

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 19

READT 50/11

IN THE MATTER OF a charge laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN **REAL ESTATE AGENTS**
AUTHORITY (CAC 10054)

Complainant

AND **ARTHUR SUBRITZKY**

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF DECISION: 26 April 2012

APPEARANCES

Mr L J Clancy – counsel for complainant
Mr V Anand for defendant

DECISION OF THE TRIBUNAL

The Issue

[1] On 6 May 2011, following a complaint by a process server Mr Mark Steyn, the Authority charged the defendant with misconduct under s.73(a) of the Real Estate Agents Act 2008 “*in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*” As explained below, the charge has arisen out of a Mr M Dingwall, private investigator, engaging Mr Steyn to serve commercial documents on the defendant.

[2] The formal charge document set out basic “*Particulars*” as follows:

“Particulars:

On 13 August 2010, the defendant:

- (a) *At 11 Fairlight Place, Manurewa, or thereabouts, behaved in a threatening and/or aggressive manner towards the complainant;*

(b) Said to the complainant words to the effect of:

"I have a good mind to get out of this car and knock your block off".

(c) Sent a text message to the complainant, which read:

"Actually I'm angry cause your a f....n visitor 2 my country you f....n south African f..k you cost me money 2day wit your bullShit f....n story I've done some research keep this message you cock see you later mark" (sic)

(d) Sent a text message to the complainant, which read:

"F..k you you south african c..t" (sic)

[3] A brief of evidence for the defendant was filed and served on Monday 5 March 2012 and makes it clear that the underlying factual allegations against the defendant are not in dispute. Accordingly, the parties agreed that we deal with this matter by way of submissions based on the signed briefs of evidence and the agreed bundle of documents.

[4] The only issue before us is whether the facts as alleged and accepted amount to conduct on the part of the defendant which would be regarded by agents of good standing, or reasonable members of the public, as disgraceful and, therefore, amount to misconduct under s.73(a) of the Act which provides:

"73 Misconduct

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;"*

The Defence

[5] The defendant has put it that he is not guilty of the charge:

"For the following reasons that I have stated throughout the case;

- a. *Once Mr Steyn indicated to me that the true nature of his business I stopped acting in any form of real estate capacity.*
- b. *I was confronted in an aggressive manner by Mr Steyn and therefore was well within my rights to remove him from the property, because of his aggressive nature I may have responded in the like verbally, but this was after serious provocation, I also believe Mr Steyn to have seriously exaggerated what I said as if you saw the two of us in person, you would realise due to the size difference that any threat of violence from me towards Mr Steyn could potentially end up badly for me.*
- c. *I believe that any further correspondence that may have transpired between myself and Mr Steyn after this episode @ the property is totally*

between him and I just as any correspondence I have with any other contacts I have outside of real estate is my business and is no business of the REAA and in no way affects my capacity as a real estate salesperson, although I acknowledge that those text messages originated from my phone, in no way am I admitting that I am the author of those text messages.

I would also like you to take into account when considering my case:

- a. *My unblemished record to date within the real estate industry, a career spanning nearly a decade and hundreds of vendors and buyers, something that I could not accomplish especially over the last few difficult years if I acted unprofessionally in any manner."*

The Evidence

[6] The complainant, Mr Steyn, is a real estate licensee and process server who, in August 2010, was instructed to serve documents on the defendant a licensed salesperson under the Act. In particular, Mr Steyn stated as follows:

- “3. *At around 12.46 pm on 13 August 2010, I contacted Mr Subritzky via my mobile. I said that I was interested in a property that he had listed in Manurewa. Mr Dingwall had supplied the information about the property for sale. Mr Subritzky told me the address was 11 Fairlight Place, Manurewa and that he would see me there in ten minutes.*
4. *Mr Subritzky arrived at 11 Fairlight Place, Manurewa in a black Mustang with a yellowish/orange stripe down the middle of the car. The car registration number was PL8TNM. Mr Subritzky and a blonde woman to whom I was not introduced exited the car.*
5. *I introduced myself to Mr Subritzky and, to confirm that I had the right person to serve the papers on, I inquired as to where he had come by his unusual surname. Once I had established Mr Subritzky's identity, I informed him that he was being served and handed the papers to him. I identify Mr Arthur Subritzky as the defendant.*
6. *When I handed him the papers, the defendant said “at least you do it with a smile”. He then told me that he had already been served and asked why I was doing it again. I replied that I was only following instructions.*
7. *The defendant then asked why I had to meet him outside of the Now Realty office in order to serve him. I said that I was following instructions as there had been an incident with the last person who had served papers at Now Realty. The defendant denied that the previous incident at Now Realty had occurred and said he would have met me in order to be served.*
8. *We then both climbed into our cars. I was writing down the address, time (1.01pm) and his registration number when he pulled out of the driveway and started to drive away. The defendant then stopped and reversed his car so that he was alongside mine and wound down his window. He now*

Appeared angry. He told me that he was upset that I had lured him away from his office and wasted his time. I replied that I understood his opinion but that I had done it this way because of the incident that occurred with the last person that had served papers at Now Realty.

