BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 13

READT 012/16

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	VALERIE STEVEN and COURTNEY STEVEN Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 405) First Respondent
AND	GABRIEL BIRT AND STEPHEN JONES Second Respondents
Hearing:	30 November 2016, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms N Dangen, Member
Appearances:	Mr T Rea, on behalf of the Appellants Ms K Lawson-Bradshaw, on behalf of the Authority Mr G Birt and Mr S Jones, in person
Date of Decision:	8 March 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Valerie Steven and Ms Courtney Steven ("the appellants")[1] have appealed against the decision of Complaints Assessment Committee 405 ("the Committee") dated 29 October 2015.[2] The Committee's decision was in respect of a complaint made by Mr Gabriel Birt and Mr Stephen Jones ("the second respondents").[3] In its decision the Committee found that each of the appellants had breached rr 5.1 and 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") and had engaged in unsatisfactory conduct in relation to the sale of a unit on Level 1 of an apartment complex in Wellington Road, Howick ("the property") to the second respondents.

[2] Each of the appellants is licensed under the Real Estate Agents Act 2008 ("the Act"). Valerie Steven is a licensed branch manager, and her daughter Courtney Steven is a licensed real estate salesperson. They work from Barfoot & Thompson's Howick branch office ("the Agency").

[3] The essence of the second respondents' complaint was that noise issues relating to a gym that operated on the ground floor of the complex ("the noise issue") were not fully disclosed to them by the appellants and that, in particular, they did not disclose to the second respondents that legal proceedings relating to the noise issue had not been resolved.

[4] The appellants contended on appeal that the Committee was wrong to find that they had not made full disclosure of the noise issue, and was wrong to find that their conduct met the threshold for unsatisfactory conduct and/or failed to exercise its discretion to take no action on the second respondents' complaint.

[5] The appeal hearing was by way of written and oral submissions to the Tribunal on the material that was before the Committee. That material included statements

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1 Ms Valerie Steven and Ms Courtney Steven will be referred to as "the appellants", except where it is necessary to refer to them separately.

2 Complaint No. CO4836, 29 October 2015.

3 Mr Birt and Mr Jones will be referred to as "the second respondents", except where it is necessary to refer to them separately.

made to the Real Estate Agents Authority's ("the Authority") investigator, correspondence between the purchasers' solicitor and the Agency, and submissions made to the Committee.

Background facts

The noise issue

[6] At the time the apartment was marketed, the ground floor of the complex had been occupied by a gym since July 2011. Initially it operated on a 24/7 basis. In January 2012, residents started complaining about noise from the gym. The noise particularly affected units on Levels 1 and 2 of the complex. The gym owners attempted to mitigate the noise but those attempts were unsuccessful.

[7] On 18 December 2012, the Tenancy Tribunal made an interim order, on the application of the complex's Body Corporate, that:

> Between the hours of 11.30 pm to 5.30 am, 24/7 Fitness Howick Limited are to prevent within two working days from the date of this order, the use of straight bars and dumbells at the gym until furthers of the Tribunal. Any party may at any time apply to the Tribunal for cancellation or variation of this order.

The Tenancy Tribunal made a further order on 11 June 2013. This order provided (among other things) that:

> …
>
> 6. The interim order … in the Tribunal's orders dated 18 December 2012, remains in full force and effect as an interim order.
>
> 7. In consultation with the parties the Registrar is to set this matter down for hearing. …

[8] The Tribunal was advised that the proceeding before the Tenancy Tribunal was transferred to the District Court. However, the noise issue continued until the gym vacated the building in late 2014.

The second respondents' purchase of the property

[9] Valerie Steven was the listing salesperson for the property, which was sold at auction to the purchasers on 29 January 2013. She was assisted by Courtney Steven.

[10] The second respondents first visited the complex in late 2011. Valerie Steven sent them some information about a unit in the complex (although not the one they eventually bought) in December 2011. They second respondents did not proceed further until January 2013.

[11] The appellants held Open Homes at the property during the weekend of 12 and 13 January 2013. Although there was a difference in the evidence given by the appellants and the second respondents as to which of the second respondents attended, and on which day, we find that Mr Jones attended the Open Home on 12 January (with his mother), and Mr Birt and Mr Jones attended on 13 January.

[12] There is a substantial difference in the evidence that was before the Committee as to what was said to the purchasers concerning the noise issue.

