Decision No: [2011] NZREADT 33

Reference No: READT 016/11

IN THE MATTER OF	a charge laid under s 91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10027)**
AND	**JOSEPH BRANKIN**
	Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport – Chairperson
Mr J Gaukrodger – Member
Mr G Denley – Member

HEARD at CHRISTCHURCH on 26 October 2011

APPEARANCES

Mr Michael Hodge for the Committee
Mr J J McCall for the Defendant

PRELIMINARY DECISION ON ADMISSABILITY OF EVIDENCE

Background

[1] On 27 January 2011 the Complaints Assessment Committee laid a charge against Mr Brankin. This charge is annexed and marked with a letter 'A'. The charge relates to the alleged behaviour of Mr Brankin towards Ms Smith a former real estate salesperson. Mr Brankin was the Branch Manager for Ms Smith.

[2] Because the dispute concerns conversations and interaction between Mr Brankin and Ms Smith much of the evidence is likely to be a conflict between Mr Brankin's evidence and Ms Smith's evidence. However concerns about the

disintegrating situation in her office led Ms Smith to begin to tape conversations that she had with Mr Brankin and then subsequently to leave the tape running in the office when she was out of the office or away from her desk, enabling her to tape conversations primarily between Mr Brankin and another member of the office, Ms Martin. During the course of the hearing Ms Smith advised the Tribunal that approximately 100 hours of taping was undertaken by her but transcripts existed for only a small portion of that taping. The original tapes do exist but they are located in an office still within Christchurch's Red Zone and not currently accessible by Ms Smith and thus the Complaints Assessment Committee and the Tribunal.

[3] Mr McCall on behalf of Mr Brankin objects to the Tribunal considering the evidence taped by Ms Smith in which she is not a party. This evidence is contained in the transcripts of recorded conversations and will need to be dealt with individually. It is summarised below:

Tab 1: A conversation dated 29 April 2009 between Mr Brankin and Ms Martin.

Tab 2: A conversation on 24 April 2009 between Mr Brankin and Ms Martin.

Tab 3: A two line extract on 18 February with a statement by Mr Brankin alone.

Tab 4: A two line conversation (date not recorded) between Ms Martin and Mr Brankin.

Tab 10: A six line extract of a conversation on 15 April between Ms Martin and Mr Brankin.

Tab 11: An extract of five lines on 29 April between Ms Martin and Mr Brankin.

Tab 12: An extract in April 2009 between Mr Brankin and Ms Martin of eight lines.

[4] The only other fact relevant to this decision is that the parties reached an agreed settlement in the Human Rights Commission over a claim by Ms Smith. Part of the settlement reached was an acknowledgement by all the parties that the tapes could be used in subsequent proceedings before this Tribunal.

The Issues

[5] There are a number of competing legal principles to be considered by the Tribunal in determining whether or not this evidence ought to be admissible. Pursuant to s 109 of the Real Estate Agents Act the Tribunal has the right to accept any evidence/statement/document which would assist it to deal effectively with the matters before it, whether or not that document would be admissible in a Court of Law. This is colloquially known as an 'all evidence' rule.

[6] However the Evidence Act does also apply (see s 109(4)).

The Law: ***The Statutory Provisions***

[7] Section 8 of the Evidence Act provides that in any proceeding the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceedings or needlessly prolong it.

[8] Section 9 provides that any evidence can be admitted with the agreement of all parties.

The Real Estate Agents Act

109 Evidence

(1) Subject to section 105, the Disciplinary Tribunal may receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law.

(2) The Disciplinary Tribunal may take evidence on oath and, for that purpose, any member of the Disciplinary Tribunal may administer an oath.

(3) The Disciplinary Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and verifying that statement by oath.

(4) Subject to subsections (1)to(3), the Evidence Act 2006 applies to the Disciplinary Tribunal in the same manner as if the Disciplinary Tribunal were a court within the meaning of that Act.

(5) A hearing before the Disciplinary Tribunal is a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury)".

