

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 72

READT 022/17

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	ALICE WOUTERS Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 412) First Respondent
AND	THOMAS RICHARDSON Second Respondent
Hearing:	21 November 2017, at Dunedin
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms N Dangen, Member
Appearances:	Ms Wouters Ms Feltham, on behalf of the Authority
Date of Decision:	29 November 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Wouters has appealed pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 412 (“the Committee”), dated 22 May 2017, in which the Committee decided to take no further action in respect of her complaint against Mr Richardson.¹

[2] The appeal was heard on 21 November 2017. The Tribunal heard submissions from Ms Wouters and Ms Feltham. Although he had previously participated in the appeal, Mr Richardson advised the Tribunal that he did not wish to make submissions on the appeal. He did not attend the hearing.

Background

[3] Ms Wouters and her husband, Mr Rietveld,² bought a house on two hectares of land that was intended to be subdivided from a larger block of land at Halfway Bush, near Dunedin (“the property”) in May 2012. Mr Richardson was the salesperson marketing the property.³ He was also a director of the vendor company, RPR Properties Ltd (“RPR”). The subdivision creating Ms Wouters’ two hectare lot was subsequently completed.

[4] In February 2013, RPR was granted resource consent to subdivide the land remaining after subdivision of Ms Wouters’ lot (“the balance land”) into nine lots. The nine lots were of varying sizes, ranging from 2547 m² to 10.4 ha. Lots of 2547 m², 3850 m², and 3936 m², were subsequently sold.

[5] In June 2015 (following the release by the Dunedin City Council (“the Council”) of proposed zone changes), RPR applied for resource consent to create 34 lots. That application has been opposed by Ms Wouters and other residents in the area. No determination has yet been made with regard to this application.

¹ Complaint No. C15274, re Thomas Richardson, Decision to take no further action, 22 May 2017.

² Ms Wouters was the sole appellant, for herself and on behalf of Mr Rietveld. For convenience, references will be to Ms Wouters, only.

³ Mr Richardson voluntarily surrendered his salesperson’s licence in March 2016.

The Complaint

[6] In a complaint dated 15 August 2016, Ms Wouters alleged that Mr Richardson had:

- [a] not made written disclosure of his interest in the transaction as vendor (as is required by s 136 of the Act);
- [b] misrepresented to her that the balance land would be subdivided into nine lots, each of two hectares;
- [c] lied at resource consent hearings by saying that she was aware of the intention to subdivide the balance land into smaller lots;
- [d] misrepresented to her the ownership of an undeveloped road along one boundary of the property, onto which sheds on the property encroached; and
- [e] published the agreement for sale and purchase of the property without her permission.

[7] Mr Richardson denied the allegations. He stated that at the time of the sale to Ms Wouters there was no requirement for written disclosure,⁴ he had not misrepresented the number of lots to be developed, and he had not lied at the resource consent hearing. He also stated that Ms Wouters was fully aware of the issues relating to the road, and that the Council had published the agreement for sale and purchase after he had provided it, as part of the resource consent process.

The Committee's decision

[8] The Committee's reasons for deciding to take no further action on Ms Wouters' complaint may be summarised as follows:

⁴ This was clearly incorrect, as the Act had been in force since 17 November 2009, approximately two years and six months before Ms Wouters' purchase.

- [a] While rejecting Mr Richardson’s submission that he was not required to give disclosure of his interest in the transaction, the Committee found that Ms Wouters knew that Mr Richardson was the director of RPR. It also found that although there was no written disclosure, there was oral disclosure, Mr Richardson had signed the sale and purchase agreement as director of RPR, and there was no suggestion that the position would have been different had there had been written disclosure.⁵
- [b] Ms Wouters expected the balance land to be developed into rural lifestyle blocks, and Mr Richardson could not have predicted the outcome of his applications for resource consent. The Committee was not satisfied that Mr Richardson had misled Ms Wouters.⁶
- [c] Mr Richardson had not misled Ms Wouters concerning the road.⁷
- [d] Mr Richardson’s statements at a resource consent hearing were made in his capacity as director of RPR, not as a licensee in the course of real estate agency work.⁸
- [e] Mr Richardson had provided the sale and purchase agreement in the course of the resource consent process in his capacity as director of RPR and not as a licensee, and it would be unreasonable if the fact that he was a licensee prevented him from doing something he would otherwise be able to do.⁹

