Decision No: [2011] NZ READT 03

Reference No: READT 043/10

IN THE MATTER OF	s.111 of the Real Estate Agents Act 2008
BETWEEN	**CAROL LAURIE HODGSON**
	Appellant
AND	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10037)**
	First Respondent
AND	**PAUL ARNOLD**
	Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Judge Michael Hobbs – Chairman
J Robson – Member
J Gaukrodger – Member

Hearing: 29 March 2011

Appearances: Appellant in person
Steven Haszard and Nicole Wilde for First Respondent

Decision: 6 April 2011

DECISION

Introduction

[1] This is an appeal by Carol Laurie Hodgson ("the appellant") against the decision of Complaints Assessment Committee 10037 ("the Committee") to take no further action under s 89(2)(c) of the Real Estate Agents Act 2008 ("the Act") in respect of the appellant's complaints against Paul Arnold ("the licensee") under the Act. The appeal is by way of rehearing s 111(3) of the Act.

[2] The complaints arose in the context of the licensee performing real estate agency work on behalf of the appellant acting as a Trustee of her father's estate prior to the Act coming in to force. In broad terms the appellant was not satisfied with the licensee's performance in terms of both marketing and communication.

The Appeal

[3] The appellant made a number of allegations in support of her complaint which included that the licensee:-

(a) Failed to display "Open Home" signs and flags on one occasion of an "Open Home".

(b) Failed to turn up to an advertised "Open Home".

(c) Failed to obtain offers in the range of the valuation she had obtained of $320,000.

(d) Advertised the property with the words "Empty Must Sell".

(e) Failed to consult the appellant about advertising approved by her Co-Trustee.

(f) Told the appellant her price expectations were unreasonable.

(g) Left a door to the house unlocked on one occasion and the garage door on another.

[4] The Real Estate Agents Authority ("the Authority") received the appellant's complaint on 18 March 2010 from the Real Estate Institute of New Zealand and referred it to the Committee.

[5] On 6 May 2010 the Committee considered the complaint and determined to inquire into it s 79(2)(e).

[6] The Committee further considered the complaint on 5 July 2010 and after obtaining all the written information and supporting documents provided by the appellant and the licensee again considered the complaint on 16 August 2010.

[7] The hearing by the Committee of the complaint was conducted on the papers before it pursuant to s 90(1) of the Act and having done so the Committee determined under s 89(2)(c) of the Act to take no further action with regard to the complaint.

Appeal Hearing

[8] The Tribunal heard the appeal in Tauranga on 29 March 2011 having considered all the documents compiled in the bundles of documents which were considered by the Committee together with the written submissions of the Committee and the appellant.

[9] The licensee had advised the Tribunal that he did not wish to take any part in the hearing of the appeal and he filed no submission.

[10] The appellant was invited by the Tribunal to give or call any additional evidence if she wished. The appellant declined the invitation to give evidence but called one witness Robert Ramshaw.

[11] Mr Ramshaw said in evidence that on one occasion, the date of which he could not remember, he met a couple from Waihi who had been waiting for 45 minutes outside the property in question for an agent to arrive for an Open Home. They had seen the Open Home advertised and the advertising signs were erected outside the property but Mr Ramshaw said the couple decided not to wait any longer and left.

[12] This evidence in the form of a letter dated 8 June 2010 was part of the material before the Committee when it considered the appellant's complaint.

[13] In addition to the two bundles of documents filed by the parties the Tribunal has considered the Memorandum of Submission filed by the appellant which in essence summarised the background to her dealings with the Real Estate Institute of New Zealand and the Authority.

[14] It was evident to the Tribunal that in addition to her specific complaints set out in para 3 the appellant believed she was not given the opportunity to state her case to the Committee.

[15] It is appropriate therefore to note the provisions of s 90 of the Act:-

"90 Hearings on papers

(1) A hearing conducted under section 89(1) by a Committee is to be a hearing on the papers, unless the Committee otherwise directs.

(2) If the Committee conducts the hearing on the papers, the Committee must make its determination on the basis of the written material before it.

(3) Consideration of the written material may be undertaken in whatever manner the Committee thinks fit".

[16] It was incumbent upon the appellant to persuade the Committee on a balance of probabilities that the licensee was guilty of unsatisfactory conduct pursuant to s 72 of the Act.

"72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or

(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or

(c) is incompetent or negligent; or

(d) would reasonably be regarded by agents of good standing as being unacceptable."

Decision of Committee

"5.2 From the information received by the Committee, it is apparent that while Ms Hodgson was dissatisfied with what she saw as a lack of commitment to selling the property on the part of Mr Arnold, Mr Arnold did undertake his responsibilities as a real estate agent with reasonable care and skill.

5.3 While Ms Hodgson states that she did not approve of the hearing 'Empty must sell', this advertisement ran for a least five weeks and she could have discussed the issues she had with

Mr Arnold and had the heading changed. There is also evidence provided to show that Mr Arnold provided written reports about the open homes and feedback from people who attended them. Ms Hodgson states that she did not receive any reports, but there is clear evidence that Mr Arnold did write them.

5.4 From the evidence provided to the Committee, this comes down to a case of which party should be believed or is the more credible, and it is clear that Ms Hodgson and Mr Arnold did not clearly communicate their expectations as to how the marketing process of the property would proceed.

5.5 Under the provisions of the Real Estate Agents Act 2008, Mr Arnold would have been obliged to discuss his marketing plan prior to signing any agreement and this would have minimised any possible misunderstandings (s 9.8(b) Real Estate Agents Act (Professional Conduct and Clients Care) Rules 2009).

