Decision No: [2011] NZREADT 6

Reference No: READT 055/10

IN THE MATTER OF	s 111 of the Real Estate Agents Act 2008
BETWEEN	**MALCOLM EDEN**
	Appellant
AND	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10059)**
	First Respondent
AND	**SEDDON REAL ESTATE LIMITED**
	Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Appellant in person
Mr L J Clancy for the CAC (First Respondent)
No appearance for Second Respondent

Introduction

[1] This is an appeal by Malcolm Eden ("the appellant") against the decision of Complaints Assessment Committee 10059 ("the Committee") to take no further action in respect of the appellant's complaints against Seddon Real Estate Limited ("the licensee") an agent under the Real Estate Agents Act 2008 ("the Act"). The appeal is by way of rehearing s 111(3) of the Act.

[2] The appellant was at all material times a self employed salesman employed by Mr Richard Bean, the principal officer of Seddon Real Estate which carried on business as real estate agents in Auckland and Tauranga.

[3] Pursuant to s 111 of the Act 2008 any person affected by determination of the Committee may appeal to the Tribunal against this determination. This appeal is by way of rehearing and the Tribunal may confirm, reverse or modify the determination of the committee.

Summary of Complaints

[4] Mr Eden's notice of appeal sets out the following grounds for the appeal:

> *"Richard Bean is a Director of Seddon Realestate Ltd and was a Licensee within this company. Richard wore several hats as to say being a Director and a Licensee, that's been established by the REAA by identifying the correct criteria and issuing these titles to Richard Bean on their website with accompanying documentation for the public to peruse and other Licensee's (since withdrawn). Malcolm holds a current licence under the REAA. The Conduit had been established being; We have always had two Licensee's working this Realestate Project. Both Malcolm & Richard working together for their individual apportionments of Commissions! that have been attained from the Sales made at The Pacific, (that have been paid out to Seddon Realestate Ltd 'The Company') and then the Commission monies were distributed to Licensee Richard and subsequently due to Fraudulent actions by Richard, Malcolm has a loss to date of $16,131.14 (plus accruing interest to be added).*
>
> *Licensees Malcolm & Richard worked very very closely together on all potential and concluded sales to date at The Pacific Development; see statement from Kevin Findlater attached.*
>
> *To date I have not heard from Richard since my documented timeline E-mails in my complaint sent to REAA-CAC on 29th June 2010. To the best of my knowledge Richard has absconded overseas and is still there somewhere. Therefore it is wrong for the CAC to assume it is a Commercial Dispute! as above it has been identified that both Malcolm & Richard were Licensee's at that time & Richard must be charged accordingly with 'Constructive Fraud'."*

[5] The gist of the complaint was that Mr Bean had not paid $16,131.14 in commission to Mr Eden. Mr Eden's evidence was contained in affidavits from Mr Findlater and from Mr Eden himself and Raewyn Mayvis Eden.

[6] Mr Findlater said that Mr Bean had complete control of Seddon Real Estate but had been involved in a joint enterprise with Tonic Creative Communications Limited. Mr Findlater was part of Tonic Creative Communications. He asserted that in late 2009 an overdraft of $20,000 was arranged for Seddons with the National Bank, guaranteed by the Tonic directors (of which Findlater was one) and Mr Bean personally. Mr Findlater said it was agreed that all trading for Seddons would be done through this account and all withdrawals would need to have the approval of all three guarantors. Mr Findlater claims that from August until November 2009 Mr Bean withdrew $48,223 from the Seddons National Bank account when the company had no capacity to repay this sum. This included the commissions due to Mr Eden. Mr Findlater also complained that commissions received by Mr Bean were not paid into the National Bank account but were paid into a separate Westpac bank account and used by Mr Bean without accounting for these monies. He provided some financial information and a copy of the letter dated 3 May 2010 (as attachment 2) which was a letter written by Mr Bean to Mr Findlater marked 'without prejudice' and 'private and confidential'.

[7] It was part of Mr Eden's case that this letter amounted to blackmail as it threatened to bring a complaint against a person connected with Mr Findlater over allegations that the certain information that Mr Findlater must have been obtained by him improperly.

[8] Mr Findlater acknowledged that he had separately made a complaint to the Real Estate Agent's Authority about this conduct and that on 11 January 2011 Complaints Assessment Committee no. 3103428 resolved to take no further action. It determined that the dispute between Mr Findlater and his business partner and Mr Bean was a commercial dispute. Mr Findlater's oral evidence confirmed that Mr Bean appeared to have left the country and for that reason no proceedings had been issued against him. He said that $75,000 (in round figures) was the sum that Mr Bean had taken from either the joint venture partners or from Tonic.

