

Decision No: [2012] NZREADT 10

Reference No: READT 068/11

**IN THE MATTER OF** an appeal made under s 111 of the Real Estate Agents Act 2008

**BETWEEN** **KELLIE-ANNE SHIRLEY FIELDING**

Appellant

**AND** **REAL ESTATE AGENTS  
AUTHORITY (CAC 10068)**

First Respondent

**AND** **KIMBALL (“GRAHAM”) McINTYRE**

Second Respondent

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

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

**HEARD** at AUCKLAND on 24 January 2012

**APPEARANCES**

The appellant in person  
Mr L Clancy for first respondent  
No appearance by second respondent

***Introduction***

[1] Ms Fielding made a complaint against Mr Graham McIntyre in early 2011. Ms Fielding had been employed as a salesperson and property manager with L J Hooker Kumeu by Mr McIntyre. The relationship between Ms Fielding and Mr McIntyre had been excellent until the time of her departure from L J Hooker. She left the business on 30 November 2010. She says there was a lengthy delay after she left L J Hooker until she was paid the monies that she was owed. Further she complained that Mr McIntyre continued to show her name on L J Hooker listings on the internet with the label “*MREINZ*” after her name when she was no longer employed by L J Hooker and had not been for a number of months. At that time she was also not then currently licensed with the Real Estate Institute of New Zealand. She further complained that Mr McIntyre had unfairly blamed her for a number of issues with the property management at L J Hooker after her departure and “*bad mouthed her*” to clients. The Complaints Assessment Committee dismissed her complaints saying that they did not have jurisdiction to consider them because the complaints did not involve real estate agent’s

work. The Complaints Assessment Committee also found that the conduct of the licensee was not such that even at its worst it could be described as disgraceful conduct. Pursuant to s 79(2)(a) of the Act the Complaints Assessment Committee determined that the complaint alleged neither unsatisfactory conduct nor misconduct. They dismissed the complaint.

### ***The Appeal***

[2] Ms Fielding advised the Tribunal that she acknowledged that many of her complaints did not fall within the definition of real estate agency work as it was defined in the Real Estate Agents Act 2008. Instead she focused on her appeal on the complaint that Mr McIntyre had continued to list her name and that of L J Hooker on the internet for properties which were not still listed for sale by L J Hooker. She said that on numerous occasions she asked Mr McIntyre to remove her name from all management e-mails and software that contained her e-mail address and had her name on them, and all entries on the internet which showed her as working for L J Hooker. She says it took almost three months for him to remove her photograph, personal details and the internet advertisement.

[3] When discussing the matter with the Tribunal she referred to written material already filed and a YouTube clip which showed a property for sale by L J Hooker Kumeu at 167 Taha Road, Waimauku, Auckland which she said had remained on the internet for two years without L J Hooker having a listing authority. She said that this property was not one which L J Hooker had an authority either to rent or to sell. She asserted that this was a breach of the Real Estate Agents Act (Professional Conduct & Client Care Rules), and in particular in breach of rule 9.15. This provides that licensees have a duty not to market properties for which they do not have an agency.

[4] The issues for the Tribunal are:

- (i) Was this material before the Complaints Assessment Committee? If so did the Complaints Assessment Committee err in dismissing the complaint as not relating to real estate agency work?
- (ii) If the complaint was not properly investigated by the Complaints Assessment Committee should the Tribunal order it to be returned to the Complaints Assessment Committee for this investigation to be carried out?
- (iii) Should the appeal be upheld or dismissed?

### ***Discussion***

[5] The Tribunal's power on an appeal is set out in s 111. The appeal is by way of rehearing and the Tribunal may confirm, reverse or modify the determination of the Committee. In this case the Complaints Assessment Committee determined to take no action.

[6] The principles applying to the exercise of appellate jurisdiction have been considered by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. 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 that 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”.*

[7] 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)”.*

[8] We have considered the information put forward by Ms Fielding and consider that the issue of properties and information remaining on the L J Hooker website was raised in the initial complaint made by Ms Fielding to the REAA. We find that Ms Fielding has provided *prima facie* evidence to show that Mr McIntyre did continue to advertise at least one property on the internet for which L J Hooker had no authority to do so. *Prima facie* this appears to be in breach of rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care Rules). This says:

*“9.5 An appraisal of land or a business must be provided in writing to a client by a licensee; must realistically reflect current market conditions; and must be supported by comparable information on sales of similar land in similar locations or businesses”.*

[9] In its decision the Complaints Assessment Committee did not appear to consider this issue separately.

[10] The Tribunal does not have sufficient information to determine how the Complaints Assessment Committee ought to have resolved this complaint. However we have heard sufficient information to decide that the Complaints Assessment Committee ought to have investigated these alleged breaches of the rules. Mr McIntyre ought to also have an opportunity to explain this allegation. Thus far his explanation has been that contained in his letter of 6 December 2011 to the Tribunal where he says:

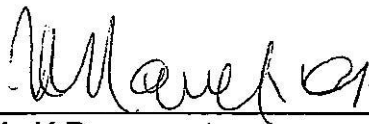
*“The name and mobile number of the contractor was removed as quickly as possible but technical issues between Ljhooker.com and Realestate.co.nz did not allow all information to be erased immediately. It was not in our interest to have Kellie-Anne Fielding’s details on our website as she was offering a competitive solution to that of this company”.*

**Conclusion**

[11] We determine therefore pursuant to s 111 to modify the decision of the Complaints Assessment Committee. We determine that pursuant to s 79(2) the Complaints Assessment Committee should enquire into the complaint raised by Ms Fielding as to the unauthorised continuation of listings on websites and other media when authorities did not exist to advertise the properties, and where Ms Fielding's name was associated with the advertisements after she had left the company. We do not limit it to these matters and it may be that when a proper investigation has been undertaken by the Complaints Assessment Committee that further issues are raised which should be addressed by the Complaints Assessment Committee.

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

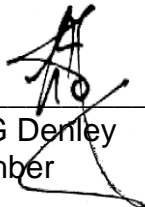
**DATED** at AUCKLAND this 29 day of March 2012



Ms K Davenport  
Chairperson



Ms J Robson  
Member



Mr G Denley  
Member