> 9.8 When inviting signature of an agency agreement a licensee must explain to the prospective client in writing –
>
> (b) how the land or business will be marketed and advertised, including any additional expenses that such advertising and marketing will incur: it must be explained to the prospective client that he or she is not obliged to agree to such additional expenses.

But these provisions were not in place at the time of their interaction. It is clear from the evidence provided to the Committee, that Ms Hodgson and Mr Arnold did not have a clear understanding of what each expected from the other.

5.6 Ms Hodgson also alleges that Mr Arnold did not turn up to scheduled open homes and provides a letter from Mr Ramshaw in support of this allegation. In his letter dated 8 June 2010, Mr Ramshaw outlines one instance where he alleges that this occurred but is unable to remember the date. Mr Arnold denies this, but acknowledges that he was, on one occasion, late due to the previous open home running over time.

5.7 While Ms Hodgson has provided the Committee with a supporting letter covering one alleged instance of Mr Arnold not turning up for an open home, there is no evidence of any further instances where Mr Arnold may not have turned up. There is however, evidence provided to the Committee of reports written by Mr Arnold following open homes and providing information to Ms Hodgson with feedback from people who attend them.

5.8 Evidence provided to the Committee also shows that Ms Hodgson believed that Kaimai Real Estate would continue the weekly open homes that she had been previously holding, but due to staffing levels, Kaimai Real Estate did not always hold weekly open homes. This also illustrates the miscommunication between Ms Hodgson and Mr Arnold that would have been prevented if the provisions outlined in paragraph 5.5 above had been in place at the time (s9.8(b)).

5.9 This complaint is essentially one where the two parties involved had differing expectations of the other and did not establish clear communication from the onset of the process.

5.10 As the complaint relates to conduct which occurred before the commencement of the REAA the Committee understands that section 72(b) does not apply because section 72(b) refers to contraventions by a licensee of the 2008 Act or of any regulations or rules made under that Act.

5.11 The Committee did not regard any of the aspects of conduct which was the subject of the complaint as falling short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee (s 72(a)).

5.12 Nor did it consider Mr Arnold had carried out real estate agency work which was incompetent or negligent (s 72(c)) or which would reasonably be regarded by agents of good standing as being unacceptable (s 72(c)).

5.13 Taking into account all the circumstances described above, in the Committee's view there is no basis upon which it could make a finding of unsatisfactory conduct in respect of any aspect of conduct which were the subject of complaint.

5.14 For these reasons the Committee has determined under section 89(2)(c) of the REEA that it take no further action with regard to the complaint or any issue involved in the complaint".

Relevant Law

[17] The correct test the Tribunal must apply is that on any appeal against findings of fact by the Committee, it is for the Tribunal to rehear the case and to give the judgment it considers ought to have been given in the first instance.

This Tribunal considered the approach to be taken in the present kind of appeal in *Smith v CAC and Brankin*[1].

"[10] The principles applying to the exercise of appellate jurisdiction have been considered by the Supreme Court in *Austin, Nichols & Co Inc v Stitchting Lodgestar*[2]. According to the judgment, a Court considering an appeal from a lower Court is not obliged to defer to the reasons of the decision appealed from. Rather, the appellate Court has the responsibility of arriving at its own assessment of the merits of the case [paragraph [16]:

> [16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where the opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion".

[11] In *Kacem v Bashir*[3] the Supreme Court has clarified that the principles in *Austin, Nichols* apply to Courts exercising jurisdiction over general appeals from lower Courts, not appeals from decisions made in the exercise of a lower Court's discretion. The distinction between general appeals and appeals from discretionary decisions is set out at paragraph [32]:

> [32] But for present purposes, the important point arising from 'Austin Nichols' is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. **In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.** The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary (emphasis added).

[12] Section 89 of the Act confers on the Committee the power to make a determination on a complaint after it has inquired into it and conducted a hearing. Determinations made pursuant to s 89 would generally be regarded as 'general appeals' and the Committee submits the Tribunal in considering the appeal of way of rehearing, should apply the principles set out in *Austin, Nichols*".

[1] [2010] NZREADT 13
[2] [2007] NZSC 103, [2008] 2 NZLR 141
[3] [2010] NZSC 112

[18] The Tribunal accepts this appeal should be regarded as a general appeal rather than a discretionary one as was the case in *Smith v CAC and Brankin*.

Conclusion

[19] Having considered all the material before us both oral and written the Tribunal has no hesitation in finding that the decision of the Committee was the correct one. On the basis of the material before the Committee to find the licensee's failings in the eyes of the appellant to amount to unsatisfactory conduct would be quite unreasonable. The Tribunal accepts that the appellant was unhappy with her perceived failings of the licensee's work but it cannot uphold the argument that they amount to unsatisfactory conduct. Accordingly the appeal is dismissed.

[20] Although it is not relevant to the conclusion the Tribunal has reached even if the licensee had engaged in unsatisfactory conduct no orders could be made against him pursuant to s 172(2) of the Act. See CAC 10024 v *Downtown Apartments Ltd (in* liquidation) and Anr[4].

[21] In accordance with s 113 of the Act the Tribunal advises the parties of the right to appeal this decision to the High Court pursuant to s 116 of the Act.

DATED at WELLINGTON this 11th day of April 2011

Judge Michael Hobbs
Chairman

J Robson
Member

J Gaukrodger
Member

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