The nature of this appeal

[9] Section 89(1) of the Act provides that after inquiring into a complaint, the Committee “may” make one or more of the determinations set out in s 89(2). In the present case, the Committee exercised its powers to decide to take no further action against Mr Richardson, pursuant to s 89(2)(c).

⁵ Committee’s decision, at paragraphs 3.2–3.14.

⁶ At paragraphs 3.15–3.25

⁷ At paragraph 3.26.

⁸ At paragraph 3.27.

⁹ At paragraph 3.28.

[10] The word “may” indicates that the Committee had a discretion as to what action it took with regard to Ms Wouters’ complaint. Ms Wouters’ appeal against the Committee’s decision is an appeal against the Committee’s exercise of its discretion. The Tribunal is required to determine whether Ms Wouldes established that in exercising its power to take no further action against Mr Richardson the Committee made an error of law or principle, took irrelevant considerations into account, failed to take relevant considerations into account, or was plainly wrong (that is, that its decision was not reasonably open to it on the evidence before it).¹⁰

[11] If the Tribunal is satisfied that the Committee erred in one or more of those respects, it can only exercise such powers as the Committee could have exercised.¹¹

Appeal issues

[12] Ms Wouters challenges the Committee’s findings as to Mr Richardson’s disclosure of future subdivision of the balance land, and his statements at a resource consent hearing. Her notice of appeal does not refer to the Committee’s findings concerning the issues of Mr Richardson’s disclosure under s 136 of the Act, representations concerning the road, or disclosure of the sale and purchase agreement.

Disputed evidence

[13] This appeal turns on the Committee’s finding as to what Mr Richardson said to Ms Wouters as to future development of the balance land, at the time she bought the property. We set out, below, the evidence given to the Committee by Ms Wouters’ and Mr Richardson, respectively.

[14] Ms Wouters said that she was aware that Mr Richardson intended further development of the balance land. She told the Authority’s facilitator that “years ago”, Mr Richardson was planning to put 106 houses on the land, and there was a lot of community objection to the proposal.

¹⁰ See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 2011; *Edinburgh Realty Limited v Real Estate Agents Authority* [2016] NZHC 2898, at [111].

¹¹ Section 111(5) of the Act.

[15] She said that because of her concern about such a subdivision she asked Mr Richardson, on two occasions, what he intended to do with the balance land and his response was that there would be nine two-hectare lots. She further said that if she had known that the subdivision was going to be into anything other than that, she would not have bought the property.

[16] In his response to the complaint, Mr Richardson said that at the time the property was sold to Ms Wouters, it was not possible to quantify potential section numbers, as the zoning of the land required lots of at least 15 hectares, and an application for consent to create lots of less than 15 hectares had to be publicly notified. Accordingly, he said, nothing was, or could be, guaranteed as to development possibilities, or as to lot numbers and sizes. He said that as an experienced developer he would never make claims as to lot sizes.

[17] In a submission to a resource consent hearing on 14 September 2016 (which was before the Committee) , Mr Richardson said that he had shown Ms Wouters a draft concept plan dated 9 February 2011, which showed the total land block being subdivided into 22 titles. He said that this concept plan showed Ms Wouters' property as comprising 0.57 ha, which was then increased to one hectare following discussion with the Council, then to the two-hectare lot bought by Ms Wouters. We record in respect of this point that Ms Wouters denied receiving a copy of the concept plan, and said she did not see it until it was produced at the resource consent hearing.

