BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 25

READT 030/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PAUL DAVID MILLER**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10017)**
	First respondent
AND	**DAVID AND EDNA McATAMNEY**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION: 4 May 2012

COUNSEL

Mr M E Parker for appellant
Mr M Hodge and Ms J MacGibbon for first respondent
Mr T Shiels for second respondent

DECISION OF THE TRIBUNAL

The Issue

[1] Should the appellant, Paul David Miller, have been charged by the Real Estate Agents Authority with misconduct as a real estate agent?

[2] The appellant licensed salesperson has been charged by the first respondent Authority with misconduct under s.73(a) of the Real Estate Agents Act 2008 (the Act) regarding the 27 January 2009 sale of a property at 20 Scaife Place, Wanaka, to David and Edna McAtamney, the second respondents and complainants. We now deal with Mr Miller's appeal against the laying of that charge against him by the Authority.

[3] Section 73(a) of that Act reads:

> *"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; or ..."*

[4] The complainants say that, subsequent to their purchase of the property, the views from the property have been affected by a building development at a neighbouring College. With regard to that alleged loss of view, they complain about the appellant's conduct in the sale of the property to them.

[5] The charge alleges that, during the course of selling the property, the appellant licensee misled the complainants by advising them that there was no concern the neighbouring College would build on the playing field to the north of the property and that any buildings, if built, would be situated well away from the area in front of their property. This was in circumstances where, allegedly, the licensee had received a conceptual development plan from the neighbouring College showing that it proposed to build on the playing field in front of the property.

[6] The licensee has appealed the 27 January 2011 determination of the Committee to lay a charge against him so that we are dealing only with that threshold issue at this stage. For the present, Mr Shiels makes no submission for the complainants on this preliminary issue.

The Charge

[7] As it presently reads, the charge is as follows:

> *"1. Following a complaint made by David and Edna McAtamney ("the complainants"), Complaints Assessment Committee 10017 charges Paul David Miller, salesperson, 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.*
>
> ***Particulars***
>
> *During the course of selling his property at 20 Scaife Place, Wanaka ("the property"), the defendant misled the complainants by advising them that there was no concern the neighbouring school would build on the playing field to the north of the property and any buildings, if built, would be situated well away from the area in front of the property, in circumstances where the defendant had received a conceptual development plan from the neighbouring school showing that it proposed to build on the playing field in front of the property."*

A Summary of the Authority's Position

[8] It is submitted for the Authority that there are sufficient grounds for a charge; and that the submissions on behalf of the licensee ultimately go to weight and are matters for us to determine as part of our overall assessment of the evidence at a substantive hearing of the charge.

[9] It is also submitted for the Authority that the submissions on behalf of the licensee place undue emphasis on whether there was any material reliance on the part of the complainants; and that the focus of these proceedings must be on the conduct of the licensee, irrespective of whether loss has been caused to the complainants.

The Basic Stance of the Appellant

[10] Mr Parker has filed very helpful opening submissions for the appellant on the substantive charge; but it is not appropriate to discuss them in relation to the said threshold issue now before us.

[11] The appellant's grounds for appeal are as follows:

> *"a. The Complaints Assessment Committee has failed to adequately consider the information before it in regard to the laying of a complaint; namely, that the McAtamneys knew that Mt Aspiring College intended to build structures on the playing field in front of the appellant's property in the future, and were privy to the information before the appellant was.*
>
> *b. The appellant did not have any personal dealings with the McAtamneys' and did not introduce the McAtamneys to the property, or make any representations to them.*
>
> *c. The appellant reasonably believed that the McAtamneys had all available information in respect to any proposed future development with Mt Aspiring College; as it was the McAtamneys that had first alerted the appellant through the agent with whom the McAtamney's were dealing, to the proposed future development with Mt Aspiring College.*
>
> *d. The appellant did not make any representations to the McAtamneys in terms of future development, and the grounds for the particulars of the charge to be brought before the Real Estate Agents Disciplinary Tribunal have no evidential basis.*
>
> *e. The Complaints Assessment Committee has failed to properly consider the evidence before it, and this failure has caused prejudice to the appellant by having to face a charge for which there is no, or no cogent, evidence."*

[12] With regard to the preliminary issue now before me, the appellant's case is simply that when the Complaints Assessment Committee investigated the complaint by the McAtamneys, the evidence did not support its decision to lay a charge with us (i.e. this Disciplinary Tribunal); that the evidence submitted by the McAtamneys is contradictory, inconsistent and substantially and plainly wrong; that the appellant's position is supported by and is consistent with contemporaneous documentation; and that conversely, the investigations made by the investigator on behalf of the Authority were one sided, and therefore superficial, and constituted a breach of natural justice in that he did not consult with the appellant nor give him, or any other person from the appellant's employer, the opportunity to comment or respond.