(a) The second respondents' evidence

[13] The second respondents said that when viewing the property they knew that it was directly above the gym, and they specifically asked Valerie and Courtney Steven about the hours the gym operated, and the noise level from the gym. They both said that Valerie Steven's response was that the gym was not allowed to use gym equipment overnight, and they took her at their word. They further said that they read the Body Corporate Minutes the appellants provided to them, which led them to raise the noise issue with the appellants. They said they were told that the noise issue had "been fixed, resolved, and was no longer a problem". They became aware of the background to the noise issue and the proceeding before the Tenancy Tribunal when they attended a residents' meeting on 10 April 2013.

[14] The second respondents also referred to an independent acoustic engineer's report dated 16 October 2012 which identified their apartment as "an affected

apartment with nuisance noise in existence". They said that the appellants did not provide this to them.

[15] As noted earlier, Mrs Jones viewed the property with her son at an Open Home. She said she asked "the older lady real estate agent" (Valerie Steven) about the noise level from the gym as she was concerned because it was a 24-hour gym, and was told that it was not able to use equipment over night, and there was no problem. Each of Mr Birt, Mr Jones and Mrs Jones said that was no mention at all about there being any current dispute between the residents and the gym.

(b) The appellants' evidence

[16] Both of the appellants said that the second respondents were told about the noise issue, as was anyone who visited or showed interest in the apartment. They said that the second respondents were told many times to undertake due diligence around all aspects of the purchase including the noise, and that they had time after the open homes and before the auction day to do this.

[17] In a response to the second respondents' complaint, dated 5 August 2015, the appellants said (among other things):

> Jones and Birt came through the open home for 106. Dawn Grant from unit 105 met Jones, Birt, Val & Courtney in the hallway. Dawn said they may be going back to tribunal about the noise, stated in front of Birt and Jones. Val told Birt and Jones that Dawn was the main driver for resolution of the noise issue. They knew full well that the person coordinating the action to have the gym quietened was their direct neighbour. They indicated they were determined to purchase this unit.

[18] Courtney Steven sent an email to the Authority's investigator Mr Johnson on 9 September 2015, as follows:

> Yes I was present at both open homes that weekend and I do recall Val chatting with Dawn regarding the ongoing issue with noise. From memory Gabriel and Stephen were present when this conversation happened. They then went on to mention that they would like to have a cat in the apartment as it was during these open homes that they found out that Dawn had a pet dog in her apartment (as we could hear it during the open home). We told them they would have to seek permission under the body corporate rules. I distinctly remember us telling them about the noise issue when they visited the open

> home. We told everybody who visited or showed interest in the apartment about the noise issue.

[19] The appellants referred to an email sent to all Open Home visitors (blind copied to "stephen.jones@xtra.co.nz") on 14 January 2013:

> Hi there
>
> We saw one of the owners at the complex who informed us about the noise from the gym. There is an order in place to stop the use of weights from 23.30 to 05.30, apparently this is not always adhered to so the commercial body corporate people are going back to the Tribunal to ensure it is enforced, this should happen either today or early this week.
>
> Regards

They said that this email was sent to all Open Home visitors because they did not know at that stage who might be the successful buyer.

[20] We note that in response to this aspect of the appellants' evidence, the second respondents said that they never received this email. They pointed out that the email address to which it was blind copied is not correct for Mr Jones, and that his correct email address was used by Valerie Steven in an email to him on 24 December 2011, and is recorded on the Agency's "Customer Information Report".

[21] The appellants also referred to copies of the Body Corporate Minutes which were included in the material sent to the second respondents. The Minutes included, among other things, reference to proceedings regarding the noise issue.

[22] Further, the appellants referred to a "Transaction Report" they prepared for the Agency, dated 29 January 2013 (10 days after the auction). In the section headed "Any other comments or relevant points" they recorded:

> Noise from Jetts Gym to be fully resolved. Buyer stated they are not concerned with this.

