

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 74

READT 13/16

UNDER THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF AN APPEAL UNDER SECTION 111 OF
THE ACT
BETWEEN BARFOOT & THOMPSON LIMITED and
SUZANNE SAYWELL
Applicants
AND THE REAL ESTATE AGENTS
AUTHORITY (CAC)
First Respondent
AND TREVOR WATT and ROBYN WATT
Second Respondents

Tribunal: Ms K Davenport QC – Chairperson
Ms C Sandelin – Member
Mr J Gaukrodger – Member
Decision: On the papers
Counsel for the Applicant: Mr T Rea
Counsel for the First Respondent: Ms K Lawson-Bradshaw
Date of Decision: 21 November 2016

DECISION OF THE TRIBUNAL

[1] Ms Saywell and Barfoot & Thompson were found guilty of unsatisfactory conduct by the Complaints Assessment Committee and found to be in breach of Rules 5.1, 6.2, 6.4 and 10.7 of the Client Care Rules (2012).

[2] As a result of these findings Ms Saywell was censured and fined \$2,000 and Barfoot & Thompson was censured and fined \$2,500.

[3] Both appeal these decisions in whole or part.

[4] Counsel have agreed the appeal may be determined on the papers.

The Facts

[5] These facts are taken from the CAC's decision and from the bundle of documents. No evidence has been called.

[6] On 4 August 2014, the Real Estate Agents Authority received a complaint from Trevor and Robyn Watt (the Complainants) against Sue Saywell (the Licensee) and Barfoot and Thompson Mt Eden (the Agency).

[7] The complaints asserted that the Licensee failed to disclose information to them contained in a building report which revealed structural defects in the property. They claimed that these defects were known to the Licensee and the Agency prior to the Complainants submitting their offer on 7 June 2014.

[8] Ms Saywell of Barfoot & Thompson, Mt Eden was the listing agent for these two units and the property was to be sold at auction. On 26 May 2014, the property went to auction and did not meet reserve. It was listed for sale for \$595,000.

[9] On 29 May 2014, the vendor entered into a conditional contract with a prospective purchaser. The agent who acted on this sale was a Ms Yu at Barfoot & Thompson, Mt Albert. This sale did not proceed. On inquiry the Licensee informed the Complainants (who were subsequent potential purchasers) that the conditional contract was subject only to finance. The agreement was in fact not subject to any finance clause but was subject to a building report.

[10] There is a dispute between the evidence of Ms Saywell and Ms Yu as to what Ms Saywell was told about the reasons for the collapse of the first sale. Ms Saywell's evidence to the CAC was that she had no knowledge of the building report and believed the sale was cancelled because of a failure to obtain finance. Ms Yu stated she made clear to Ms Saywell that the agreement was cancelled because of the

concerns raised in the building report. The CAC found in favour of Ms Yu's version. The appellant challenges these findings.

[11] The Barfoot & Thompson office system was updated to show "conditional, sell date 29 May 2014 conditional to 6 June 2014, subject builder". This agreement did not proceed due to a structural problem with the property which was highlighted in the building report. Ms Saywell says she was unaware of this update.

[12] There is a dispute in the evidence over the sequence of events between 5 and 7 June. Ms Saywell's evidence is that she did not have any significant communication between the signing of the conditional offer by Ms Yu's clients until she called the vendor's solicitor's office at 5pm on 6 June and was informed that the sale had fallen over. Ms Saywell says "*my understanding and belief was that the agreement was focussed on adequate finance*". In my discussion with Joanna Yu she informed me she would work hard to make the agreement work and that the buyers were borrowing a lot of finance." Ms Saywell says she didn't see the conditional agreement and she didn't look at the status of the agreement in the company listing system. On the evening of 6 June she contacted Ms Watt to advise her that the sale had fallen over and an unconditional offer was made on 7 June.

[13] Ms Yu says the agreement was never subject to a finance condition. Ms Yu says¹ that on 4 June (or the 5th, this date seems uncertain), she rang Ms Saywell and said that there was some problems with the building report and asked about the drainage and Ms Saywell suggested she call the vendors. On 5 June Ms Yu says that Ms Saywell rang her and asked about whether the sale was going to proceed because she wished to place another Herald ad for Saturday. Ms Yu said she told her it would definitely fall over as the house had structural problems. Ms Yu told her Manager at Barfoot & Thompson, Mt Albert and the Manager emailed the building report to Mr Gray and called him. Mr Gray accepts he did not pass this information on to Ms Saywell.