[18] Mr Richardson further said that he had made it “crystal clear” to all parties that it was intended to develop the balance land further at some time in the near future, and that RPR had made public disclosures from time to time as to its development intentions, as had the Council.

Submissions

[19] Ms Wouters submitted that the Committee should have found that when telling her that the balance land would be subdivided into nine two-hectare lots, Mr Richardson had misled her as to his future intentions. She submitted that the Committee should have found that when marketing the property to her, rather than to

subdivide the balance into nine two-hectare lots, Mr Richardson in fact had plans for a more intensive subdivision.

[20] She submitted that Mr Richardson's intention as to development were evident from his having had concept plans for a development well over a year before she bought the property, his insisting on including clauses in agreements for sale and purchase of lots providing that purchasers would not make submissions against future applications for subdivision, and his application in 2016 to subdivide the balance land into 34 lots.

[21] Ms Wouters referred to statements provided to the Committee by owners of land in the vicinity of Ms Wouters' property, to the effect either that Mr Richardson had told them that the balance land would be subdivided into nine two-hectare blocks, or "lifestyle" blocks, or that that was their understanding.

[22] Ms Feltham submitted that in deciding whether Mr Richardson had misled Ms Wouters as to the nature of the development on the balance land, the Committee was required to consider the sharp conflict in the evidence before it. She submitted that in the light of this conflict, and the obviously acrimonious relationship between Ms Wouters and Mr Richardson, the Committee was right to take a cautious approach.

[23] She submitted that while accepting that Ms Wouters' expectation was that the balance would be subdivided into rural lifestyle blocks, the Committee could only find that Mr Richardson had misled her if RPR had some intention other than the nine-lot subdivision Ms Wouters said he represented to her. She submitted that as it was not in dispute that the balance land was in fact subdivided into nine lots, the Committee was not wrong in finding that it could not be established that Mr Richardson was planning a more intensive development.

[24] Ms Feltham further submitted that in any event, any indication of Mr Richardson's intention at the time Ms Wouters bought the property would not have created some kind of estoppel which would prevent his undertaking further development. In support of this submission she referred to the negotiated clause in Ms Wouters' agreement for sale and purchase, to the effect that she "will not unreasonably

withhold consent to” any application made by the vendor in respect of the balance land.

Discussion

[25] As we have noted above, and as stated by the Committee, the issue is whether Richardson misled Ms Wouters as to RPR’s subdivision intentions. In order to decide whether that occurred, the Committee was required to make a factual finding as to what Mr Richardson said to Ms Wouters in response to a question as to what RPR’s subdivision intentions were. In other words, if the Committee were not satisfied that Mr Richardson told Ms Wouters that RPR’s intention was that the balance land was going to be subdivided into nine two-hectare lots, it would have no basis for a finding that he had misled Ms Wouters.

[26] For the purposes of determining whether the Committee was wrong to conclude that it was not satisfied that Mr Richardson misled Ms Wouters, we set out the evidence considered by the Committee, and the reasoning by which it reached its conclusion.

[27] The Committee accepted that Ms Wouters’ expectation was that there was to be a subdivision into rural lifestyle blocks, and referred to her evidence that she recalled Mr Richardson saying that the balance land would be subdivided into nine two-hectare blocks . The Committee also referred to Mr Richardson’s evidence that he could not make, and would not have made, such a specific representation as to future subdivision.¹²

[28] The Committee also referred to the evidence given by third parties who had had dealings with Mr Richardson. It noted that their statements gave support to Ms Wouters’ recollection of what Mr Richardson said generally about the intended subdivision, but also noted that those statements could not confirm what Mr Richardson said to Ms Wouters. In the light of the considerable period of time that had elapsed since these conversations, and the “standoff” that appeared to have developed between RPR and members of the community regarding RPR’s applications

¹² Committee’s decision, at paragraphs 3.15 and 3.16.