Ms Grant's evidence

[23] The Authority's investigator spoke to the second respondents' neighbour, Ms Grant, on 17 August 2015. His record of the conversation is as follows:

> Dawn is the next door neighbour of Birt and Jones. She is also involved in the Body Corp for that block of addresses.
>
> Dawn states: I first met Gabriel and Stephen when they moved into their apartment which is next door to mine. I never met them prior to that time nor did I ever speak with them re any noise issues.
>
> I seem to remember that it was at least 2-3 months after winning the [auction] to their apartment that they moved in.
>
> After they moved in I had many conversations with them about the noise issues coming from Jetts Gym which is situated below our flats.
>
> During the open homes of 12-16 January I was away vising a friend in hospital. I recall coming home toward the end of the day and salesperson Val Steven was showing some people around the apartment. I didn't see these people or have any conversation with them.
>
> I do recall on that meeting I spoke with Val re the noise and she showed me a text she had received from Craig O'Hara, the property manager. She said the text has said that the noise issue had been resolved. I pointed out to her that it was only an interim order and that we would still have to go to court.
>
> The noise from the Gym was unbearable. It was very difficult to sleep.

The Committee's decision

[24] The Committee found that information as to the legal proceedings by the Body Corporate concerning the noise issue should in fairness have been disclosed to the second respondents.

[25] The Committee found that the Body Corporate had kept complex owners well updated, and that both appellants were aware of developments. The Committee noted that the appellants' email of 14 January 2013 was sent to an incorrect address for Mr Jones and it accepted Ms Grant's evidence that the second respondents were not present when she spoke with the appellants about the noise issues. The Committee went on to say:

> 3.12 The [second respondents] stated had they known about the Tenancy Tribunal Order and subsequent ongoing legal action they would not have purchased the Property, rather they relied on the [appellants'] assurance that the noise issues had been resolved.
>
> 3.13 The Committee accepts this and in its deliberation considered whether the reliance placed by the [appellants] upon incorrectly sent email communication and reference to the MYINFO website tome of documentation about the Property was enough to fulfil the [appellants] obligation under Rules 5.1 and 6.2.
>
> 3.14 The matter of ongoing Tenancy Tribunal and possible District Court action by the Body Corporate against Jetts Gym in relation to the noise issue

> was information that, in fairness, should have been specifically provided to the [second respondents].

[26] The Committee found that both appellants had engaged in unsatisfactory conduct. In a subsequent decision dated 24 February 2016, the Committee censured both appellants, ordered them to write a letter of apology to the second respondents, and ordered each of them to pay a fine of $2,000.

Issue on appeal

[27] The issue on appeal can be simply stated: was the Committee wrong to find that the appellants failed to provide to the second respondents information that should have been provided to them, namely, that the noise issues had not been resolved?

Submissions

The appellants

[28] Mr Rea submitted that the only contemporaneous evidence as to what was said to the second respondents was the Transaction Report, which states that the noise issue was yet to be resolved, and that the buyers had said that they were not concerned. He submitted that the investigator's discussion with Ms Grant could not be accepted as reliable because the discussion was some years after the event. He submitted that it is common ground, on the basis of Ms Grant's interview, that there was conversation with Ms Grant concerning the noise issue, and that Ms Grant said there was only an interim order. He submitted that Ms Grant was wrong in her statement as to when this was, and that her evidence as to the conversation is wrong.

[29] Mr Rea further submitted that the appellants' email of 14 January 2013 could only have resulted from a conversation with Ms Grant on 13 January 2013, and that the Tribunal should find that it was received by the second respondents. He submitted that the email was, at the very least, an attempt to communicate with the second respondents in writing. If there was an error in the address, it was inadvertent, and there was no evidence that the appellants had the correct email

before that time. He later acknowledged that Valerie Steven had emailed information concerning the complex to Mr Jones at his correct email address in November 2011, but submitted that there was no evidence of email communication between them since then. He submitted that it was reasonably possible that Mr Jones had given an incorrect email address on the Open Home register. In any event, he submitted, a finding of unsatisfactory conduct could not be made on the basis of an incorrect email.

[30] Mr Rea submitted that in order for the Committee to find that the appellants had not disclosed that the noise issue was not resolved, it would have to find either that the appellants had fabricated the Transaction Report, or that they were mistaken in the report. He submitted that on the basis of the Transaction Report, the Committee could not reasonably have concluded that the appellants had not disclosed the noise issue orally. He submitted that the second respondents must either not have heard what was said in their presence, or not taken it in. He said that the mention of a cat in Courtney Steven's email to the Authority's investigator added to the credibility of her account. He further submitted that it is inherently unlikely that the appellants would not have referred to the noise issue in the course of their dealings with the second respondents.

