

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 53 READT 009/17

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| UNDER | THE REAL ESTATE AGENTS ACT 2008 |
| IN THE MATTER OF | AN APPEAL UNDER SECTION 111 OF THE ACT |
| BETWEEN | Henric Eden Appellant |
| AND | THE REAL ESTATE AGENTS AUTHORITY (CAC413) First respondent |
| AND | Dean Abraham Second respondent |
| AND | Angela Sanson Third respondent |

Hearing: Hamilton, 22 May 2017

Tribunal: Ms K Davenport QC – Chair
 Mr G Denley, Member
 Ms C Sandelin, Member

Appearances: Mr Eden, in Person
 Mr S C M Waalkens, for the Real Estate Agents Authority
 Mr M A Cavanaugh, for the 2nd and 3rd Respondents

Decision: 12 September 2017

DECISION OF THE TRIBUNAL

[1] Mr Eden appeals against the decision of the Complaints Assessment Committee (CAC), dated 16 February 2017, to take no further action against the agents, Dean Abraham and Angela Sanson.

522 River Road, Hamilton

[2] In 2015 Mr Eden and Ms Eden Zhou (**Ms Eden Zhou**) purchased a property in Hamilton (**the property**) to be used as commercial premises. The agents involved in this purchase were Mr Dean Abraham and Ms Angela Sanson.

[3] Mr Eden and Ms Eden Zhou had been looking for a commercial property for a while. They had previously worked with Ms Sanson in the purchase of another property, and had asked her for her help to find a commercial property. The River Road property was identified. Ms Eden Zhou first looked at the property in December 2014. In April 2015 she contacted Ms Sanson and said she wanted to view it again. Ms Sanson organised for Mr Abraham to show the property to Ms Eden Zhou. Mr Abraham was the agent for the vendor. The agents arrived separately – Mr Abraham in one car, and Ms Sanson and Ms Eden Zhou together in another. This viewing of the property occurred on 10 April 2015.

[4] The property was tenanted by the Heartland Bank. Ms Eden Zhou only had the opportunity for a brief look at the property. Mr Abraham says that during this viewing he disclosed to Ms Sanson and Ms Eden Zhou the fact that the property was not leaky but had had two previous leaks through the roof due to a lack of maintenance. Ms Eden Zhou denies that such a conversation took place.

[5] Mr Eden and Ms Eden Zhou subsequently offered to purchase the property. This offer was accepted. A building report was to be obtained. At the pre-settlement inspection on 30 June 2015, Mr Abraham says that he again mentioned to the Edens that the internal gutters of the roof required clearing so that they did not leak, and that previous leaks at the property had been caused by the failure to keep the gutters clear.

[6] Mr Eden and Ms Eden Zhou acknowledge that the June conversation took place, but deny the earlier conversation. They say that when they took possession of the property it almost immediately had a major leak in the roof. They received advice that this leak was caused by a defect which led to the leak, rather than any lack of maintenance.

CAC decision

[7] The Edens complained about the agents' conduct to the CAC. They alleged that the licensees should have disclosed that the roof of the property was defective and that the property had previously suffered water ingress as a result. Had the licensees done so, the Appellants alleged that they would have been able to make a more informed decision as to their purchase. The Appellants sought compensation

from the agents in the amount of \$13,829.88, this being the cost of remedial work on the defective roof.

[8] The CAC considered the complaint and decided to inquire into it under s 79(2)(e) of the Real Estate Agents Act 2008 (**the Act**). The CAC acknowledged that the complaint engaged Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (**the Rules**). Rule 6.4 provides that 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 a client. Rule 10.7, which requires licensees to disclose known defects to customers, was also relevant.

[9] On 16 February 2017, the CAC decided to take no further action against the agents. The CAC had concluded that there was insufficient evidence to support the contention of the Appellants that the licensees did not disclose known defects. Mr Eden appealed this decision to the Tribunal.

Appeal

[10] During the pre-hearing exchange of submissions, Mr Eden sought, and was granted leave, to adduce further evidence from Mr Abraham, Ms Sanson and Ms Eden Zhou about their knowledge of past leaks and issues with the roof prior to the settlement, and the conversation that occurred on 10 April 2015 between Ms Eden Zhou, Mr Abraham and Ms Sanson.