[9] Some guidance as to the approach to be adopted by the Tribunal has been given by the High Court in the decision of *A v The Professional Conduct Committee* (HC Auckland, CIV 2008-404-2927, Keane J 5 September 2008). At paragraph 83 the Court considered the relationship between the Health Practitioners Disciplinary Tribunal's ability to receive evidence (its own *"any evidence clause"*) and the limitations provided by the Evidence Act 2006. Justice Keane said:

> *"That wide ability does not, however, free the Tribunal altogether from the Evidence Act 2006, the most fundamental principle of which is relevance: s 7. Nor did it entitle the Tribunal to receive material that is frankly prejudicial and not probative: R v S, (CA 395/06, 24 November 2006, para [12]); Doherty v Judicial Committee of the Veterinary Council of NZ (HC Wellington, CP 37/00, 15 March 2001 Doogue J).*

[10] The Tribunal therefore must consider whether the evidence sought to be admitted is relevant, was admitted by agreement or if its probative value outweighs any prejudice to Mr Brankin if it is admitted.

[11] Section 216B of the Crimes Act makes it a crime to intercept any private communication by means of a recording device unless the person is a party to that communication or is doing it for lawful purposes which are set out in the section.

Prima facie therefore the recordings by Ms Smith of the conversations between Mr Brankin and Ms Martin are in breach of s 216B of the Crimes Act. Section 216C of the Crimes Act prohibits disclosure of these communications if they have been unlawfully intercepted unless the party disclosing is a party to the communication or where ss 2(b)(iii) applies *"giving evidence in any other civil or criminal proceedings where that evidence is not rendered inadmissible by the Evidence Act 2006"*. Thus disclosure can be made for the purposes of allowing this Tribunal to consider whether or not the disclosure is admissible in the proceedings before the Tribunal.

[12] As the CAC submitted it is not the Tribunal's role to determine whether there has been any breach of the Crimes Act but to determine whether it is appropriate that this evidence be admitted. Section 312M of the Crimes Act prevents evidence being given which is obtained as a result of unlawfully intercepted private communications. Section 312 allows the evidence to be admitted if all parties consent to the person giving evidence or if prior consent was given.

[13] Mr Hodge for the Complaints Assessment Committee submitted that s 312M made inadmissible any evidence obtained in contravention of s 216B but in <u>criminal</u> proceedings only. However he submitted that even though s 312 applies only to criminal proceedings the Tribunal still needs to determine whether the evidence should be admitted under the Evidence Act (ss 7 & 8). He further submitted that the Tribunal should consider the fact that the disciplinary proceedings are for the protection of the public and to regulate appropriate real estate agents' conduct. In those circumstances evidence which is critical to determining the conduct of agents should be admitted.

[14] Mr McCall was roughly in agreement with Mr Hodge as to the appropriate legal principles but submitted that application of them led to the conclusion that the taped conversations should not be admitted.

[15] He referred the Tribunal to the decision of Justice William Young in *Moreton v the Police* [2002] 2 NZLR 234 where in a criminal case for theft of greenstone the Court excluded all private communications intercepted by a member of the public between the alleged offenders using a radio scanner. The conversation between the two alleged offenders was held to be a 'private conversation' and the evidence was therefore inadmissible. Mr McCall submitted further that Ms Smith's taping of private communications constituted an unreasonable search and seizure under the New Zealand Bill of Rights Act. He referred the Tribunal to the Court of Appeal decision of *R v A* [1994] NZLR 429. In that decision the Court of Appeal said that the appropriate enquiry to determine whether the evidence ought to be admitted was to weigh all the relevant public interest considerations in the application against the facts of a particular case. Mr McCall submitted that other than one recording, that the majority of the conversations do not relate to real estate work but rather to the personal relationship (and its breakdown) between Mr Brankin and Ms Smith. He submitted that there were no relevant public interest considerations as there had been no breach of real estate obligations by Mr Brankin. He submitted therefore that there was no public need under the Bill of Rights Act to admit the evidence.

[16] Both parties made reference to the fact that there had been a complaint made to the Human Rights Commission which had been resolved between the parties and accepted that there was agreement that the conversations could be used by the Tribunal.

[17] Mr McCall submitted that the Tribunal were not bound by the Memorandum of Consent. Mr McCall also urged the Tribunal to consider that the recordings were only extracts from the whole which meant that the context of the evidence as a whole could not be assessed.

Discussion

[18] The evidence the subject of this dispute directly relates to Particulars (f), (g) and (h) of the charge. Particular (f) is that Mr Brankin accessed the complainant's private e-mails (evidence in Tabs 3 and 4), Particular (g) is that Mr Brankin verbally abused the complainant and referred to her unfavourably in the words set out in the charge (Tabs 10 and 11 and part of Tab 2 and 12) and Particular (h) is that Mr Brankin disclosed to a friend private and confidential information with respect to a client for whom he was acting (Tab 1).