[9] Ms Eden's affidavit set out some financial information relating to the receipt of incorrect commission statements and the fact that Mr Bean had arranged to deduct PAYE on behalf of Mr Eden which caused difficulties.

[10] Mr Eden's own affidavit claimed that Mr Bean was in breach of s 122 of the Act as he had misapplied monies received in the course of business and that he was also in breach of s 72 (ss.(c) and ss.(d)) of the Real Estate Agents Act. He said in his affidavit at paragraph 7 "*it was wrong for the CAC to make this decision alone on just written material from myself without interacting face to face to grasp a fuller understanding of this very very serious situation that has accrued*". He reiterated that he stood firm in his accusations about Mr Bean.

[11] He amplified this position in his written submissions. He submitted that the CAC should not have dismissed the complaint as it was not just a commercial dispute. He said that Mr Bean's actions were a breach of s 73 of the Act and submitted that Mr Bean had hidden behind the threat of blackmail by using the words "*without prejudice*" "*private and confidential*" in his letter of 3 May 2010. He submitted that under s 122(3) "*commissions received by Mr Bean on behalf of Mr Eden as his licensed real estate salesperson should have been held in the real estate agent's account and not disbursed except to properly pay Mr Eden".* He invited the Tribunal to direct a further enquiry by the CAC under s 82 of the Act.

[12] He submitted further that s 122 were clearly applicable as he (Mr Eden) was a party to the transaction referred to under s 122.

[13] Mr Bean, on behalf of Seddon Real Estate, took no part in the action. However, he had filed a reply to Mr Eden's evidence and submissions. He submitted that s 122 of the Act dealt solely with a "*treatment of monies in trust accounts*" and was not relevant to the dispute. He said that a nil balance was recorded for Seddon Real Estate every month in its trust account. He denied that he was guilty of any unsatisfactory conduct under s 72. He submitted that his actions as director in charge of Seddon Real Estate were always conducted to the best of his ability. He said

> *"My contention regarding this dispute is that this dispute has been brought about by Seddon Real Estate Limited not being paid back an amount of approximately $18,000 being a loan made to an associate company Tonic. The complexities of the association between SREL and Tonic have led to a commercial dispute which has led to a complaint being laid with the Real Estate Agents Authority against SREL and myself. I respectfully submit that this is not the forum to have this matter adjudicated upon"*.

[14] He denies a statement by Mrs Eden in her affidavit that calculation of PAYE as opposed to withholding tax was done with any kind of deliberate attempt to defraud:

"At no time have SREL or myself set out with the intent of not paying Mr Eden's fees or commissions which were earned and due to be paid by SREL to him. SREL have accumulated significant costs associated with running the business and these had accrued for several months and were required to be paid. SREL became involved in a commercial dispute within an associated company Tonic over an overdraft facility and an outstanding loan provided to Tonic by SREL. This left the company without sufficient funds to pay Mr Eden".

[15] He provided the Tribunal also with a response to Mr Findlater's affidavit saying that the information provided by Mr Findlater was a:

"*one eyed version of the relationship between SREL and Tonic and makes no comment about many of the costs incurred by SREAL and that Mr Bean had drawn no salary or wages for more than 12 months*".

[16] From this evidence the Tribunal can see that there is no clear issue between Mr Eden and Mr Bean (on behalf of Seddon Real Estate) as to the obligation to commission. There seems to be no dispute that this commission was owed to Mr Eden. The issue for the Tribunal is whether the actions of Seddon Real Estate in not paying the commission amount constitute any breach of the Act. The Committee submitted that:

[a] Section 72 is concerned only with a licensee's conduct in carrying out real estate agency work which is further defined in s 4 as "any work done or services provided in trade on behalf of another person for the purpose of bringing about a transaction." Transaction is further defined by s 4 of the Act. "Transaction" means any 1 or more of the following:

- *(a) the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land:*
- *(b) the grant, sale, purchase or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies);*
- *(c) the grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 1952;*
- *(d) the grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003;*
- *(e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).*

[b] Section 73 could apply as s 73(a) could encompass conduct not directly relating to carrying out real estate agency work but it must reach the threshold of being reasonably regarded as disgraceful.

[17] Mr Clancy submitted that failure to pay commissions did not fall within the definition of real estate agency work set out in s 4 and that the conduct complained of did not reach the threshold for disgraceful conduct set out under s 73(a).

[18] He further submitted that s 122 was not applicable to this case as it created an obligation only in relation to monies held by a real estate agent as stakeholder or agent for a third party to the real estate transaction. Mr Clancy referred also to s 3 of the Act

which sets out the purpose of the Act. This is to "*promote and protect the interests of consumers in respect of real estate agent transactions*". He submitted it was not part of the purpose of the Act to attach penalties to contractual obligations between agents and their employees (see s 149) thus s 122 did not apply to the Contractual obligations.