[11] Just prior to the hearing, Mr Eden also made a request under Principle 6 of the Privacy Act 1993 for information to be disclosed to him relating to the insurance that the previous tenants or owners had had on the property. The Tribunal dealt with this matter at the commencement of the hearing. Both Mr Waalkens and Mr Cavanaugh agreed broadly with the following submissions:

- (a) That there was no mechanism under the Privacy Act for this Tribunal to grant leave for the evidence to be adduced;
- (b) Further, there is no jurisdiction for the Tribunal to obtain another party's insurance details and details of their file; and

- (c) It wasn't relevant to the question of whether or not Mr Abraham and Ms Sanson had disclosed the information to the Appellants.

[12] Accordingly, the Tribunal did not grant the request.

Evidence

[13] During the hearing, Mr Abraham and Ms Sanson accepted that they did not make notes of their meetings with the Edens or record the disclosures made about the property's previous incidents of water ingress in writing. They noted, however, that since this complaint it is now their practice to do so.

(a) Appellant

[14] Mr Eden did not give evidence but submitted that:

- (a) There was no disclosure of prior occasions of leaking made by the vendors in the listing agreement.
- (b) The incidents of roof leaking disclosed by the agents refer to only two incidents in 2011 and 2013, and did not disclose the most recent in 2014.
- (c) Mr Abraham had been aware of the December 2014 incident, as the vendor, Mrs Duncan, had told him that and he had failed to disclose this event.
- (d) Mr Eden denied disclosure had taken place to his wife on 10 April 2015, and even if it had, that the disclosure was incomplete and flawed. He noted that in her evidence Ms Eden Zhou denies any knowledge of the two alleged disclosures.

[15] Ms Eden Zhou's evidence was that during the viewing of the property on 10 April nothing was mentioned at all about any issues with the roof. She said instead that the focus was on the earthquake rating of the building.

[16] Mr Eden further pointed out that the agreement for sale and purchase did not disclose any issues with the roof. While Mr Eden acknowledged that at the pre-settlement inspection Mr Abraham had made an indirect reference to the need to keep the gutters clean, Mr Eden was adamant that there had been no disclosure of flooding or roof failure.

(b) Mr Abraham

[17] Mr Abraham's evidence was that he was only aware of two prior incidents of water ingress at the property. The vendors informed him of these incidents in early to mid-January 2015. One incident was due to a tennis ball getting lodged in the property's guttering, and the second was due to debris from neighbouring trees obstructing the guttering. Mr Abraham alleges that he disclosed those two incidents to two prospective purchasers before the Edens (and the Edens). One of the prospective purchasers was the Waikato Rugby Union, who, when asked about this by the CAC investigator, did not dispute the disclosure.

[18] Mr Abraham denies there were any known defects with the roof — he said the issues disclosed were maintenance issues. Mr Abraham alleges that he told Ms Eden Zhou at the 10 April 2015 meeting that the property's gutters required ongoing maintenance and that during the vendors' ownership, the failure to do so had caused two incidents of water ingress. Mr Abraham also states that he disclosed the same to Mr Eden during the 30 June 2015 meeting.

[19] In regard to Mr Eden's suggestions of a third undisclosed incident of water ingress occurring in December 2014, Mr Abraham maintains that the vendors only informed him of the two incidents of water ingress that are mentioned above. He said that there had been a leak with the office water cooler in December 2014 which was initially believed to be a problem with the property's roof. It was only during investigations by the CAC that Mr Abraham learned that this incident may have been attributable to water ingress rather than an issue with the water cooler.

[20] Counsel for Mr Abraham noted that the property's vendors had confirmed with the investigator that there were only two occasions of water ingress, and that they informed Mr Abraham of these two incidents.

[21] Mr Abraham also stated that the vendors had Mr Keith Couchman (a roofing contractor) clear the gutters prior to settlement, and that Mr Couchman had told him there were no issues with the integrity of the roof. This was confirmed by the vendors' insurer.

(c) Ms Sanson

[22] Counsel for Ms Sanson submitted that her evidence was consistent with that of Mr Abraham. Ms Sanson was present during the 10 April meeting and stated that she could remember Mr Abraham disclosing the two incidents of water ingress to Ms Eden Zhou. Ms Sanson was also present at the 30 June 2015 meeting and recalls Mr Abraham talking about the two previous incidents of water ingress that occurred due to issues with the property's guttering with Mr Eden present.