[19] The Tribunal heard from Ms Smith who gave evidence that she had warned Mr Brankin and Mr Flanagan, director of the real estate firm Matson & Allan (Mr Brankin's employer), that she had taped conversations and that she might be taping further conversations again. The issues for this Tribunal are:

(a) Whether or not ss 216 and 312 of the Crimes Act prevent any disclosure of the recorded conversations?

(b) Whether parties consented in the mediation to the tapes disclosure.

(c) The interests of public safety and regulation of the Real Estate agents' profession.

(d) The Evidence Act.

Issue (a)

[20] *Prima Facie* the recording by Ms Smith of conversations in the office when she was not herself in the office are prohibited by s 216 of the Crimes Act.

[21] The Tribunal do not find that Mr Brankin consented to the taping of these conversations. On Ms Smith's own evidence, at best Mr Brankin <u>may</u> have been aware in very general terms that taping <u>might</u> occur. We do not find that s 216C(2)(b) applies i.e. the disclosure is made with the express or implied consent of Mr Brankin. However we do find it is arguable that the Tribunal can consider this evidence under s 216C(2)(b)(iii) of the Crimes Act. Thus evidence which advances these purposes is more likely to be of greater probative value. Further we find that s 312M applies only to criminal proceedings and that in these proceedings the recording <u>could</u> be admissible.

[22] We consider that the agreement reached in the Human Rights Commission that this evidence could be used amounts to consent under s 9 of the Evidence Act. Nonetheless the provisions of the Evidence Act make it clear that material which is unduly prejudicial should not be admitted regardless of consent.

[23] In considering whether the probative value of the evidence is outweighed by the risk of unfairness in admitting the evidence the Tribunal has considered each of the charges that the evidence relates to. In the Tribunal's view the purpose of the legislation is a helpful guide in determining what evidence ought to be admitted. The purpose of the Real Estate Agents Act is to promote and protect the interests of consumers in real estate transactions and promote public confidence in the performance of real estate agency work (s. 3). Thus evidence which advances these purposes is more likely to be of greater probative value. The Tribunal have then examined whether each particular contains an element of real estate agency work.

(i) Particular (f) relates to an allegation of accessing private e-mails and Particular (h) is an allegation of disclosure of private and confidential details of a client.

(ii) Particular (g) is an allegation of verbal abuse of the complainant. This allegation does not directly relate to Mr Brankin's work as a real estate agent.

[24] The Tribunal regard as more serious those particulars which relate to real estate agency work. We bear in mind that Mr Brankin agreed to the disclosure of these tapes (even if he did not have a copy of the transcript at the time of agreeing to the disclosure of the transcripts) when reaching a resolution with the complainant on other matters. It is important to record that the parties had discussed this and agreed this in the context of a settlement. The Tribunal should be slow to find prejudice in the face of clear agreement.

[25] Having weighed up all of these factors and the transcripts we consider therefore as follows:

Evidence under Tab 1: A seven line conversation relating to a discussion about the private business of a client.

An allegation that an agent passes confidential information obtained in the course of his agency work to another is a serious allegation. Evidence that relates to this potentially serious breach of a real estate agent's duty should properly be considered by the Tribunal. Therefore we admit the evidence contained behind Tab 1.

Evidence under Tab 2:

Tab 2 relates to particular (g). We regard this as being the least serious of the allegations against Mr Brankin and potentially the most prejudicial. We agree with Mr McCall's submission that people who believe that they are unheard may say unwise or hurtful things about another that they would not say to that person, especially where there is clearly an inter office dispute going on. We therefore consider that the prejudicial value of the evidence at Tab 2 outweighs its probative value and exclude it.

Evidence under Tab 3:

The evidence behind Tab 3 relates to Particular (f). We consider this is also potentially serious. The extract is only two lines long and in these circumstances we have determined that its probative value outweighs its potential prejudice.

Evidence under Tab 4:

For the same reason as Tab 3 we admit the evidence under Tab 4.

Evidence under Tabs 10, 11 & 12:

We exclude the evidence behind Tab 10, Tab 11 and Tab 12. We consider that these comments while unwise and unpleasant by Mr Brankin do not directly relate to his real estate work and therefore the prejudicial effect outweighs its probative value.

[26] Pursuant to s 113 of the Act the Tribunal advises the parties of the right to appeal this decision to the High Court as conferred by s 116 of the Act.

DATED at WELLINGTON this 22nd day of November 2011

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Ms K Davenport
Chairperson

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Mr G Denley
Member

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Mr J Gaukrodger
Member