The Law

[19] The Tribunal's role on appeal is to look at the matter *de novo* (see s 111). In *Austen, Nicols & Co v Stichtieng Lodestarn* [2008 2 NZLR 14 1] the Supreme Court confirmed that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the Appellate Court even when that opinion involves an assessment of fact and degree and entails a value judgment.

[20] In *Kacem v Bashir* [2010] NZSC 112 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)".*

Section 80 confers a discretion on the Committee to decide not to consider a complaint, or to take no further action if in the course of the investigation it appears any further action is unnecessary or inappropriate. When considering appeals from decisions in which the Committee has exercised its discretion under s 80, the Tribunal accepts that the decision of the Committee is a discretionary one and it should therefore follow *Kacem v Bashir*.

[21] The burden of proof rests with the appellant on the balance of probabilities to establish that the appeal has been made out. This is the civil standard. The more serious the allegation, however, the more the Tribunal must be satisfied that the requisite standard has been made out. The standard of proof is still however the civil standard.

[22] The Committee determined that there were

> *"no reasonable grounds for concluding the conduct you have complained about is unsatisfactory conduct (as described in the Act) or reaches a threshold for misconduct. Therefore we encourage the parties to pursue the usual commercial channels for resolution and they determined to take no further action under s 80(2) of the Act".*

Discussion

Relevant sections of the Act

[23] We deal first with s 122. Section 122 is set out in full below:

> *"122 Duty of agent with respect of money received in course of business*
>
> *(1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions.*
>
> *(2) Despite subsection (1), if an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to the money, he or she must take all reasonable steps to ascertain as soon as practicable the person who is entitled and may retain the money in his or her trust account until that person has been ascertained.*
>
> *(3) Pending the payment of any such money, the money must be paid by the agent into a general or separate trust account at any bank carrying on business in New Zealand under the authority of any Act and may not be drawn upon except for the purpose of paying it to the person entitled or as that person may in writing direct.*
>
> *(4) No money to which this section applies is available for payment of the agent's debts, nor may it be attached or taken in execution under the order or process of any court at the instance of any of the agent's creditors.*
>
> *(5) Nothing in this section takes away or affects any just lien or claim that an agent who holds money to which this section applies has against the money."*

[24] Mr Eden relies upon s 122(3). The question is whether or not this section applies to or imposes upon Seddon Real Estate an obligation to hold commission monies payable to a salesperson of the agency on trust for them.

[25] A clue to interpretation of this section is contained in the heading to part 5 of the Act (under which s 122 is found). The part is headed "*Duties relating to real estate agency work*". Section 121 requires an agent to display certain named information. Section 122 is headed "*Receipt of money and audit of accounts*" and it requires the holding of money in a trust account if required. Section 123 provides that the money held for any person must be held for 10 days. Section 124 provides that an agent must provide an account of money held as an agent. Section 125 requires an auditing of trust accounts.

[26] Section 5 of the Interpretation Act 1999 says that "*the meaning of an enactment must be ascertained from its text and in the light of its purpose, the matters that may be considered in ascertaining the meaning of enactment include the indications provided in the enactment, examples of those include the preambles …… analysis, table of content, headings to parts in sections, marginal notes, etc*".

[27] The Tribunal may therefore have reference to the matters set out above as a means of ascertaining whether s 122 applies to the actions of Seddon Real Estate. These headings all support the interpretation that the section is directed at holding clients money.

[28] Further guidance may be gleaned from the words of s 122. The heading is "*Duty of agent with respect to money received in course of business*". Sub section 1 says that "*all money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions*". The natural meaning of this section is that any transaction where the agent receives the money as an agent (in its general legal sense) for any party to the transaction must be paid to the person lawfully entitled to it. Section 122(3) provides that "*pending the payment it must be paid into a general or separate trust account and may not be drawn upon except for the purpose of paying that a person entitled or as the person may in writing direct*".

[29] It seems clear to the Tribunal that this section is directed at the holding of monies by agents (such as a deposit) for the benefit of a party to a real estate transaction (ie vendor and purchaser). Once a commission has been earned by an agent and paid to the agency (as happened here) then the agency is no longer holding those monies *in his or her capacity as an agent* but rather are receiving it as payment for the completion of the agency work. The Tribunal also agrees with the submission made by the CAC that the provision of an offence for breach of this section (s 149) does not easily sit within the interpretation urged upon us by Mr Eden. If Mr Eden's interpretation were accepted, then a real estate agent would be in a different position to any other person who is entitled to receive money for the fruits of their labours in that they would be given protection by the Act against the disbursement of this sum for any purpose other than to pay them for their endeavours. Thus an agent would be able to claim a preference over any other general creditor of the licensee and the licensee would not be beneficially entitled to that money but only hold it on trust for the agent. While we can certainly see why this is an appealing argument for Mr Eden, we do not find that that is the correct interpretation of s 122 of the Act. Rather, we find that s 122 is directed towards the obligation of an agent to hold deposit and/or purchase monies on trust for the ultimate recipient. In those circumstances, an agent has an absolute obligation to account for those monies.