[31] Mr Rea submitted that it must be taken into account that the passage of time after the second respondents' purchase will have affected people's recollection, and will have prejudiced their ability to access documentary evidence. He gave as an example of this the fact that the relevant Open Home register no longer exists.

[32] Mr Rea submitted that the Committee was wrong to find as a fact that there was no disclosure that the noise issue was not resolved, and should have found that there was disclosure. He submitted that this is sufficient to dispose of the appeal.

The second respondents

[33] The second respondents relied on their very full written submissions and statements filed prior to the hearing.

[34] They submitted that neither of the appellants made any disclosure of the Tenancy Tribunal proceedings initiated by the Body Corporate, there was nothing in the Auction Sale Agreement that would have alerted them to the proceedings, and there was no discussion with Ms Grant about the proceedings in their presence when they were at an Open Home.

[35] They also submitted that there were a number of factual inconsistencies in the appellants' evidence, for example as to whether it was Valerie Steven or Courtney Steven who had written up the Transaction Report following the sale, and as to the email dated 14 January 2013. Regarding that email, they submitted that as it was not disclosed to them until two years after the event, and as it appears to have been addressed to an email address "that doesn't exist", the email cannot be relied on.

[36] In response to a submission by Mr Rea, the second respondents denied that there had been any inexcusable delay in submitting their complaint to the Authority. They referred to the period of time when their counsel was attempting to resolve issues with the Agency (during which period, they submitted, the Agency did not provide to them evidence that they later provided to the Authority), and their need to be away in Australia frequently when Mr Birt's father was terminally ill with cancer.

[37] In response to Mr Rea's submission that the Committee should have exercised its discretion to take no action on their complaint,[4] the second respondents submitted that Mr Rea's submission deflected from and minimised the broader issue and complexity of their complaint. They submitted that there was strong evidence before the Committee supporting its finding of unsatisfactory conduct.

The Authority

[38] Ms Lawson-Bradshaw submitted that the key issue for the Tribunal is whether the Committee properly found that the alleged conversation with Ms Grant in the second respondents' presence either never happened, or occurred but was not in sufficient detail to fulfil the appellants' obligations regarding disclosure.

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4 Under s 80 of the Act.

[39] She submitted that the 14 January email (if the Tribunal finds it was sent to the second respondents) is not sufficient disclosure, in the absence of any oral disclosure. The matter of noise disruption, and proceedings to deal with it, was a crucial matter that needed to be disclosed to anyone intending to buy. This was particularly so here, she submitted, where the second respondents' apartment was more subject to noise from the gym than others. Any disclosure needed to be clear, detailed, specific, and made to individual parties.

[40] Ms Lawson-Bradshaw submitted that it was open to the Committee and the Tribunal to find that a conversation (as the appellants said occurred with every visitor to the Open Homes) did not occur. She submitted that the Committee could have been concerned that the appellants did not remember the conversation correctly, given the length of time between the second respondents' purchase and their response to the complaint.

[41] She submitted that if it is not accepted that there was a direct conversation between the appellants and the second respondents, then the best case for the appellants is that there was a conversation between them and another resident, in the presence of the second respondents. She submitted that this would not be sufficient for disclosure, as it is not sufficient to have a conversation with one person, and assume that another person has absorbed it. Given the importance of the issue, it is not enough to rely on a discussion being overheard.

[42] Ms Lawson-Bradshaw accepted that the Transaction Report is close in time to the claimed disclosure, but submitted that it does not assist in determining the issue on appeal. The report's statement that the noise issue was "to be fully resolved" and that the "buyer stated they are not concerned with this" is not inconsistent with the second respondents' statements that they asked about the noise, were told of the limit on the gym's operation, and were told that it was resolved. She submitted that if it is accepted that the second respondents were not aware that the issue had not been resolved, it was not incorrect for the report to record that they were "not concerned".

[43] Ms Lawson-Bradshaw further submitted that the Committee did not find that the error in sending the 14 January email to the wrong address constituted

unsatisfactory conduct. Rather, it found that in sending a mass email the appellants took the risk that an address was wrongly entered, the email may not be delivered, or it may be delivered to the wrong person. In any event, she submitted, the email was in general, vague, terms, and not sufficiently detailed and specific to meet, on its own, the appellants' obligations.

