

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 20

READT 51/11

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

ROBERT FRANCIS 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

COUNSEL

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

DECISION OF THE TRIBUNAL

The Charge

[1] On 6 May 2011 the Authority, following a complaint by Mr Clive Crossman, process server, 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”*.

[2] Section 73(a) of that Act reads as follows:

“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;”

[3] The formal charge set out particulars of the alleged misconduct of the defendant as follows:

"Particulars:

On 18 December 2009 [and on 2 August 2010], at 45G Cavendish Drive, Manukau, or thereabouts, the defendant behaved in a verbally and physically threatening or aggressive manner towards the complainant."

The Defendant's Response to the Charge

[4] Part of the defendant's 18 May 2011 written response to the above charges reads as follows:

"I believe I am not guilty of misconduct under s.73(a) of the REAA (2008). I deny that I responded in a way unwarranted to the complainant at 45G Cavendish Dr, Manukau on 18th December 2009.

The complainant approached me at my property that I own, on personal business not relating to real estate. He was there to serve papers on my wife Monica Subritzky who was not present at the time, and no-one else. I told the complainant that she was not present. He threw the papers at me and said what the papers were concerning, which was none of my business nor anyone else's who was present. I found his conduct was very unprofessional and took offence to it. I told him to take his papers back and to leave. He refused and continued to leave. I believed he had not completed his job he was employed and paid to do and that he was now hoping I would do it for him so I threw his papers back at him and told him not to return to my property again.

I would ask that you please consider the following:

- 1. The complainant was not a real estate client of mine or anyone else associated with Now Realty Ltd. He was not carrying out any business relating to real estate or activities covered under the Act.*
- 2. At the time in question I was not acting as a real estate licensee or in the capacity of one.*
- 3. The business the complainant was coming on was purely personal and the person who he came to see was not present.*
- 4. I was acting in a way a property owner is entitled to do by asking Mr Crossman to leave and that he wasn't welcome back again. The committee asked for proof of ownership during their initial investigation which I provided. I may have used language that some may have found offensive but this was because of the complainant's lack of professionalism and respect shown towards myself. In no way would I find my conduct disgraceful, if it was deemed so would I then be required to report a fellow licensee if he used offensive language in his own home when an unwanted visitor was asked to leave.*
- 5. My conduct would not reach the threshold of disgraceful conduct as described in s.73(a) based upon decision no 2011 NZREADTS 067/10 between CAC & Beiszer as well as the non action of Complaint No. CA3575064 and comments made Canterbury University Professor of Law Ursula Cheer in the NZ Herald on the determination.*

6. *I am 65 years of age and have held my real estate license for over a decade and in that time have never been in front of any disciplinary board.”*

[5] Evidence was given for the prosecution by the said Clive Crossman and by Shaun Douglas Millar. The latter simply adduced relevant documents but I set out Mr Crossman's evidence as follows:

“I, CLIVE CROSSMAN, process server, of Auckland say:

1. *In late 2009, I was instructed to serve Inland Revenue documents on Now Realty Limited (Now Realty) in Auckland.*
2. *On or about 1.25pm on Friday 18 December 2009, I went to Now Realty's address for service at 45G Cavendish Drive, Manukau.*
3. *The director of Now Realty, Monica Subritzky, was not in the office. I served the documents on a male who identified himself as Mr Subritzky. He was Maori, approximately 55 years old, 180cm tall with grey hair and a stocky build. I identify the defendant, Mr Robert Subritzky, as the same Mr Subritzky I served the documents on.*
4. *When I handed the documents to the defendant, he became abusive and threatened to punch me by raising his fists. I turned to leave the office. The defendant then came after me, took hold of my jacket and pushed me out of the door. While pushing me with one hand he had his other hand raised as a fist.*
5. *The defendant then recovered the documents and, with the documents in his hand, he pursued me across the car park of the premises, trying to shove the documents inside my jacket. I walked around the car park for about five minutes while he pursued me.*
6. *When I came back to the entrance of Now Realty, the director, Monica Subritzky, pulled up in her car. The defendant handed the documents to her. I then left.*
7. *On 30 July 2010, I received instructions from Mike Dingwall, Private Investigator to attempt service on the defendant Robert (known as Frank) Subritzky, and Arthur Subritzky.*
8. *On Monday 2 August 2010, at around 12.15pm, I again went to the premises of Now Realty in order to serve documents on the defendant and Arthur Subritzky.*
9. *When inside the office, I asked for Mr Frank Subritzky. The defendant came out of a side office. There were at least three other people in the office. In the first office to the right was a round-faced Maori woman who was approximately in her mid-forties. In the main office there was another woman at the second desk, she appeared European and was approximately in her mid-thirties, of medium build and smartly dressed. Immediately behind the second woman was a male Maori in his late-twenties, approximately 182cm tall, slim build, dark hair and wearing a*

suit. The male had got up to come to the counter when I entered the office until the defendant intervened. These three people saw the following event that took place.