[30] We therefore do not find that s 122 applies to this case.

[31] We then turn our attention to s 72 of the Act. We adopt the words used by this Tribunal in *CAC v Downtime Apartments Limited* [2010] NZREADT06 at paragraphs 50 to 51:

> *"[50] At a high level of generality… it may be said that s 72 requires proof of a departure from acceptable standards and s 73 requires something more – a marked or serious departure from acceptable standards.*
>
> *[51] The requirement to prove something more than a departure from acceptable standards does not mean it is necessary to prove a wrongful intention in order to prove misconduct. That would be inconsistent with the express language of s 73(a)."*

[32] We do not find that s 72 is applicable to this case as it requires the Tribunal to conduct an inquiry into the conduct of a licensee whilst carrying out real estate agency work. Failure of an agent to pay commission due to its salesperson is not, we find, work within the definition of real estate agency work.

[33] We do accept however that s 73 is relevant and if Mr Bean's conduct could be categorised as disgraceful conduct under s 73(a) then the Tribunal would be able to make an order. Section 73(a) says:

> "*For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct-*
>
> *(a) Would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; …"*

[34] Disgraceful is a strong term. It suggests conduct which is a marked, serious or grave departure from acceptable standards. We adopt the helpful definition of disgraceful conduct set out in *Downtown Apartments* at paragraphs 55 to 58.

> *"55. The word disgraceful is in no sense a term of art. In accordance with the usual rules it is a given its natural and popular meaning in the ordinary sense of the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of 'agents of good standing' or 'reasonable members of the public'* (emphasis added).
> *56. The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See Blake v The PPC [1997 1 NZLR 71].*
> *57. The 'reasonable person' is a legal fiction of the common law representing an object of standard against which individual conduct can be measured but s.73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.*
> *58. So while the reasonable person is a mythical ideal person the Tribunal can consider inter alia the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the first defendant.*
> *59. So in summary the Tribunal must find on balance of probabilities that the conduct of the first defendant represented a marked and serious departure from the standards of an agent of good standing or a reasonable member of the public."*

[35] Did Mr Bean's conduct amount to disgraceful conduct as determined by agents of good standing or a member of the public?

[36] We cannot escape the conclusion that this behaviour, while less than ideal, is not sufficiently serious enough to amount to disgraceful conduct. Mr Bean has failed to pay the commission which he acknowledges is due. He claims that this is because of a commercial dispute with Tonic. We cannot reach any determination on this claim. We have not seen any evidence to suggest that the conduct of Mr Bean would meet this test. We do not accept Mr Eden's submission that the letter annexed as exhibit 2 to Mr Findlater's affidavit amounts to a threat of blackmail. Indeed Mr Findlater acknowledged to the CAC that if in fact the information had been obtained improperly from a solicitor then Mr Bean would have been justified in making a complaint to the Law Society.

[37] We have no evidence of fraud or of any other behaviour that would be sufficiently grave so as to breach s 73(a). The best evidence that Mr Eden can produce is to show

an unfortunate series of events which have left him, most regrettably, significantly out of pocket. We have no doubt that Mr Eden feels aggrieved and he has good cause for doing this but we do not have any evidence to move from this fact to a finding of disgraceful conduct under s 73(a).

[38] The purpose of the legislation provides in part a reason for this conclusion. Disciplinary proceedings have two main functions. They are to protect the public against unauthorised and improper activity by those registered under the Real Estate Agent's Act and secondly to ensure the maintenance of proper standards amongst those licensed. Thus the aim of any disciplinary action is both public safety and consumer protection. Unfortunately disciplinary procedures are not the appropriate places to deal with failures of licensees to meet their ordinary contractual obligations unless those failures are so gross and perverse as to amount to disgraceful conduct.

[39] From this it follows that we do not find that the Committee erred in reaching its conclusion to take no further action under s 80 of the Act. We therefore dismiss the appeal.

[40] The parties have a right of appeal against this decision pursuant to s 113 of the Act as conferred by s 116 of the Act.

DATED at WELLINGTON this 26th day of April 2011

_____
K G Davenport
Chairperson

_____
G Denley
Member

_____
J Gaukrodger
Member