BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 43

READT 005/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	PETER PHUONG MINH LAM Applicant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 413) First respondent
AND	JIANINE (DI) AUSTIN Second respondent
Hearing:	6 August 2018, at Wellington
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Mr N O'Connor, Member
Appearances:	Mr Lam, Appellant Ms Patterson, on behalf of First Respondent Ms S Mitchell & Ms A Robertson, on behalf of Second Respondent
Date of Decision:	17 August 2018

DECISION OF THE TRIBUNAL

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[1] The background to this proceeding is accurately set out in the submissions that profiled on behalf of the first respondent by counsel, Ms Patterson. The following statement is taken largely from her submissions.

Background

[2] Peter Lam (appellant) appeals the decision of Complaints Assessment Committee 413 (Committee) dated 2 February 2018 to take no further action against licensee Jianine (Di) Austin (second respondent) under s 89(2)(c) of the Real Estate Agents Act 2008 (Act).

[3] The background to this appeal is set out in detail in the Committee's decision of 2 February 2018.[1]

1.1 The appellant purchased a property situated at 247 The Terrace, Wellington (property) at auction on 26 May 2017. The second respondent was the listing salesperson.

1.2 The appellant complained to the Authority after the second respondent told the appellant about the proposed development of an adjoining property (251 The Terrace) after the auction. The appellant alleged that the second respondent knew about the proposed development prior to the sale and failed to disclose it to him. The appellant also complained that the property was marketed as having five carparks, when in reality it had three off-street carparks and two on- street carparks. Finally, the appellant alleged that the second respondent was aware of a damaged masonry boundary wall and failed to disclose this to him.

1.3 The Committee determined to take no further action on the complaint pursuant to s 89(2)(c) of the Act. The Committee found that there was no evidence that the second respondent knew (or ought to have known) about the proposed development; that the second respondent did not misrepresent the number of carparks being sold with the property; and that there was insufficient evidence that the second respondent knew (or ought to have known) about the structural issue on the boundary wall.

1.4 The Committee considered the evidence before it, and found that two pieces of marketing material clearly showed that the second respondent represented the property as having one garage and two carport spaces, and two on-street carparks.[2] While the Committee accepted that the number of carparks was an important matter for the appellant, the Committee found that the appellant offered no evidence to support his contention that the number of carparks had been misrepresented to him.[3] The Committee found that on the evidence adduced before it, the second respondent's representation of the carparks was accurate.

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[1] Complaint No. C20942, 2 February 2018, BOD Vol. 3 at Tab 3 ("Committee Decision").

1.5 The Committee also considered r 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) in relation to the issue with the wall. It determined that the wall could be properly categorised as a hidden defect, and that the second respondent was therefore not at fault for failing to identify and disclose the defect to the appellant.

1.6 The Committee then considered the issue of whether the second respondent had knowledge of the wall issue, thereby being required to disclose it under r 6.4 of the Rules. The Committee found that the second respondent was not aware of the wall defect to a degree that amounted to being put on notice of the issue.

The Appeal

[4] There is no dispute that the Tribunal in dealing with this matter is required to conduct an appeal by way of rehearing. That means that the Tribunal is able to reach its own view of the case independently of what the Committee found.

[5] It is also not disputed that the burden of proof of establishing disputed factual allegations lies on the appellant who must establish that the disputed facts for which he contends are established on the balance of probabilities.

The complaint concerning the carparks

[6] The Committee did not accept the view of the appellant that there had been a misrepresentation of the number of car parks and therefore determined to take no further action in respect of the complaint under s 89(2)(c) of the Real Estate Agents Act 2008 (the Act). The appellant in his appeal challenges that conclusion.

[7] The appellant is of the view that the Committee erred in finding that the second respondent did not misrepresent the number of carparks on the property. It is this issue that we will consider first.

The parties' contentions with regard to the car parks

[8] The appellant claims that the reference in the advertising and marketing material to the two on street carparks refers to the two street carparks that were

directly in front of the garages. It is his argument, in effect, that the significance of the location of the car parks is that they should not be taken into account when assessing the truth of the representation which was made to the appellant that there were a total of five car parks on the property. Because there are only three car parks on the site and because, on the submission of the appellant, the car parks in the street could not be used, there was a material misrepresentation about the total number of car parks.

[9] This was the correct conclusion, he said, because it was unlawful to use the two on street carparks. To use those carparks would infringe a regulation which forbids parking in front of a vehicle entrance. Therefore when the second respondent and the vendor asserted that there were two on street carparks that was a misrepresentation.

[10] The respondents stated that the two street car parks were available and once they were included the total number of car parks that had been represented was established as a matter of fact.

