the home having a conversation. There were patched members standing outside the property next door while we were standing on the driveway talking. We were discussing the neighbours and I told her that it was the pad and I offered to take her over and introduce her to make it easier but [Ms Tapu] said it wasn't necessary at that time.

I told her that I had no trouble with them and as an example of what they are like, I told her the community lady had broken down outside my house and they had come out and helped her and jump started her car for her.

[23] On 22 September 2020 the Committee's investigator received a phone message from Mr Denton, in responses to messages the investigator had left for him. The investigator recorded Mr Denton as saying:

Hi my name is Karl Denton. I am ringing regarding the inquiry you made. I do not know what help I can give you. And I'd be wanting to talk to a lawyer before I talk to anyone. I do not know what my liabilities are in regards this case. And I can't remember much details anyway. Thank you.

Other evidence

[24] The Tribunal also heard evidence from Ms Cave, who attended some viewings (but none of Ms Drummond's property) with Ms Drummond. She said that Ms Drummond made it clear to Ms Tapu at a property viewing and in a later telephone call that her safety, and her dogs' safety, was her paramount consideration as she lives alone, and was new to Te Kuiti. Another friend, Ms Wilde, said that Ms Drummond had previously tenanted a cottage she owned, and when she decided to sell the cottage she and Ms Drummond had many discussions about the property she was looking for. She said that Ms Drummond said that the main thing she was looking for was somewhere that would be safe for her and her dogs.

[25] A further witness, Ms Kite, bought a property in the same street, but a few doors away from No 105, in June 2019. She had previously, in 2018, considered buying Ms

Drummond's property, but was told about No. 105's gang connections by a relative who lives in Te Kuiti. She said that after she signed an agreement for sale and purchase for her property, but before it went unconditional, Ms Tapu telephoned her and asked if she knew about the gang presence.

[26] The Tribunal also heard evidence from a real estate salesperson, Ms Rendall, who had an agency agreement for the property prior to Ms Tapu's agency. She was aware of No 105's gang connection before she obtained the listing, and saw patched gang members outside No. 105 on a couple of occasions during her listing.

[27] Ms Rendall said that the vendors of the property said nothing about withholding disclosure of No. 105's gang connection, and said they had not had problems with them. She explained No. 105's gang connection to prospective purchasers, usually before they came to view the property. She said some decided not to view it but others still viewed it. She said that while there was quite a lot of interest when she first listed the property it tapered off quite quickly. She decided not to re-list it when the agency period ended.

[28] Two senior members of the real estate industry gave evidence on behalf of Ms Tapu. Neither was involved in Ms Tapu's marketing of the property, and their evidence is properly regarded as character evidence.

[29] Ms Alexander was retained for a period in 2018 and 2019 as consultant to the Agency. She said that Ms Tapu was a top salesperson, and she found her reliable and professional. She said she had visited Ms Drummond's property more than once after being made aware of the complaint and on each occasion there was "clear but non-threatening evidence" of No. 105's gang connection. At the hearing she accepted that her only knowledge of No. 105 was on the basis of what she was told, and she did not notice gang patches, flags, or other gang insignia. She also accepted that if as an agent she was aware that a property had gang connections it would "absolutely" be advised to prospective purchasers.

[30] Ms Alexander said she understood that No. 105 likely has no power, and is somewhere where overflow gang members can "doss down" when they are in Te Kuiti

for events like tangi. She told the Tribunal she has learned that there are numerous gang properties in Te Kuiti, which are clearly more established than No. 105, with operating power and permanent occupants.

[31] Mr Wakelin is currently the branch manager of the Agency. He was not the manager at the time Ms Tapu marketed the property. He also spoke very highly of her ability as a real estate salesperson and her contribution to the community, in particular her voluntary work at her local marae and support of less fortunate community members.

[32] Mr Wakelin believes that the purchase price paid by Ms Drummond for the property reflected the gang connection of No. 105, and the market value at the time. Having reviewed the relevant documents, Mr Wakelin expressed the opinion that Ms Tapu had very good reason to think that Ms Drummond was fully aware of No. 105's gang connection, and that she would have disclosed the connection had she believed Ms Drummond was not aware of it. He said that anywhere you go in Te Kuiti there is a gang presence nearby, and you do not have to be associated with the town for long to realise this.

[33] Mr Wakelin accepted at the hearing that his evidence was based on an assumption that Ms Drummond was aware of No. 105's gang connection. He agreed that a neighbouring gang presence ought to be disclosed to a prospective purchaser, and that the disclosure ought to be recorded on a transaction report. He was referred to the "Transaction and Representation Report" prepared by Ms Tapu after Ms Drummond's purchase of the property, in which she ticked the "NO" box to answer the question "Are you aware of anything about the property which may cause a problem for the purchaser in the future?" Mr Wakelin accepted that a neighbouring gang presence is a matter which might cause a problem for a purchaser of a property in the future but said that he did not see a problem if a prospective purchaser was aware of the presence and was comfortable with it.