for consent, the Committee considered it appropriate to take a cautious approach in evaluating the third parties' evidence.¹³

[29] The Committee accepted that because of the need to make a publicly notified application for resource consent for any subdivision, Mr Richardson would not have been in a position to make any prediction as to what the outcome of an application for resource consent would have been.¹⁴

[30] On the basis of the evidence before it, the Committee was not satisfied, on the balance of probabilities, that Ms Wouters was misled.¹⁵ The Committee gave as its reasons for this finding that:

[a] It had not been established with any likelihood that a more extensive development was intended than that expected by Ms Wouters at the time she and her husband bought the property;¹⁶ and

[b] Ms Wouters and her husband were aware that there was a risk of future subdivision, as evidenced by their having negotiated a variation to the terms of the agreement for sale and purchase so as to give them the right to object to any planned development if such objection was not unreasonable.¹⁷

[31] In any complaint, the complainant bears the responsibility of establishing that the complaint is made out. When reaching a decision on the complaint, the Committee may conclude that the matter should be referred to the Tribunal or, if it is satisfied that the complaint has been proved, it may make a finding of unsatisfactory conduct. If it is not satisfied that the complaint has been proved it may determine to take no further action on the complaint.

[32] In the present case, the Committee was not satisfied that Ms Wouters had proved that Mr Richardson told her that the balance land would be subdivided into nine two-

¹³ At paragraph 3.24.

¹⁴ At paragraph 3.17.

¹⁵ At paragraph 3.18.

¹⁶ At paragraph 3.19.

¹⁷ At paragraph 3.21.

hectare lots. On appeal, the Tribunal is required to determine whether the Committee made an error of law or principle, failed to take relevant matters into account, took irrelevant matters into account, or whether the Committee could reasonably have reached its conclusion on the evidence before it.

[33] We do not consider that there is any question of the Committee having made an error of law or principle, or that it took irrelevant matters into account, or that it failed to take relevant matters into account. The sole issue to be determined is whether Ms Wouters' has established that the Committee could not reasonably have reached its conclusion on the evidence before it.

[34] The evidence considered by the Committee has been set out earlier. There was evidence on both sides, and the evidence of each of Ms Wouters and Mr Richardson was supported by other factors. We are not persuaded that the Committee was wrong to conclude that it was not satisfied that Mr Richardson told Ms Wouters that the only subdivision would be into nine two-hectare lots. We are not persuaded that that conclusion was not reasonably open to the Committee on the evidence before it. As the Committee was not satisfied on that point, it had no basis on which it could find that Ms Wouters was misled as to RPR's future subdivision intentions.

Outcome

[35] It has not been established that the Committee was wrong to determine that it would take no further action on Ms Wouters' complaint against Mr Richardson. The appeal is, therefore, dismissed.

[36] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, 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.

Observation

[37] Although this was not an issue on this appeal, it is appropriate for the Tribunal to comment on the Committee's finding regarding Mr Richardson's failure to comply with the requirements of s 136 of the Act, regarding disclosure of his interest in the transaction with Ms Wouters.

[38] The Committee was correct to reject Mr Richardson's submission that he was not required to make disclosure. As a director of the vendor, RPR, Mr Richardson was clearly required to make disclosure pursuant to ss 136 and 137. However, the Committee went on to say that Ms Wouters knew that Mr Richardson had a financial interest in RPR, and accepted that Mr Richardson had orally disclosed his interest in RPR. The Committee also said that in the present case there was "no doubt" that sufficient disclosure was made.

[39] This is not a correct interpretation of s 136. Section 136 provides that written disclosure must be given. It does not contain any proviso under which a licensee is absolved from the requirement for written disclosure where there is "no doubt".

[40] However, while the Committee should in this case have found Mr Richardson in breach of s 136, it would still have been open to it to decide to take no further action in respect of his breach.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms N Dangen
Member