¹ Page 151, Bundle of documents.

[14] On 7 June 2014, the Complainants entered into an agreement for sale and purchase of the property. The offer was conditional only on the vendor arranging cancellation of the fixed term tenancy.

[15] On or about 12 June 2014 Mrs Watt (one of the Complainants) who was employed at the Agency but was not a Licensee, discovered through other licensees at the Agency of the existence of the building report.

[16] Mrs Watt consulted the property listing and noted that the first agreement was subject to a building report, not finance, as they had been advised. Prior to entering into their agreement, the Complainants say that they had specifically asked the Licensee why the first agreement fell over and were advised by the Licensee the first agreement was subject only to finance.

[17] On 13 June 2014, Mrs Watt emailed the Agency to complain about the non-disclosure of the building report.

[18] On 16 June 2014, Mr Gray, the Branch Manager, called Mrs Watt into his office and allegedly offered to release the Complainants from the contract or to vary the contract by inserting a 3 day builder's condition. The Complainants wished to proceed and agreed to this variation.

[19] On 18 June 2014, the Licensee advised Mr Gray that the vendors agreed to the variation. However, the variation was not signed by the vendors as a result of legal advice they received.

[20] Between 18 June and 25 June 2014, the Licensee and Mr Gray attempted to resolve issues between the Complainants and the vendor including a request from the Complainants to negotiate a reduced price.

[21] On 3 July 2014, the builder who undertook the building report for the first potential purchasers outlined the structural damage to the walls of the property to the Complainants. The Complainants' lawyer subsequently wrote to the vendor's lawyer seeking a reduction in purchase price of \$63,760.55.

[22] On settlement day (10 July 2014) under the initial contract, the Complainant made a claim for compensation against both the vendor and the Agency. The Agency, through Mr Gray, replied advising the Complainants they could cancel the contract. The Complainants rejected this offer.

[23] The vendor's lawyer wrote to the Complainants' lawyer rejecting the civil claim and offering to release the Complainants from the agreement and refund their deposit. The Complainants elected to settle.

[24] On 21 July 2014, the Complainants' lawyer lodged a complaint against the Licensee with the Agency for non-disclosure and claimed compensation. On 4 August 2014, the Complainants lodged a complaint with the Authority.

Barfoot & Thompson

[25] The Authority accepts that s 50 of the Real Estate Agents Act 2008 does not apply to the conduct of the Agency, as the conduct complained of did not relate to the supervision of Ms Saywell but rather Mr Gray's failure to disclose the building report. In the circumstances (and as conceded by the Authority) while there could have been a finding against Mr Gray (the manager) personally there is no scope for a finding that Barfoot & Thompson failed to supervise Ms Saywell under s 50.

[26] Having considered the facts of this case the Tribunal agree that the appeal against the conviction of Barfoot & Thompson is appropriate. Accordingly, the Tribunal set aside the decision against Barfoot & Thompson and the penalty finding.

Ms Saywell

Analysis – Has there been a Breach of Rule 10.7?

[27] Ms Saywell appeals the findings that she was in breach of Rule 10.7 and Rule 6.2. She accepts she is guilty of unsatisfactory conduct and has breached Rule 5.1 and Rule 6.4.

[28] Rule 10.7 provides:

A licensee is not required to discover hidden or underlying defects in the land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either –

- (a) Obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
- (b) Ensure that a customer is informed of any significant potential risks so that a customer can seek expert advice if the customer so chooses.

[29] The Authority submits:

The finding of a breach of Rule 10.7 appears to be on the basis that Ms Saywell knew about the unfavourable building report and did not disclose it. However, the Authority accepted that there is limited evidence to support that position and significant evidence against it.

[30] The facts do not completely support a finding that Ms Saywell hid a known defect. It was the fact that there was a building report which was not disclosed which is at the heart of the complaint made by the second respondents, not a failure to disclose a defect.

