

Decision No: [2012] NZREADT 23

Reference No: READT 041/11

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

BETWEEN **REAL ESTATE AGENTS AUTHORITY**
(CAC 10043)

AND **EILEEN MARY JOSEPHINE**
BROOKER

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

Appearances:

Mr Hodge for the Real Estate Agents Authority

Ms Allen for Ms Brooker

HEARD at AUCKLAND on 5 March 2012

DECISION

Background

[1] Ms Brooker is a real estate agent working in Invercargill. She faces one charge under s 73B of the Real Estate Agents Act that her conduct constituted seriously incompetent or seriously negligent real estate agency work. The charge provides:

That on or about July 2006 she failed to advise the complainants prior to the complainants signing an agreement to purchase a property at 21 Benson Road, Nightcaps, Invercargill that she had not been able to view the inside of the property in circumstances where the defendant knew or should have known that the complainants could not view the property themselves and were reliant on her advice in relation to the property.

[2] The Tribunal have already given a decision on this matter relating to the evidence that could be filed as Mr Baird, one of the complainants, unfortunately died after making the complaint but before the charge could be heard. The evidence

therefore was given to the Tribunal by Mr Baird's partner Gay Grigg and by Ms Eileen Brooker herself. Mr Baird had been the person who had dealt with Ms Brooker. He had seen several properties advertised on the internet in Invercargill and over the course of approximately two to three weeks in July 2006 he entered into Agreements for Sale and Purchase to purchase three properties. Ms Brooker was the agent for all three properties. The property in question is one at 21 Benson Road, Nightcaps which was sold to Mr Baird and Ms Grigg for \$75,000 in an agreement dated 3 July 2006. The property was advertised as *"more than four acres, offers in the \$70s. This little cottage needs some loving, all the basics are there – a cheap farmlet"*. There were photographs of the property showing a cottage with smoke coming out of the chimney as well as photographs of land with cows.

[3] The difficulty was that Ms Brooker had not been able to get inside the property (or the land in question) as there was apparently a large dog on the property. Ms Brooker had not been able to get past it or get hold of the neighbour that was supposed to give her access. The complainants say Ms Brooker did not tell them this vital fact. When the complainants completed the purchase and arranged for a rental appraisal they were told that the property was not rentable as it was and needed work amounting to about \$40,000 to make the cottage habitable.

[4] The Professionals had organised a rental appraisal prior to the sale (Document 42 of the bundle) which said *"As instructed I have viewed the above property for the purposes of establishing the current market rental. It is my opinion that on today's rental market this property should realise a rental of \$150 to \$160 per week including four acres"*. Ms Grigg says that when they discovered that the property could not be rented in her hearing Mr Baird telephoned Ms Brooker and demanded to know why she had not told him that the property was not able to be rented. Ms Brooke then, (according to Mr Baird's complaint) told him that she had not been able to get into the house because of a large dog. The complainants complained to the Professionals. Then there was some correspondence between them in an endeavour to try and reach a resolution but it was never finally resolved.

[5] Ms Brooker's evidence is that she told everybody who asked about the property that she had not been able to get access to the property.

[6] The Tribunal therefore is required to weigh up the evidence which because of Mr Baird's untimely death is not as straightforward as it should be. The complainant's letter to the Real Estate Agents Authority is signed by Mr Baird and Ms Grigg. A file note of a call by the investigator for the Real Estate Agents Authority to Mr Baird shows that he was adamant when spoken to that he had not been told by Ms Brooker that she had not been into the property. Ms Brooker's evidence is that she told everybody. She was challenged by the counsel for the Complaints Assessment Committee who asked how she could be so sure and why she had not taken the trouble to put this information on a fax that she sent to the complainants enclosing a copy of the Agreement. She said she had not thought to do so. She also did not mention the lack of access when she completed the Property Report for the Professionals. On this form she was required to show whether there had been any representations or statements made about the property to the parties. The form did not have any comment on about access this so there was nothing in writing to show that Ms Brooker did tell all inquirers about access. All

that we have is her word against the evidence of Mr Baird whose evidence could not be tested. Ms Grigg his partner was adamant Mr Baird did not know about lack of access.

[7] The Complaints Assessment Committee submitted that the charge could be read to include a liberal interpretation of “*advised*” to provide that there had been no effective disclosure. Ms Allan for Ms Brooker opposed this saying that the charge needed to be proved in its current form as it was drafted and it could not be amended in this way. Both sides filed submissions on this point.

[8] The Complaints Assessment Committee submitted that s 110 of the Real Estate Agents Act permitted the Tribunal to consider any charge and if satisfied that the charge has been proved find misconduct or unsatisfactory conduct. They submitted that in keeping with the public confidence aspect of the Act (s 3) this section permitted the Tribunal to consider all the evidence and make such findings as the evidence required. These findings were not restricted only to the words of the charge. Mr Hodge also drew to the Tribunal’s attention the option of adjourning the case for an amended charge to be considered.

[9] The counsel for Ms Brooker said that the Tribunal could not construe s 110 as Mr Hodge suggested. She submitted that the Tribunal must, in the interests of the agent and natural justice construe, the charge as it is drafted. She resisted any suggestion that an amended charge could be considered.