10. *When the defendant saw me he immediately became abusive. I handed him his set of documents. I then asked for Arthur Subritzky. The defendant came around from behind the counter and pushed me up against the counter saying that I could shove my documents. As I turned to leave, he grabbed me from behind and pushed me against the wall. I then went out the front door. The defendant came outside and threw the documents at me. He went back inside and locked the door.*
11. *The same day I visited Manukau Police Station where I waited for an hour to make a complaint of assault against the defendant. I filled in a form concerning the matter. To my knowledge the Police have failed to take any action in the matter. ...”*

[6] There was also evidence for the prosecution from Michael Dingwall a self employed private investigator. He stated that on 30 July 2010 he instructed Mr Clive Crossman by correspondence to attempt service on the defendant (and on his son Arthur Subritzky) of certain documents. Mr Dingwall understood that service was required of documents relating to a failed real estate venture in Australia and that those documents included a Statement of Claim in respect of that dispute.

Discussion

[7] Although the defendant has supplied the above 18 May 2011 response to the charges, he has not sought to give formal evidence nor respond to the above evidence for the prosecution because, we understand, he has retired from the real estate industry.

[8] On 18 December 2009, a process server named Clive Crossman went to the Now Realty office to serve Inland Revenue documents on Now Realty Ltd. As the director of that company, Monica Subritzky (the defendant's wife), was not present, Mr Crossman attempted to serve the papers on the defendant as her husband.

[9] It is alleged that the defendant was verbally abusive towards Mr Crossman telling him to “*f..k off*” and that he also threatened him by raising his fist. The defendant then physically pushed Mr Crossman out of the door of the office and pursued him around the car park attempting to stuff the documents served back inside Mr Crossman's jacket.

[10] On 2 August, Mr Crossman again attempted to serve papers at the Now Realty office. The papers related to a real estate venture in Australia and included an Australian statement of claim. The documents were to be served on the defendant and his son Arthur Subritzky.

[11] Again, it is alleged that when Mr Crossman attempted to serve the defendant, he became abusive and physically aggressive. Mr Crossman states that the defendant pushed him up against a counter inside the office and then out of the door, throwing the documents after him.

[12] As indicated above, the defendant (Robert Subritzky) is no longer working in the New Zealand real estate industry and the hearing against him, in effect, proceeded as a formal proof.

[13] In respect of the first charge against the defendant, it is relevant that Mr Crossman was attempting to serve documents from Inland Revenue on the defendant's employer, Now Realty Ltd. The incident took place at Now Realty's office. We consider that agents of good standing would consider it disgraceful, in that context, for a licensee to be abusive to, raise his fists against, and physically push a process server off the premises.

[14] The papers to be served in respect of the second charge appear to have been documents intended for the defendant in his personal capacity, rather than as a representative of Now Realty Ltd. Nevertheless, agents of good standing would still expect a fellow licensee to behave in a professional and businesslike manner in receiving such documents, particularly at his place of business. Again, we consider that, in all the circumstances, the abusive and threatening behaviour alleged against Robert Francis Subritzky would be regarded by agents of good standing as disgraceful.

[15] Our reasoning about the application of s.73(a) of the Act, and the law to the facts of this case, is substantially that which we have applied and set out in our decision issued against the defendant's son, Arthur Subritzky, simultaneously with this decision. We simply adopt that reasoning, mutatis mutandis, into this decision regarding Robert Francis Subritzky. That reasoning explains that conduct not involving real estate work may, nevertheless, amount to misconduct under the Act if that conduct would reasonably be regarded as disgraceful by agents of good standing, or by reasonable members of the public. As we also said in that decision regarding Arthur Subritzky:

"[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.”


[16] We find that there was a sufficient nexus between the defendant’s conduct covered above and his fitness to conduct real estate agency work.

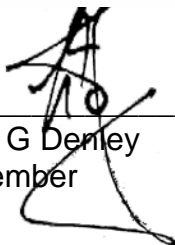
[17] The particular facts of these charges, as set out above, speak for themselves. While the defendant’s conduct is “*disgraceful*”, in many ways it is towards the lower end of the scale.

[18] Accordingly we find that misconduct under s.73(a) is proved against Robert Francis Subritzky.


[19] On the basis that the defendant Robert Francis Subritzky has retired from being a licensed real estate agent, we simply fine him \$2,000 to be paid forthwith to the Authority.







Mr G Denley
Member



Mr J Gaukrodger
Member