9. *The defendant continued to get angrier. I said to him, for whatever it was worth, would he accept my apology. He rejected the offer and said that I did not understand. He then said "I have a good mind to get out of this car and knock your block off".*
10. *The argument went back and forth between the defendant and I, with the defendant reiterating his threat to "knock my block off", until I eventually told that I was going to win the argument and was going to leave. He said he was going to follow me and I told him that he must suit himself.*
11. *I drove away slowly and the defendant followed me out of the area and then turned in the opposite direction as soon as we reached a main road. I then contacted Mr Dingwall at 1.11pm and informed him of what had occurred. He asked me to provide a written report which I emailed to him at 5.15pm that evening. ..."*
12. *At 4.35pm that evening, I made a complaint to the Police for the offence of "Other threatening behaviour of language". ...*
13. *At 6.25pm, I received a text from the defendant, it read "Actually I'm angry cause your a f....n visitor 2 my country you f....n south african f..k you cost me money 2day wit your bullShit f....n story I've done some research keep this message you cock see you later mark".*
14. *A second text from the defendant was sent shortly after at 6.30pm. It read "F..k you south african c..t".*

[7] There was quite brief evidence from a Mr Michael Dingwall, a private investigator, explaining how he engaged Mr Steyn to serve documents relating to a failed real estate venture in Australia on the defendant on 2 August 2010.

[8] There was also evidence adduced from Mr Shaun Millar, an investigator for the complainant, regarding various documentary exhibits.

[9] Finally, there was a reasonably detailed brief of evidence filed by and for the defendant, a real estate licensee of Auckland, stating as follows:

1. *I am a licensed salesperson with Now Realty Limited.*
2. *On 13/08/2010 I was on my way to an appraisal for this property in Papatoetoe when I received a phone call from Mr Steyn saying he was a cash buyer interested in 11 Fairlight Place, Manurewa.*
3. *Mr Steyn said he was outside the property and wanted to view it. I said no I am unavailable now but can do in 2 hours time or so.*

4. *Mr Steyn said he couldn't do then because he was from the North Shore and that he could only be there for 10 minutes and couldn't make it at any other time. I then told Mr Steyn that ok I will sort it out and see him there in 10 minutes.*
5. *I rang the owner of the property I was going to appraise and asked her if we could reschedule our meeting. She said yes and agreed to meet the next day.*
6. *I then drove to 11 Fairlight Place, Manurewa to meet Mr Steyn.*
7. *When I arrived there I saw Mr Steyn. We shook hands and pleasantries were exchanged.*
8. *Mr Steyn then proceeded to make remarks about my Jewish heritage, which I felt were odd and offensive as he asked me "are you a Jew?". I told him that my family were Polish Jews.*
9. *Mr Steyn smiled and laughed and then said to me "you are served" and handed me the paperwork.*
10. *I took the paperwork and said "at least you do it with a smile". I then told him that I had already been served and asked why he was doing it again. He replied that he was only following instructions.*
11. *I asked Mr Steyn why he couldn't just call me and arrange a time to give me the papers. He didn't say anything and we walked towards our cars. Mr Steyn's car was parked on the street and mine was parked in the driveway.*
12. *I pulled out of the driveway and was parked parallel to Mr Steyn's car. His window was down.*
13. *I told Mr Steyn that I was upset that he had lured me away from my appointment and wasted my time.*
14. *Mr Steyn smiled at me and continued writing.*
15. *We both passed remarks at each other.*
16. *I then said "I have a good mind to get out of my car and knock your block off".*
17. *Mr Steyn then drove off.*
18. *I drove away as well.*
19. *We both headed towards Wordsworth Road which is less than 200m from the property. Mr Steyn turned right and drove away. I turned left and headed back to my office.*

20. *Around 6.00pm I received a phone call from the owner of the property that I was going to appraise. She told me that they have given the listing to another agency and that I don't need to see her tomorrow.*
21. *At 6.25pm I sent a text to Mr Steyn. It read "Actually I'm angry cause your a f....n visitor 2 my country you f....n south African f..k you cost me money 2day with your bullShit f....n story I've done some research keep this message you cock see you later mark".*
22. *Around 6.30pm I sent another text to Mr Steyn. It read "f..k you you south african c..t".*

[10] Of course, the witnesses were available for cross examination had that been required.

Discussion

[11] On 13 August, a process server, Mark Steyn, attempted to serve documents on the defendant, Arthur Subritzky. Mr Steyn had contacted the defendant and arranged to meet him at a house which the defendant was marketing on the pretext that Mr Steyn was a potential buyer. Upon the defendant meeting Mr Steyn at the address, Mr Steyn served the documents on him. Words were passed between Arthur Subritzky and Mr Steyn, culminating in Mr Subritzky threatening Mr Steyn by saying *"I've a good mind to get out of this car and knock your block off"*.