[10] The Tribunal has decided that it does not need to make a finding on these matters. The Tribunal consider that Ms Brookers evidence was not as forthcoming as they would have liked and she did not take the opportunity to record in writing anything that she may have told to Mr Baird. It is certainly an exceptionally unusual situation for a property to be sold without either agent or the purchaser ever having seen inside it. It certainly behoves an agent to make it perfectly clear to a purchaser that there had been no access to the property especially in situations where the purchasers lived thousands of kilometres away. The Tribunal find that Ms Brooker did not inform Mr Baird and Ms Grigg of the fact that she had not been in the property. This is a serious breach of her obligations as an agent. We expand on this finding below.

[11] When the Tribunal is faced with conduct that occurred prior to the coming into force of the 2008 Real Estate Agents Act it still may consider that conduct provided that the provisions of s 172 are made out.

Relevant Law

[12] Section 172 provides as follows:

172 Allegations about conduct before commencement of this section

- (1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—

- (a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and
 - (b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.
- (2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the **[Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred]**. (emphasis added).

[13] In cases where the licensee who has been charged was licensed or approved under the 1976 Act at the time of the conduct (which the defendant was), and has not been dealt with under the 1976 Act in respect of the conduct (which the defendant has not), s 172 creates a three step process:

Step 1: Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

Step 3: If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made by this Tribunal.

[14] A charge relating to pre-17 November 2009 conduct falls to be determined in accordance with the disciplinary standards set out in ss 72 and 73 of the 2008 Act in the same way as a charge about post-17 November 2009 conduct (**Step 2**). However, there are two requirements under s 172 which limit its retrospective effect:

- (a) complaints outside the jurisdiction of the 1976 Act are also outside the jurisdiction of s 172 (**Step 1**);
- (b) only orders which could be made under the 1976 Act may be made under s 172 (**Step 3**).

[15] Each of the three steps, as they apply to this case, will be addressed in turn.

Step 1 – Could have been complained about or charged under 1976 Act

[16] Under rule 16.2 of the Rules of the Real Estate Institute of New Zealand Incorporated (“REINZ Rules”), made under s 70 of the 1976 Act, any person could complain to REINZ. Following investigation of a complaint, REINZ could take one of a number of steps, including referring a matter to the Real Estate Agents Licensing Board (rule 16.13.5). Ms Brooker was an approved salesperson.

[17] **99 Board may cancel certificate of approval or suspend salesman**

- (1) On application made to the Board in that behalf by the Institute, the Disciplinary Committee or by any other person with leave of the Board, the Board may cancel the certificate of approval issued in respect of any person or may suspend that person for such period not exceeding 3 years as the Board thinks fit on the ground—
 - (a) That since the issue of the certificate of approval the person has been convicted of any crime involving dishonesty; or
 - (b) That the person has been, or has been shown to the satisfaction of the Board to be, of such a character that it is, in the opinion of the Board, in the public interest that the certificate of approval be cancelled or that person be suspended.

[18] The allegation against the agent could have been the subject of a complaint and **Step 1** is therefore satisfied.

Step 2 – Misconduct (Section 73 of the 2008 Act)

[19] The question under **Step 2** is whether misconduct (or failing that, unsatisfactory conduct) is proved under the 2008 Act.

[20] The Tribunal considers that this conduct could be considered as misconduct under the 2008 Act.

Step 3 – Orders under the 1976 Act

[21] The Tribunal cannot impose any penalty under the 2008 Act which it could not impose under the 1976 Act. The Tribunal has powers under s 99 of the Real Estate Agents Act to cancel or suspend the certificate or impose a fine of up to \$750.

[22] Having considered all of the law, evidence and submissions the Tribunal consider that Ms Brooker did not inform Mr Baird and Ms Grigg of the fact that she had not been inside the property. Further support for the fact that they were unaware of this comes from the rental appraisal. The rental appraisal clearly says that someone had been into the property and viewed the property so that they could give a rental appraisal of \$150 to \$160 per week. Ms Brooker acknowledged that she would have organised for this to be done by asking the rental department to prepare the report. She did not put it in writing either to her own agency or to the purchasers themselves the significant and unusual fact that she had not actually been inside the house. The advertisement selling the property refers to it as having *'all the basics'*. On completion of the sale it had none of the basics. Whether the tenant *"trashed"* the property or not between listing and completion of the sale it was Ms Brookers duty to make clear to the purchasers that she had not verified the facts in the advertisement or that she had not been in the house. We find that she did not tell the complainants that she had not been inside the house.

[23] Accordingly the Tribunal find that Ms Brooker is guilty of the charge pursuant to s 73 of the Real Estate Agents Authority Act.

[24] The Tribunal calls for submissions on penalty. The Complaints Assessment Committee are to file these within 10 days of the date of this decision. The counsel for Ms Brooker is to file any submissions seven days thereafter. Any submissions in reply by the Complaints Assessment Committee may be filed within two days.

[25] This finding makes it unnecessary to consider the submissions relating to the ambit of s 110 and the amendment. We observe however that we consider that the charge needs to be proved, or amended and proved, but that the Tribunal are unlikely to find an agent guilty of professional misconduct on different facts to those contained in the charge. To do so would seem to be contrary to natural justice.

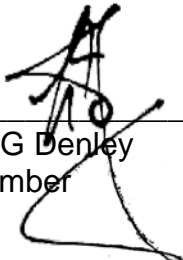
[26] Pursuant to s 113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court conferred by s 116 of the Act.

DATED at AUCKLAND this 3 day of May 2012




Ms K Davenport
Chairperson





Mr G Denley
Member



Mr J Gaukrodger
Member