Submissions

(a) Appellants

[23] The Appellants claimed that the agents breached Rule 6.4 and Rule 6.7 in failing to disclose issues with the roof to the Edens prior to their purchase of the Hamilton property. The Appellants also submitted that there was a failure to disclose the defect in writing amounted to unsatisfactory conduct, relying on the decision of this Tribunal in *Re Crockett* in support.¹ The failure to disclosure in writing was allegedly evident from the absence of any reference to the incidents of water ingress in the listing agreement and the agreement for sale and purchase. The rest of the Appellants' submissions were spent examining the plausibility of the respondents' evidence regarding the alleged oral disclosures of water ingress.

[24] The Appellants submitted that it was implausible, given their aversion to leaky buildings, that they would have brushed off any comments regarding the property's weathertightness during a pre-settlement inspection. Ms Eden Zhou, in her evidence, said she was 100% sure that the agents had not mentioned the roof having leaked during the 10 April meeting. The Appellants sought to contrast that evidence against that of Mr Abraham who they alleged was less confident in his recollection of this meeting.

[25] The Appellants also submitted that their aversion to leaky buildings was acknowledged by Ms Sanson during the hearing where she said that “[*Ms Eden Zhou and Mr Eden*] were always concerned about buying leaking buildings”. They argued that the respondents' sequence of events was therefore less plausible than theirs.

¹ *Re Crockett* [2017] NZREADT 5.

[26] As regards the third incident in 2014, the Appellants submitted that the cause of this was a third incident of water ingress, and not a water-cooler incident. The Appellants further submitted that Mr Abraham was made aware of this in December 2014 and so should have disclosed this to them.

(b) Mr Abraham and Ms Sanson

[27] Counsel for Mr Abraham and Ms Sanson submitted that in all the circumstances, the CAC was correct to find that there was insufficient evidence to suggest Mr Abraham and Ms Sanson did not disclose known issues with the Property. In regard to the Appellants' submission that the agents were obligated to disclose the defect in writing, it was submitted that this was not a requirement under the Act or the Rules, a position that was made clear in *Crockett*.²

[28] Counsel for Mr Abraham and Ms Sanson submitted that the evidence of Mr Eden and Ms Eden Zhou was, in fact, largely consistent with that of Mr Abraham and Ms Sanson. Mr Eden's evidence was that maintenance was "*absolutely*" discussed at the 30 June 2015 meeting. Mr Eden also recalled Mr Abraham telling him to keep the gutters clean, and to make sure that no balls or anything that could be thrown onto the roof got stuck in the down-pipes.

[29] Counsel submitted that on balance, it was likely that Mr Abraham disclosed the leaks to the Edens, but that this disclosure was "*simply not appreciated by Mr Eden or Ms Eden Zhou at the time*". Counsel suggested that Ms Eden Zhou showed a significant degree of urgency at the 10 April meeting, reflected in the fact that she asked Ms Sanson after the meeting to make an offer on the property. As a result of this urgency, it was submitted that she may not have appreciated the disclosure made by Mr Abraham.

[30] As regards Mr Eden, counsel submitted that while he stated that he had experience with internal gutters and the risks associated with them, he did not think Mr Abraham's discussion of the gutters at the 30 June 2015 meeting was significant. Further, while Mr Eden stated that he read the property inspection report thoroughly, and that he had identified issues to be rectified as a result of the report, these issues did not include the roof, weathertightness or the internal gutters despite the inspection report identifying several concerns in these areas.

² At [11]-[13], [46].

[31] In response to these submissions, the Appellants filed further closing submissions. Mr Eden alleged that Mr Abraham's general statements about maintenance were not interpreted by the Appellants as disclosure of known defects. The Appellants further submitted that there was evidence before the Tribunal that Mr Abraham denied knowledge of incidents as a consequence of blocked gutters at the property. As regards the building report, the Appellants submitted that no abnormalities or obvious defects were pointed out in the report.

[32] In conclusion, the Appellants maintained that the agents gave false evidence and had never disclosed the defects in the property.

(c) Real Estate Agents Authority

[33] The Real Estate Agents Authority submitted that the CAC had correctly found on the evidence before it that there was insufficient evidence that the agents had failed to disclose known defects. However, the Authority submitted that whether or not the Tribunal chose to uphold the CAC's finding was a matter for the Tribunal to decide on its assessment of all the evidence before it.

[34] The Authority did request that the Tribunal reinforce, in its decision, the importance of licensees making written disclosure of known issues with a property as a matter of best practice. The Authority acknowledged that there is no express requirement in the Act or the Rules for agents to do so, but that disclosure in writing reduces the possibility of doubt as to whether disclosure was made.