[12] Later the same evening, Arthur Subritzky sent Mr Steyn two abusive text messages as follows:

"Actually I'm angry cause your a f....n visitor 2 my country you f....n south African f..k you cost me money 2day wit your bullShit f....n story I've done some research keep this message you cock see you later mark"

"F..k you you south african c..t"

[13] Mr Steyn also reported the incident to Police.

[14] We appreciate that the conduct alleged against the defendant does not involve real estate agency work as that term is defined at s.4 of the Act. However, conduct not involving real estate work may, nevertheless, amount to misconduct under the Act if that conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[15] This Tribunal considered the ambit of the term *"disgraceful"*, as used in s.73, in *CAC v Downtown Apartments Limited* [2010] NZREADT 06 and held:

"[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is 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.

[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 PCC [1997 z NZLR 71].*

[57] *The ‘reasonable person’ is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under 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 ... defendant.*

[59] *So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public.”*

[16] Section 73(a) allows the Tribunal to assess whether conduct is disgraceful both by reference to reasonable members of the public and/or agents of good standing. The section allows for disciplinary findings to be made in respect of conduct which, while not directly involving real estate agency work, nevertheless has the capacity to bring the industry into disrepute and which, for that reason, agents of good standing or reasonable members of the public would consider to be disgraceful. It is noted that both the former REINZ Rules (rule 13.1) and the current Professional Conduct and Client Care Rules 2009 (rule 6.3) contain provision for proper conduct so as not to bring the industry into disrepute.

[17] We have recognised that s.73(a) may apply to conduct by a real estate agent outside of real estate agency work. In *CAC v Dodd* [2010] NZREADT 13 the Tribunal made a finding of misconduct and suspended the real estate agent as a result of conduct in his personal life (forging his wife’s signature on personal finance documents). In doing so, the Tribunal followed its earlier decision in *Smith v CAC and Brankin* that there must be a sufficient nexus between the conduct proved and the fitness of the licensee to conduct real estate agency work in order to make a finding under s.73(a).

[18] It is put that there are, therefore, two important considerations in applying s.73(a) to non-real estate agency work, namely: is there a sufficient nexus with the fitness of the licensee to conduct real estate agency work, and is the conduct a marked or serious departure from the standards of an agent of good standing or of a reasonable member of the public? To quite some extent, those criteria are inter-linked.

[19] Section 73(a) fulfils an essential function under the legislation of providing for disciplinary findings of misconduct outside of real estate agency work to ensure that licensees do not conduct themselves in a disgraceful manner, and bring the industry into disrepute.

[20] We find there is a sufficient nexus between the defendant's conduct as proved and his fitness to conduct real estate agency work.

[21] The nature of real estate work is, at times, stressful involving disputes and conflict in respect of transactions which are of great importance to the parties involved. Licensees must be able to be trusted to conduct themselves in a calm and professional manner at all times if consumer interests are to be promoted and protected.

[22] The issue in the present case is whether there has been disgraceful conduct i.e. a marked or serious departure from the standards of an agent of good standing or of a reasonable member of the public.

[23] In respect of the said charges against Arthur Subritzky, it is accepted that the incident took place away from the defendant's place of business as a licensee and involved documents not directly related to real estate agency work. However, agents of good standing and reasonable members of the public would, nevertheless, consider it disgraceful for a licensee to threaten a process server in the manner alleged and, particularly, to send racially abusive text messages to a person attempting to do his job.

[24] Licensees should be expected to conduct themselves professionally in the course of business, both while performing real estate agency work and otherwise. The recourse to personal abuse by the defendant was disgraceful. The threat made to Mr Steyn at the car on 13 August 2010 was an immediate reaction and, while clearly unacceptable, by itself (it was put) may not be seen as rising to the level of misconduct; although we may well have found misconduct for that alone. However, for the defendant to continue later with racially abusive and offensive texts, after there had been time for cool reflection, is properly to be regarded as disgraceful and we so find.

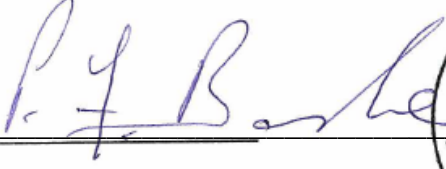
Conclusion


[25] The defendant acted aggressively and abusively towards a stranger, engaged in a professional context to effect service of documents on him. Where conduct falls so markedly below the expected standards which agents of good standing, and/or reasonable members of the public, would regard as disgraceful, then misconduct findings are warranted to uphold public confidence in the real estate industry.

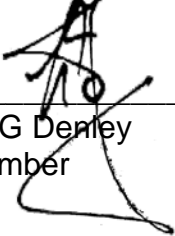
[26] We find that misconduct under s.73(a) is proved against Arthur Subritzky.

Penalty


[27] We hereby censure the defendant Arthur Subritzky; we order that he apologise to the complainant; we fine him \$3,000 payable forthwith to the complainant Authority; and also we order that he forthwith pay \$2,000 as a contribution to our costs to the Registrar of this Disciplinary Tribunal.







Mr G Denley
Member



Mr J Gaukrodger
Member