[44] Finally, Ms Lawson-Bradshaw submitted that the Body Corporate Minutes would not constitute sufficient disclosure. It would not have been sufficient to provide a collection of Minutes, which may or may not have references to the issue in them. She submitted that potential purchasers should be directed to specific entries relevant to a particular issue. She further submitted that, in any event, the Minutes provided to the second respondents were out of date, the most recent being dated six months before the Open Homes.

Our assessment

[45] The second respondents did not contend that the appellants did not say anything about the noise issue. They said that they were told that the gym's operating hours were reduced and they were told the issue was resolved. They said that they were not told that the noise issue had not been resolved, and that the proceedings intended to resolve it were ongoing. The essence of the issue on appeal is whether the Committee was correct to find that the second appellants were not told that the noise issue had not been resolved.

[46] The second respondents' evidence is supported by Ms Grant's statement to the investigator. Her evidence was independent. She acknowledged having a discussion with the appellants about the noise issue and the ongoing proceedings concerning the issue at some time during an Open Home, but she is clear that this was not in the presence of the second respondents. Mr Rea was critical of, in particular, the reliability of Ms Grant's evidence on the grounds that it was prepared some two years after the event. We see no reason to find that the Committee was wrong to prefer Ms Grant's evidence over that of the appellants. While Mr Rea referred to Courtney Steven's reference to the second respondents having talked about having a cat in the apartment as supporting the reliability of her evidence, we find that it was

open to the Committee to find that Ms Grant's recollection of a particular occasion, and a discussion of a matter in which she was intimately involved, could be relied on.

[47] Regarding the email of 14 January 2013, we find, on the basis of Valerie Steven's email concerning an apartment in the complex to Mr Jones' correct address on 24 December 2011, and the fact that his correct email address is recorded on the Agency's customer information report, that it can reasonably be inferred that the appellants knew his correct email address. There is nothing to support Mr Rea's submission that it is reasonably possible that the second respondents gave an incorrect email address when they were at an Open Home. Further, we accept Ms Lawson-Bradshaw's submission that in any event, the email could not constitute proper disclosure.

[48] We turn to the Transaction Report, which Mr Rea submitted corroborated the appellants' evidence. As Ms Lawson-Bradshaw submitted, the report is in vague terms in that it does not say what was said, and when. Further, it is not inconsistent with the second respondents' evidence. If the second respondents accepted what they were told by the appellants, and were not aware that the noise issues were ongoing, then it might be expected that they would say that they were "not concerned".

[49] Mr Rea was critical of the Committee's statement, at paragraph 3.2 of its decision, that the appellants "withheld information (legal action by the Body Corporate) which should in fairness have been disclosed to" the second respondents. We accept his submission that to "withhold" information requires some intention to conceal. However, the Committee's finding is set out at paragraph 3.14:

> The matter of the ongoing Tenancy Tribunal and possible District Court action by the Body Corporate was information that, in fairness, should have been specifically provided to the [second respondents].

[50] It is clear from the decision as a whole, supported by the penalties imposed, that the Committee did not find that the appellants deliberately concealed information regarding the ongoing proceedings from the second respondents. The Tribunal concurs with the Committee's approach.

[51] We accept Ms Lawson-Bradshaw's submission that the noise issue was an important, if not crucial, matter for any person considering buying the property. In the circumstances, in order to meet their obligations under r 5.1 of the Rules (to exercise skill, care, competence, and diligence), and under r 6.4 (to ensure that the second respondents were not misled regarding the noise issues), the appellants needed to disclose the noise issue to the second respondents in a manner that was clear, detailed, specific, and made to them individually, as potential purchasers. Their disclosure obligation was not met by way of a comment to another person in their presence, or by way of a mass email, or by providing them with Body Corporate Minutes without specifically referring the second respondents to the relevant entries. We do not accept that this is to set the bar too high.

[52] We conclude that it was open to the Committee to find that the appellants did not make adequate disclosure as to the noise issue to the second respondents. While it can be accepted that the appellants did not deliberately conceal the issue, and may have thought that they had discussed the noise issue and received a response to the effect that the second respondents were "not concerned", they failed to clarify the state of the legal proceedings: that is, whether a final decision had been made, what the current legal position was at the time the property was marketed. Further, the legal position should have been disclosed at the auction, and an appropriate clause included in the auction agreement.

Outcome

[53] The appellants' appeal against the Committee's finding that they engaged in unsatisfactory conduct is dismissed.

[54] 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.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Ms N Dangen
Member