[13] For all of the above reasons, the appellant submits that the fair and proper course of action would be for us to quash the decision of the Authority to bring the said charge and, instead, decide that no charges be brought against the appellant.

Principles on appeal against a decision to lay a charge

[14] This Tribunal considered the scope of an appeal against a decision of the Authority to lay a charge in *Brown v CAC 10050* [2011] NZREADT 42. There, we found that the decision to lay a charge is the exercise of a different power to the decision to reach a finding of unsatisfactory conduct under s.72 of the Act. Once a finding to lay a charge is made, the Authority then becomes the prosecuting body, and the charge is prosecuted before this Tribunal. Of course, the Authority must have sufficient evidence in order to consider that there are grounds to lay a charge. It is not the Authority's task to be satisfied, on the balance of probabilities, that the licensee has engaged in conduct contrary to s.73 of the Act. This analysis led the Disciplinary Tribunal to the conclusion that an appeal pursuant to s.111 of the Act, on a decision of a Committee to lay a charge, must be limited to an appeal pursuant to the preliminary screening role which the Authority has.

[15] Accordingly, the present appeal against the Authority's decision to lay a charge is confined to the issue of whether there is a case to answer by the appellant; i.e. has a prima facie case been established against the appellant.

[16] In *Brown v* CAC, the Disciplinary Tribunal also found that the only consideration can be whether or not there were sufficient grounds under s.89 of the Act to make a finding that the complaint be considered by the Disciplinary Tribunal. Allegations that the Authority (through its Committee) breached the rules of natural justice will be met by the appeal process, as the parties will have the opportunity to respond to all the material provided in the course of any hearing on the substantive charge.

Factual Background – As understood by the Authority

[17] The property was owned by the licensee together with Jeanette Miller and Race & Douglas Trustees Ltd. It was listed for sale with W Thompson & Co Ltd, trading as Harcourts Wanaka, on 31 October 2008. The licensee was recorded as the listing agent on the listing agreement.

[18] The property was advertised on the Harcourts website under the heading *"Stunning ... Style, Location, Views!!"*. Other Harcourts' marketing materials similarly emphasised the property's *"stunning views"* and showed the licensee as the agent to contact in respect of the property.

[19] Kate Bull (nee Wilkins), another agent with Harcourts Wanaka, introduced the complainants to the property on 6 November 2008. According to Ms Bull, Edna McAtamney stated that she had been told by a friend (Fiona from Locations Real Estate) of the plans of the College neighbouring the property, Mount Aspiring College, to develop new building structures. As a result of this query, Ms Bull raised this concern with the licensee. On the licensee's account, he contacted Wayne Bosley at Mount Aspiring College who informed him that the intended science block was located away from the boundary and would not affect the property's views.

[20] However, it is put that on 7 November 2008 a letter regarding the development of the College's buildings was hand delivered to the licensee by Ronnie Moffat, the

Property Manager at Mount Aspiring College. A map was attached which highlighted the specific developments in a light green area shown on it as in front of the property. This map shows plans to relocate and expand buildings on the college grounds to the north-western boundary of the property.

[21] This development plan was largely followed in the eventual construction work which took place in July 2009. It appears that the only substantial difference from the original plan were two relocated classrooms in the same location as the originally intended languages block.

[22] The licensee states that on 7 November 2008 he checked his understanding of the development with Mr Moffat, who confirmed that there would be no obstruction of the property's views. However, according to Mr Moffat's statement, he was approached by the licensee a few days after delivering the letter and the licensee said something about now having to disclose the information about the development.

[23] Around this time Ms Bull responded to the complainants stating that the licensee had confirmed that there was no development planned for the top field. According to Ms Bull's diary, the complainants had visited the property for a second time and stated that it was number one on their list. It is put that by the time of this second visit the licensee was in possession of the letter and map regarding the new development at Mount Aspiring College but they were not disclosed to the complainants.

[24] Stephen Todd states in an email that he went with the complainants to a property inspection on 16 December 2008 and that Ms Bull told them *"you will never be built out"*.

[25] A sale and purchase agreement for the property was signed on 27 January 2009. At a viewing on 28 February 2009, it is alleged that the licensee said to John Greenwood (a friend of the complainant's) that there was *"no concern about building in the front"*. There was still no disclosure of the letter and map in the possession of the licensee.