[31] Having considered the Rule and the facts carefully the Tribunal conclude that there is insufficient evidence to support a finding of breach of Rule 10.7. The CAC decision is modified to delete this finding.

Has there been a breach of Rule 6.2?

[32] Ms Saywell accepts she was in breach of Rules 5.1 and 6.4 but does not accept that there has been a breach of Rule 6.2. Rule 6.2 provides a licensee must act in good faith and deal fairly with all the parties engaged in a transaction. Rule 6.4 provides a licensee must not mislead a customer or client, nor provide false information.

[33] Counsel for Ms Saywell submits:

It is submitted that concepts of “fairness” do not fit with the facts, where the admitted failure by Ms Saywell was inadvertent, due to miscommunication. It may have been imprudent for Ms Saywell to omit to make further inquiries, but it was not “unfair”. It is agreed that findings of multiple rule breaches can arise from the same facts, but a

finding of a breach of Rule 6.2 would involve an unnecessarily strained interpretation of Rule 6.2.

The appeal also seeks modification of the Committee's decision in respect of gratuitous disparaging comments included in that decision, as identified in the submissions for the appellants. It is submitted that this should be the subject of express findings by the Tribunal modifying the decision. The submissions for the Authority are silent on this issue. This issue is important because even though a finding by a Complaints Assessment Committee may be overturned on appeal, it is the practice of the Real Estate Agents Authority (recently confirmed in correspondence between counsel on another matter) still to publish the Committee's overturned decision on the Authority's internet website, in the interests of "open justice". In the circumstances, it is submitted that the appeal decision should include express consideration and findings on the modifications that are sought.

[34] The Authority submits that "*misrepresenting to the complainants why the previous purchasers had cancelled the sale and purchase agreement without undertaking adequate checks of the real reason means that Ms Saywell did not deal with the complainants fairly.*" The Authority submit that it would have been easy for Ms Saywell to check the property listing on Barfoot & Thompson where she could have seen that the agreement was conditional on a building report which would have put her on notice to undertake further enquiries. The Authority submits that Ms Saywell's conduct is a failure to act in good faith as well as a breach of Rules 5.1 and 6.4.

Discussion

[35] After having considered the facts and the submissions of counsel the Tribunal find that there has been a breach of Rule 6.2. This finding is despite the fact that this results in findings that there have been multiple rules breached by Ms Saywell. However, breaches of three Rules does not lead to a finding that Ms Saywell is any more culpable than if there had been a breach of the two Rules. The fact remains that Ms Saywell by her own acknowledgement did not deal fairly with the purchasers by not fully advising them of the reasons for the cancellation of the previous agreement. Had she made proper inquiries then she would have been put on notice about potential for other defects.

[36] However the Tribunal notes the difficulty with decisions made on the papers is that it is almost impossible to resolve factual disputes in this way. The piecemeal

collection of evidence can mean that one party does not respond fully to the other parties evidence. In this case the CAC did not accept Ms Saywell's evidence that she was unaware of the existence of a report. It does seem likely that Ms Saywell would call Ms Yu to check whether the sale was unconditional and then ask the reason why the sale was not to proceed but the Tribunal's decisions is not dependant on any finding on the contested evidence. It is enough that Ms Saywell ought to have known about the reasons for the collapse of the agreement and ought to have conveyed these real reasons to the Watts. Her failure to do so has led to the finding of unsatisfactory conduct. Mr Rea has made comment on the negative comments made about Ms Saywell by the CAC in its decision. In this case, given the conflict of evidence more neutral language on the decision may have been appropriate.

[37] For the reasons set out above the Tribunal allows the appeal in relation to Barfoot & Thompson and dismiss the finding of unsatisfactory conduct against them.

[38] With respect to Ms Saywell the Tribunal modify the CAC's decision to finding that there was no breach of Rule 10.7 but in all other respects confirms the decision of the Complaints Assessment Committee as to findings and penalty against Ms Saywell.

[39] The Tribunal draws the parties' attention to the provisions of s 116 of the Real Estate Agents Act 2008.

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Ms K Davenport QC
Chairperson

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Ms C Sandelin
Member

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Mr J Gaukrodger
Member