Findings

[34] There was no dispute as to No. 105's gang connection. We find that while that was known to Ms Tapu and the vendor, Mr Denton, it was not known to Ms Drummond before she bought the property. We also accept Ms Drummond's evidence that No. 105's gang connection was not obvious to her when she viewed the property.

[35] We accept Ms Drummond's evidence as to what she was told about No. 105, and her evidence that her paramount consideration was to buy a property that provided safety for herself and her dogs. Her evidence was clear and consistent throughout, and her statement that had she known of No. 105's gang connection she would not have ignored the issue or been comfortable with purchasing the property was consistent with her approach. The statements made by Mr Denton were inconsistent and he did not give evidence at the hearing. We are not able to place any weight on his statement as to what he told Ms Drummond, or Ms Tapu's evidence that she believed he told Ms Drummond that No. 105 was a gang pad.

[36] We find that Mr Denton told Ms Drummond that youths slept at No. 105 from time to time and had parties there, but did not disclose No. 105's gang connection to her, or tell her that it was a gang pad.

Submissions

[37] Ms Tapu acknowledged that No. 105's gang connection was a matter that should in fairness have been disclosed to Ms Drummond and that she did not disclose it. The issue for determination is whether that failure constitutes unsatisfactory conduct under s 72(b) of the Act, as she accepted, or misconduct under either s 73(c)(iii) or s 73(b).

[38] Mr Waalkens submitted that failure to disclose No. 105's gang connection was serious and went well beyond unsatisfactory conduct. He submitted that the appropriate finding is that Ms Tapu's failure to disclose No. 105's gang connection constitutes misconduct under s 73(c)(iii): that is, that it was a reckless breach of r 6.4. He submitted that Ms Tapu knew that she should disclose the gang connection to Ms

Drummond but chose not to do so. He submitted that she had courted the risk of breaching r 6.4.

[39] Mr Waalkens submitted that there were many occasions when she could have made disclosure: including during either of two visits to the property with Ms Drummond, or during any dealing with Ms Drummond before the purchase was complete. He submitted that Ms Tapu had chosen to ignore her obligations at every step of the sale process. In the alternative, he submitted that if the Tribunal did not accept that Ms Tapu's failure to disclose No. 105's gang connection was reckless, it should find that it constituted seriously incompetent or seriously negligent real estate agency work, and thus misconduct under s 73(b) of the Act.

[40] Mr Hern submitted that the Tribunal should take account of the respective parties' perceptions of the exchanges with Mr Denton. He submitted that as someone who was born and bred in Te Kuiti, whether or not Mr Denton actually used the words "gang" or "Mongrel Mob", as well as "youths" who "occasionally slept at" and "had parties at" No. 105, Ms Tapu would have been "hard-wired" to take what he said as being a reference to the gang connection of which she was already aware. He submitted that she reasonably assumed that Ms Drummond also understood it as such.

[41] He submitted that Ms Tapu genuinely believed that Ms Drummond entered into the agreement for sale and purchase of the property knowing of No. 105's gang connection, and was not concerned. He submitted that the issue arises as to why, if the gang connection was of such concern, Ms Drummond could not sell the property and re-locate. He did not accept her evidence that she could not do so.

[42] Mr Hern submitted that this case is not an instance of non-disclosure; rather it is a case of a misunderstanding of the meaning of what was said. He submitted that none of Ms Tapu's actions or omissions could accurately be described as being wilful or reckless (and thus misconduct under s 73(c)(iii)) or seriously incompetent or seriously negligent real estate agency work (and thus misconduct under s 73(b)).

[43] He submitted that if the Tribunal found that Ms Drummond was not told about No. 105's gang connection, it was a matter of inadequate disclosure or partial

disclosure, not non-disclosure. He submitted that a finding of unsatisfactory conduct under s 72(b) (that she breached a provision of the Act or Rules) would adequately meet the consumer-protection purpose of the Act.

Discussion

Did Ms Tapu breach r 6.4?

[44] Licensees are in breach of r 6.4 if they (as relevant to the present case) “withhold information that should ... in fairness be provided to a customer or client”. In her judgment on an appeal from a Tribunal decision in *Barfoot & Thompson v Real Estate Agents Authority (Complaints Assessment Committee 20007)* her Honour Justice Thomas held that:²

... An evaluation of what “should by ... fairness” be provided to a client must be undertaken in the particular circumstances of each individual case. There is no presumption either way.

[45] Ms Tapu accepted that information regarding No. 105’s gang connection was information that a prospective purchaser of the property such as Ms Drummond would be interested in knowing. She contended that either she or (as in the present case) the vendor Mr Denton disclosed No. 105’s gang connection to every prospective purchaser of the property.