[26] The possession/settlement date for the property was 11 March 2009.

[27] On 21 May 2009 building consent was issued for two transportable buildings for Mount Aspiring College.

[28] On 6 July 2009 the complainants became aware of construction taking place at the College which would (it is put) impede their view. It is also put that it was at that point that Mr Moffat showed the complainants the letter and map dated 7 November 2009 which shows the planned development.

Discussion

[29] The factual background set out above must be regarded as preliminary only, but it shows that there is a case to answer on the charge. It seems that the licensee had the letter and map from the College showing its building plans and did not disclose it. Rather, according to material before the Committee, the licensee misrepresented the position.

[30] The facts are in dispute. However, the matters put forward on behalf of the licensee are matters to be tested in cross-examination of the witnesses, and are for us to weigh as the finder of fact as part of our assessment of all the evidence at the substantive hearing of the charge.

[31] The submissions for the licensee place much emphasis on the complainant's knowledge and conduct. However, the focus in disciplinary proceedings must be on the conduct of the licensee. It was put that the question is, in broad terms, whether acceptable industry standards of behaviour have been complied with; but we consider the issue to be more strict i.e. whether the appellant's conduct was disgraceful. Whether or not loss has been caused, as a matter of fact, does not absolve an agent from failing to act in accordance with acceptable standards. As was stated by the Tribunal in *Wright v CAC 10056 & Woods* [2011] NZREADT 21:

> *"The emphasis [under the Real Estate Agents Act (Professional conduct and Client Care) Rules 2009] is on the conduct of the licensee. The Rules provide that a licensee must ensure that they are open and honest with a purchaser so that they are not misled in their decision to make an offer to purchase a property. There does not need to be any reliance by the purchaser on the statements (or lack of statements) by the agent and it is clear that a duty of utmost good faith is required from the agent."*

[32] We are conscious that, under s.74 of the Act, any person may make a written complaint to the Authority about the conduct of a licensee. The Authority must refer the complaint to a Committee. The functions of such Committees are set out in s.78 of the Act but, for present purposes, are to enquire into and investigate complaints and, inter alia, lay and prosecute charges before this Disciplinary Tribunal. The Act sets out the procedures to be followed by such a Committee but, in particular, under s.84(1) *"A Committee must exercise its powers and perform its duties and functions in a way that is consistent with the rules of natural justice"*. By virtue of s.88 of the Act, such a Committee has wide powers to admit evidence. By virtue of s.89, among the determinations the Committee may make is *"... that the complaint ... be considered by the Disciplinary Tribunal"*.

[33] Broadly speaking, we consider that the standard of proof for a no case to answer application from, in this case, the appellant is whether there is some evidence not inherently incredible which, if we were to accept it as accurate, would establish each essential element in the alleged offending conduct of the appellant complained of i.e. misconduct under s.73(a). On that type of test we have no hesitation in finding that there is a case to answer from the appellant. We feel that on the prosecuting evidence so far from the first respondent Authority, it would be reasonable for us to find misconduct on the part of the appellant. This means that it is necessary for the charge to proceed to a substantive hearing so that, inter alia, the appellant's defence can be properly heard in accordance with justice.

[34] A collateral issue has arisen in that the Authority wishes to amend the charge and has provided an amended version to us and to the parties. Counsel for the Authority put it that the allegation that the licensee had a map of the development, but misrepresented the true position, is captured by the present charge; but, the charge could be better particularised. That is a separate issue requiring a Timetable for submissions, particularly for response submissions from Mr Parker as counsel for the appellant.

[35] Simply put, a complaint has been made to the Authority which, having caused to be carried out what appears to be a sensible and reasonable preliminary investigation, has determined under s.89 of the Act that the allegations be considered by this Disciplinary Tribunal and has laid the said charge accordingly. It has not been demonstrated to us that there are no grounds for such a course or that there is any bad faith on the part of the prosecution. It seems to us that, so far, the process complies with natural justice.

[36] It has not been shown to us that there is no case to answer. The substantive charge will proceed. We direct that, as soon as is reasonably convenient, the Registrar arrange a telephone conference to confirm a Timetable towards a fixture, but taking into account the further preliminary issue of whether the charge should be amended by the prosecuting Authority. At this stage we record that, in due course, we wish to take a view of the property in the company of counsel.

Judge P F Barber
Chairperson

REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms J Robson
Member

Mr J Gaukrodger
Member