Discussion

[35] The first issue we need to address is the nature of the disclosure that is necessary under Rules 6.4 and 10.7. The Appellants have submitted that disclosure in writing is required. This Tribunal in *Crockett* noted the following:

[13] Ms Earl also relied on the Tribunal's decision in Dixon v Complaints Assessment Committee 2004, where the Tribunal held that it is best practice for advice as to defects in a property to be given in writing. Mr Rea submitted that there is no requirement under the Act or Rules for such advice to be given in writing. However, it must be acknowledged that advice given or confirmed in writing reduces the possibility of doubt as to whether it was given.

[36] We accept the submission of the Authority that written disclosure is not mandatory, but is best practice. Accordingly, we now turn to whether there was oral disclosure of known defects with the property.

[37] The real issue in this dispute is evidentiary. There are two conflicting accounts of what Mr Abraham disclosed to the purchasers in April 2015. Mr Abraham and Ms Sanson say that they both recall Mr Abraham mentioning the need to maintain the roof by keeping it clear of debris. Ms Eden Zhou denies this conversation.

[38] The Tribunal must weigh up the evidence and decide whether they accept the evidence of one party over the other. The Appellants have the burden of establishing that the appeal should be allowed. The civil standard of proof is the relevant standard. Therefore, the Tribunal must consider whether, on the balance of probabilities (i.e. is it more likely than not), Mr Abraham and Ms Sanson did **not** provide Mrs Eden Zhou with the information concerning the roof.

[39] When the Tribunal are trying to resolve a conflict between two parties, the best method of resolving such a dispute is to look at any contemporaneous evidence that has been provided. Mr Eden and Ms Eden Zhou commissioned an inspection report on the property which was dated 22 April 2015. This report did not identify any issues with the roof leaking³ but the inspector noted that the pitch of the roof was minimal and the roof would need to be regularly monitored and maintained to prevent moisture ingress. The inspector also noted that there was a shade cloth fitted through the roof which might allow moisture to get in. Further, the inspector added that there had been a repair to the overflow pipe at the back of the building and that this needed to be monitored to ensure weathertightness.

[40] Mr Eden first complained about the leak in the roof on 19 July. On 21 July, Mr Abraham responded by stating that he (and Ms Sanson) had previously informed him that on two previous occasions the property had leaked.

[41] On 22 July, Mr Eden asked Mr Abraham who had been made aware that the property leaked and added that he or his wife had not been informed about any issues with the roof in the past. Mr Eden acknowledged that the pre-inspection report had included the comment about the maintenance of the roof.

³ Page 137 NOE.

[42] By late July to early August, Mr Eden had raised the issue of the agents failing to disclose the information concerning the roof. Mr Abraham and Mr Eden had also had a dispute about whether the building was defective, i.e. a leaky building, or it whether it was simply a question of maintenance given the two previous incidents had been a result of obstructed guttering for the internal gutters.

[43] It is always best practice if any “known issue” with a property is identified by an agent, whether it is regarded as a defect or a need to maintain, it is then conveyed to the potential purchaser. The best way to avoid any later dispute is to put this in writing either as part of the disclosure package or following inspection by a potential purchaser. This protects all parties.

[44] In this case contemporaneous evidence appears to support an early assertion by Mr Abraham and an equally early assertion by Mr Eden that these issues were discussed or not discussed before purchase.

[45] In the end, we are unable on the material and the evidence that we have heard to resolve this issue. On the balance of probabilities we need to resolve the matter in favour of the agents whose conduct is being impugned. This is because a disciplinary finding is a very serious matter. Accordingly, if there is any question as to whether or not an agent is guilty of a disciplinary matter then this must be resolved in favour of the agent because of the seriousness and the consequences of such a finding.

[46] We acknowledge, however, that it is entirely possible that everybody is telling the truth in this case. Ms Eden Zhou may have simply taken the comments made at the 10 April 2015 meeting as general indications regarding maintenance, rather than understanding this to be a reference to a defect or water ingress issues with the property’s roof. It is equally possible that Mr Abraham and Ms Sanson did not raise the issue until the pre-inspection report. Either way, the Tribunal is unable to decide on the balance of probabilities that the agents did or did not disclose the information. The agents should learn from this that any issue with a property should be recorded in writing.

[47] Accordingly, we dismiss the appeal against the agents.

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

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Ms K Davenport QC
Chairperson

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Mr G Denley
Member

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Ms C Sandelin
Member