[46] We find that in the circumstances of the present case, No. 105’s gang connection was a matter which, in fairness, should have been disclosed to Ms Drummond. It was information that Ms Drummond should have been given so that she could make an informed decision as to whether the property met her requirements of safety and security in her particular circumstances. Ms Tapu accepts that she did not make disclosure to Ms Drummond. We have found that Mr Denton did not disclose No. 105’s gang connection. We find that by failing to disclose No 105’s gang connection Ms Tapu breached r 6.4.

² *Barfoot & Thompson v Real Estate Agents Authority (Complaints Assessment Committee 20007)* [2014] NZHC 2817, at [50].

Should Ms Tapu be found guilty of misconduct under s 73(c)(iii)?

[47] Section 73(c)(iii) provides that a licensee is guilty of misconduct if the licensee's conduct:

...

(c) consists of a wilful or reckless contravention of—

...

(iii) regulations or rules made under this Act; ...

[48] We accept Mr Waalkens' submission that to establish a "wilful" contravention of a rule requires proof that the licensee deliberately contravened that rule, and to establish a "reckless" breach of a rule requires evidence that the licensee foresaw the possibility that his or her conduct might breach professional standards, and proceeded regardless of that possibility.³

[49] We agree that the fact that Ms Tapu said in evidence that she had disclosed No. 105's gang connection to other prospective purchasers (as Ms Kite said she did) is evidence that she turned her mind to the requirements of r 6.4, but it does not necessarily follow that her failure to make disclosure to Ms Drummond was reckless.

[50] We accept that given her familiarity with the gang presence in Te Kuiti, it is reasonably possible that Ms Tapu assumed that Ms Drummond understood Mr Denton's references to youths who occasionally slept at No. 105 and held parties there as being references to a gang connection. She may then have assumed that as Ms Drummond did not raise any particular issue following Mr Denton's advice, she was comfortable with proceeding to buy the property and it was not necessary for her to make disclosure of No 105's gang connection herself, or to record it as a possible "future problem" in her transaction report.

[51] Given that possibility, we are not satisfied on the balance of probabilities that Ms Tapu's failure to disclose No. 105's gang connection was a reckless breach of r 6.4.

³ Citing *Real Estate Agents Authority v Clark* [2013] NZREADT 62, at [70]–[74] (referring to *Zaitman v Law Institute of Victoria* [1994] VicSC 778 (9 December 1994)).

Should Ms Tapu be found guilty of misconduct under s 73(b)?

[52] Section 73 (b) provides that a licensee is guilty of misconduct under s 73(b) of the licensee's conduct:

...

- (b) constitutes seriously incompetent or seriously negligent real estate agency work; ...

[53] Her Honour Justice Thomas discussed s 73(b) in her judgment in *Complaints Assessment Committee 20003 v Zhagroo*:⁴

The words of s 73(b) must be given their plain meaning. Whether serious negligence or serious incompetence has occurred is a question to be determined in the circumstances of each case.

[54] The determination whether a licensee's conduct constituted "serious" incompetence or negligence must turn on the facts and circumstances of each particular case.

[55] In the present case, Ms Drummond was very clear in advising Ms Tapu of her personal circumstances as an older woman living alone and that her paramount concern was for her personal security and safety and that of her specialist working dogs. In those circumstances, we do not accept that disclosure of No. 105's gang connection was something that could be left to the vendor of the property. It was a matter that was of particular importance to Ms Drummond, and it should have been attended to by Ms Tapu, in person, and in clear terms. In the circumstances of this case it was not sufficient for Ms Tapu to assume that Ms Drummond had understood Mr Denton's statements about "youths" as referring to gang members.

[56] We do not accept Mr Hern's submission that this is a case of "partial" disclosure, rather than non-disclosure. In the present case, No. 105's gang connection was not disclosed to Ms Drummond, at all.

[57] Nor do we accept Mr Hern's submission that Ms Tapu's failure to disclose No. 105's gang connection to Ms Drummond did not constitute "serious" incompetence or

⁴ *Complaints Assessment Committee 20003 v Zhagroo* [2014] NZHC 2077, at [49].

negligence. Given Ms Drummond's clear statement as to her personal circumstances and her paramount concerns, Ms Tapu's failure to make disclosure can only be regarded as seriously incompetent or seriously negligent real estate agency work.

Orders

[58] We find Ms Tapu guilty of misconduct under s 73(b) of the Act.

[59] The Tribunal will receive submissions as to penalty. Submissions on behalf of the Committee are to be provided within 15 working days of the date of this decision and submissions on behalf of Ms Tapu are to be provided within a further 15 working days. Counsel are to advise the Tribunal whether an oral hearing is sought as to penalty, or whether the matter may be determined on the papers.

[60] 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.

Hon P J Andrews
Chairperson

Mr N O'Connor
Member

Ms F Mathieson
Member