Discussion of the Issue about the Car Parks

[11] There is little doubt that the appellant carried out a detailed inspection of the property and was shown the two street carparks. Because he did so, it would have been evident to him that the two on-street carparks that the marketing material was referring to included two carparks which were opposite vehicle accessways.

[12] Although the appellant did not put it in these terms, what his case essentially comes down to is to say that the second respondent ought to have appreciated that parking cars in the two off-street car parks in question amounted to an infringement of the relevant regulations. The corollary of this argument is that the two car parks could not be used and therefore could not be represented as relevant car parks for the purposes of the sale of the property

[13] The evidence establishes that the licensee said that the vendor had been anxious to ensure that prospective buyers knew about the ability to park on the street because parking was quite tight in that residential area. He told her, she says, that as a resident in the area he was entitled to two on street parking permits. He told the

second respondent that he had not bothered to obtain such permits. Nonetheless, family members had used the two carparks in front of the residence and there had never been any problems with them doing so.

[14] The appellant did not dispute that the second respondents had been given the information about the carparks that has just been summarised.

[15] The Tribunal concluded that when the appellant visited the property to inspect it he would have been made aware of the location of the carparks. The second respondent said:

> I also stood beside the other two carparks and pointed out where the vendor's guests parked in the two carparks on the street.

[16] It is common ground that it would actually contravene the Land Transport (Road User) Rules 2004 to park in front of any vehicle entrance.

[17] We consider, though, that the evidence establishes that the appellant knew the location of the on-street carparks. Because it is common knowledge and because he did not try to advance the contrary, we also conclude that he would have known, that it is not permitted to park in front of vehicle entrances.

[18] Taking reasonableness as its yardstick, the Committee would have been entitled to come to the view that the second respondent was not under any obligation to explicitly spell out these matters to potential purchasers, including the appellant. That is the view that we come to.

[19] We also conclude notwithstanding that the evidence establishes that while it might have been a technical infringement of the Road Transport Regulations to park in the two carparks concerned, the vendor had been able to do so without any intervention by the relevant enforcement authorities.

[20] In these circumstances the question arises whether there was any basis to conclude that the second respondent has breached any obligation as a licensee.

[21] The substance and effect of her actions was to pass on to the appellant the claim by the vendor that there were five carparks including two on street spaces that a buyer would be able to use for additional parking. We consider that it is established that the vendor would have been entitled to two on street carpark permits although he did not take up that entitlement. It may have been that the permits would have applied to two identified specific car parks and that they may not have been immediately outside the property. We do not need to decide that point though. We consider it likely that the vendor did not apply for permits because of a pragmatic decision on the part of the enforcement authorities that he should be able to use the two spaces immediately outside the property without obtaining a permit.

[22] Whatever the true position is, the second respondent did not mislead the appellant. She did not act other than in good faith. What she told the appellant not only reflected the instructions that the vendor had given her but on the face of it the matters which she was required to relay to buyers were all based on accurate factual contentions.

[23] While the appellant did not explicitly say so in the course of his submissions, it would appear that his complaint against the second respondent is that she did not explicitly advise that parking in front of a property may have been an illegal activity. A number of answers can be made to any such contention. In the first place it was not at all beyond the realms of possibility that the vendor had come to some practical accommodation with the territorial authority which, at worst, amounted to that authority turning a blind eye to the "illegal" parking. Alternatively there may have been an unspoken arrangement to that effect. There is a reasonably high level of certainty on our part that there must have been such an arrangement because the evidence that the vendor permitted a family member to occupy one of the car parks for a period of many months without apparently any infringement proceedings being taken.

[24] On that view of it, whether or not the car parks were strictly in accordance with the law was irrelevant.

[25] In our view, the second respondent was not guilty of any misrepresentation by associating herself with the marketing material which said there were two on street car parks. The factual position was that the owner/occupier of the property was able to use the two car parks. It would seem likely that other members of the public would be reluctant to park there given that there is widespread knowledge that parking across a vehicle crossing would expose the person doing it to infringement proceedings. The exact process by which the vendor was able to bring about such an arrangement is not clear to us. It can be inferred that there must have been some communication with the enforcement authority otherwise infringement proceedings would have been taken.

[26] Secondly, it is not the function of a licensee in the position of the second respondent to research the legal position about such matters. There was obviously some risk surrounding the legality of parking in the car parks but that must have been obvious to the appellant. It was not incumbent upon the first respondent to further define matters in order to provide the appellant with certainty on the point. For the second respondent to be required to do so would have involved her in providing legal advice. That she was not required to do.

[27] That is because the recipient of that representation, the appellant, was to her knowledge fully aware of the context in which the representation was made and, specifically, any uncertainties about the availability of those parks.

The Boundary Wall

[28] The next matter which was the subject of a complaint on the part of the appellant concerned what he said was the failure on the part of the second respondent to disclose to him that a dividing wall between the subject property and the neighbouring property at number 251 had ‘failed’ and required substantial repair or replacement.

[29] The contention for the appellant is that the evidence of the second respondent is that she had dealings with the owner of number 251, Mr Fraser, when marketing the subject property at 247. Mr Fraser apparently expressed interest in buying 247.

The evidence of the second respondent is that Mr Fraser viewed the property and in the course of doing so commented to the effect that if he was to buy 247 The Terrace, he would not have to talk to or get the cooperation of any third party when it came to 'tidying up' the wall between the two properties.

[30] It turned out subsequently that there was a crack in the party wall between the two properties, 247 and 251. This led to the appellant making enquiries of the neighbour, Mr Fraser about the wall. He claims that he was told that Mr Fraser had spoken to the second respondent about the condition of the wall.

[31] As a result, the appellant came to the view that the second respondent knew, or ought to have known, that the wall had a 'structural issue'. This was the subject of a separate complaint that he submitted to the Committee. They however did not accept that there was sufficient evidence to establish this allegation and elected to take no further action in respect of it.

[32] When they came to consider this matter, the Committee noted that under Rule 10.7 a licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. The Committee noted that while there was a problem with the wall there was no dispute that the extent of the problem was not visible from 247, the property to which the second respondent, of course, had access for the purposes of marketing that property. The crack was visible, though, from certain parts of 251.

[33] However the appellant insists that the second respondent did have information about the wall which she ought to have disclosed. The appellant swore an affidavit in which he said that the owner of 251, Mr Fraser, told him that he had informed the second respondent that there was an issue with the wall. It will therefore be necessary to examine some of the evidence relating to this issue.

[34] A critical part of the evidence on this point consists of email exchanges between the appellant and Mr Fraser and the relevant messages need to be referred to

The email exchange

[35] On Friday 7 July at 11.44 am the appellant emailed Mr Fraser.

> When I spoke to you last time on the telephone, you advised me you had informed and disclosed to Di Austin of the failed retaining wall in the north-east corner of your property (south-east corner of 247 The Terrace). This retaining wall forms the boundary between the two properties at 247 The Terrace and 251 The Terrace.
>
> The brick retaining wall has tilted forward (in the south direction) beyond the acceptable limits and has a large crack along the full height of the wall. I have attached the photos of the wall. The wall has clearly failed from an engineering perspective. This retaining wall is an important structure of the property at 247 The Terrace as it is supporting the ground which in turn supports the perimeter foundation wall along the south elevation of the house.
>
> The perimeter foundation wall supports the external load-bearing walls, the floor, and the restructure of the house at 247 The Terrace.
>
> Please confirm that you did inform and disclose this information to Di Austin as you told me on the telephone.

[36] Later that day, 7 July 2017 at 12.58 pm, Mr Fraser replied:

> Dear Peter, after our previous conversation, I was informed that you believed I was telling lies and floundering. Therefore I will not be having any further communication with you. I am only responding to your email as it is the polite thing to do. To confirm everything I have told you in our conversations is 100% true and I take great offence to my integrity being taken into question.

[37] The appellant was undiscouraged. At 1.34 pm 7 July 2017, that is later that day, he emailed Mr Fraser saying, amongst other things:

> Just to be very clear. You are confirming that you have informed and disclosed the information regarding the failed south boundary retaining wall (at 247 The Terrace) to Di Austin as you told me on the telephone.

[38] On Thursday, 31 August at 9.39 am the appellant emailed Mr Fraser asking him to:

> Please confirm you did disclose the crack in the retaining wall to Di Austin [the second respondent] as you told me on the phone.

…

[39] On 31 August 2017 at 11:02 am the appellant emailed Mr Fraser as follows-

> Further to my email this morning. I recall our conversation is following:
>
> you told me that she did not disclose the information to Di Austin.
>
> But one thing that you did disclose and inform her was that there was a crack in the retaining wall.
>
> As you said to me, I then became aware of the situation.
>
> The crack can only be seen from the back door of your property. If you had not told me this I would not have been able to find out about this matter and raised it to Harcourts attention.
>
> The crack could not be seen from 247 the Terrace.
>
> Thank you for your help.
>
> I appreciate this.
>
> ….

[40] At 1:18 pm on 31 August 2017 Mr Fraser emailed to the appellant the following-

> Hi Peter, I have just talked with my wife, who was present when I spoke to [the second respondent]. She has confirmed what I thought was the case. As we were leaving, after viewing 247 The Terrace, I turned and said to [the second respondent] "well at least if we buy the place there will be no confusion over the retaining wall". I made no mention of cracks or its condition. In fact the whole comment was said in a joking manner and lasted all of five seconds. I am sorry if this does not aid your case at all but as I said I can only rely what I said. I may have mentioned cracks to you when we spoke on the phone, as we talked quite in detail. I understand we are to be neighbours and I wish I could help more.

[41] Earlier that morning at 11.02 am Mr Lam again emailed Mr Fraser saying:

> Further to my email this morning. I recall our conversation as following:
>
> You told me that you did not disclose the development to Di Austin.

> But one thing you did disclose and inform her was that there was a crack in the retaining wall.
>
> As you said that to me, I then became aware of the situation.
>
> The crack can only be seen from the back door of your property. If you had not told me this I would not have been able to find out about this matter and raised it to Harcourts' attention.
>
> This crack could not be seen from 247 The Terrace.

[42] The appellant, notwithstanding these exchanges claims in an affidavit which he swore dated 4 October 2017 that Mr Fraser had advised him that he had discussed and disclosed information regarding the failure to the south boundary brick retaining wall (large vertical crack) to Di Austin.

[43] At the hearing of this matter on 6 August 2018 the appellant stated that because he had given a sworn affidavit that Mr Fraser had made such a statement, the Committee had been obliged to accept his position because the only countervailing evidential material was in the form of unsworn emails (which we have observed above). Mr Lam did not refer us to any authority which would support such a contention.

[44] Section 88 of the Act provides that a Committee may receive in evidence any material whether or not it would be admissible in a Court of law. It may, but does not have to, take evidence on oath. The Act therefore contemplated that both types of evidence (and in some occasions in the same hearing) would be admissible. The Act did not go on to say that where evidence is given on oath it should be regarded as being of greater probative value than unsworn material such as emails. While it is a not a conclusive factor, we observe that in any case where sworn evidence had been provided on a particular point, the opposing party would have to file an affidavit in reply, if the position is as Mr Lam has stated it. Failure to do so would result in the Committee being obliged to come to the view that the sworn evidence must prevail by default. That would substantially undermine the permissive provisions of s 88 sanctioning unsworn evidence.

[45] It is our view that this contention on the part of the appellant cannot be accepted.

[46] The material which the respondents rely on, if accepted, could defeat the case which the appellant puts forward. The evidence on each side is not entirely satisfactory on this point.

[47] In his final email on the subject, Mr Fraser conceded that the appellant may have been told about the cracks in the wall. We conclude that the crack can only be viewed from 251 but not from the property which the appellant bought. It is likely that the appellant learnt of the crack from some other person.

[48] In the last email that he sent on the subject, Mr Fraser said he did not make any mention of the crack or the condition of the wall to the second respondent. Significantly though he does not rule out the possibility that he may have mentioned cracks when he spoke on the phone to the appellant.

[49] That for the respondents seems to concede that Mr Fraser did make some reference to the state of the property at 247 but not a reference to cracks in the wall[1] rather confusingly, though, she then said that[2] she brought up "Mr Fraser's comment" with the vendor. She does not further define what comment she is talking about nor when she brought the matter up with the vendor. However it is clear that at some point she did bring up with the vendor the question of the cracks in the wall. That is because the context of her statement of evidence connects that discussion with what the vendor remembered about the state of the wall. She says that he told her that there had been no movement or change in the wall as long as he lived at the property-a period of approximately 25 years.

Assessment of complaint concerning wall

[50] There appears to have been a discussion between the second respondent and Mr Fraser about the wall. It is not clear whether this was before or after the appellant had purchased the property. The appellant did not suggest that if any communication

had occurred after the date of purchase that there would have still been an obligation on the part of the licensee to tell him about it. We would not be prepared to conclude that that is a likely requirement under the client care rules.

[51] It is accepted that the licensee could not have seen the state of the wall from 247. Mr Lam attempted to suggest at the hearing that the second respondent could have inspected the wall by going on to the property at 251. But there are problems with such an approach. She had no authority to do that and more particularly if she had no reason to be guard about the state of the wall then she would not be expected to obtain permission to go onto the property at 251 for an inspection.

[52] Based upon the evidence, it would appear that the only way that the second respondent could have found out about the wall therefore was a communication from Mr Fraser and, as we have noted, he says that he did not discuss the subject of the cracks to the wall with her when he visited the property.

[53] In our view the Committee came to the right decision in this matter. The burden of proving that the second respondent breached her obligations under Rule 10.7 lay on the appellant when the matter came before the Committee. The Committee were entitled to take the view that because of the conflict of evidence and a lack of means to resolve the impasse on the evidence, such a charge should not be further progressed. We do not consider therefore that having reconsidered this matter by way of an appeal by rehearing that there is any basis upon which we could conclude that the Committee was in error. We decline therefore to reverse the decision of the Committee.

Orders

[54] The appeal which the appellant has brought is dismissed.

[55] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, 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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J Doogue
Deputy Chairperson

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G Denley
Member

_____
N O'Connor
Member