Decision No: [2012] NZREADT 35

Reference No: READT 009/12

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**FRANCIS KEEGAN AND JEAN KEEGAN**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10062)**
	First Respondent
AND	**LINDA PEACOCKE AND STANAWAY REAL ESTATE**
	Second Respondents

Reference No: READT 010/12 & 011/12

IN THE MATTER OF	appeals under s 111 of the Real Estate Agents Act 2008
BETWEEN	**LINDA PEACOCKE AND STANAWAY REAL ESTATE**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10062)**
	First Respondent
AND	**FRANCIS KEEGAN AND JEAN KEEGAN**
	Second Respondents

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mr P Johnson for the Keegans
Mr S Wimsett for First Respondent
Mr D Bigio and Ms P Couldwell for Ms Peacocke and Stanaway Real Estate

Introduction

[1] In September 2009 Mr and Mrs Keegan contracted to buy an apartment in 5/2A Frieston Road, Milford. The respondent Linda Peacocke was the agent who acted on the sale and the real estate company who employs her is Stanaway Real Estate Limited trading as Bayleys (North Shore). The Keegans complain that the licensee gave them information about the watertightness of the property. The complainants assert that the licensee told them that there were no leaks in the apartment and with the complex as a whole. A building inspection was undertaken by the complainants' builder on the apartment itself. After completion the complainants say that they discovered that there had been a report undertaken in November 2008 regarding the (lack of) weathertightness of the building and legal advice had been received relating to this. This advice had been received by the body corporate. The complainants assert that the agent knew about this report. On 24 November 2011 the Complaints Assessment Committee found that both the licensee and the agency had engaged in unsatisfactory conduct. In a separate penalty decision dated 21 February 2012 the Complaints Assessment Committee ordered that the licensee pay a fine of $500 and the agency pay a fine of $3,000. Appeals were lodged by all parties. The Keegans appealed the penalty decision. They submitted that it was open to the Complaints Assessment Committee to make an order for compensation or damages under s 93(1)(f) of the Real Estate Agents Act 2008 (see Notice of Appeal 12/3/12). They also sought legal costs pursuant to s 93(1)(i). Stanaway Real Estate and Ms Peacocke appealed the decision finding them guilty of unsatisfactory conduct.

[2] The matter comes before the Tribunal because contemporaneously with these appeals the Keegans have commenced civil proceedings against the agency and against the vendors of the property. These proceedings are now in the High Court and *inter alia* seek damages for breach of contract. Mr Bigio for the respondents submits that the appeal proceedings should be stayed pending the outcome of the High Court proceedings as the Keegans are seeking the same remedy in each case and it would be an abuse of process to allow both to proceed at the same time. Mr Bigio relies upon *Slough Estates Limited v Slough Borough Council* [1967] 2 WLR 1511 and *Bank of New Zealand v Rada Corporation* (1989) 2 PRNZ 147. He submits that in any proceedings where the proceedings are substantially the same leading to equally effective remedies, one should be stayed pending the outcome of the other.

[3] Mr Johnson, on behalf of Mr and Mrs Keegan, rejects this submission. He submits that the Tribunal has no jurisdiction to stay an appeal and Real Estate Agents Act contemplates parallel proceedings. He submits further that disciplinary proceedings under the Real Estate Agents Act are fundamentally different from civil proceedings. Finally he submitted that continuation of the appeal was not an abuse of process.

[4] Mr Johnson also relied upon s 110. He argued further that s 105 which permits the Tribunal to regulate its own procedures does not permit the Tribunal to stay proceedings. He argues that s 102 provides that the Tribunal must hear an appeal

under s 111 and the Tribunal is given no statutory discretion to take any other course of action except to hear the appeal. He submitted that the Tribunal must also comply with the principles of natural justice, administrative law and the New Zealand Bill of Rights. Mr Johnson submitted that before the *Slough Estates* case could apply there had to be a duplication of proceedings. He submitted that the two proceedings were so fundamentally different that there was no common jurisdiction which would allow all matters to be determined in the same proceedings. He therefore concluded that the stay should be refused.

[5] The REAA submits that there is no actual prejudice to either party in the appeal proceeding in the prescribed way. Mr Wimsett submitted that an adjournment, as he described the application for a temporary stay, should not be granted. He submitted that the jurisdiction of the Tribunal is to determine disciplinary functions and to determine whether a real estate agent has met the appropriate standard of conduct. He submits that the Act provides that there is no *"double dipping"* because of the operation of s 110(3). This provides:

> *"The making of an order under this section for the payment of compensation to any person does not affect the right (if any) of that person to recover damages in respect of the same loss, but any sum ordered to be paid under this section, and the effect of any order made under this section for the reduction, cancellation, or refund of fees, must be taken into account in assessing any such damages."*

Discussion

[6] The parties also provided the Tribunal with a copy of the High Court proceedings and it can be seen that the courses of action in the Statement of Claim arise out of allegations of breaches of contract, tort and misrepresentations. The appeals, however, relate only to the professional disciplinary obligations of Ms Peacocke and Stanaway Real Estate and whether they have complied with the provisions in the Act (and Rules). To that extent, therefore, the two proceedings are quite different in reaching a decision on an appeal. This Tribunal will need to consider whether or not the decision of the Complaints Assessment Committee that Ms Peacocke and Stanaway Real Estate have been guilty of unsatisfactory conduct is made out or not. However, where the overlap arises is in the level of compensation that the Keegans are seeking under the Real Estate Agents Act. In their submissions to the Complaints Assessment Committee on penalty, dated 2 December 2011, they sought to recover the costs of the apartment's share of remedial work for the apartment block as a whole. This amounted to $100,841.85. They sought general damages of $25,000 each for Mr and Mrs Keegan. They also sought the imposition of a fine on Ms Peacocke and Stanaway Real Estate and costs.

[7] In the High Court proceedings they seek similar amounts by way of damages for breach of contract, tort and misrepresentation. The issue for the Tribunal therefore is:

1. Whether the Tribunal has jurisdiction to order a stay;

2. Is it appropriate in the circumstances to order a stay; and

3. If so, on what terms should a stay be ordered.

Issue One – Whether the Tribunal has Jurisdiction to Order a Stay

[8] The Tribunal considers that it does have jurisdiction under s 105 to order a stay. In regulation of its own proceedings it must be able to defer the hearing of a case to ensure that fairness is achieved between the parties. This is part of its natural justice obligations. The effect of the stay being sought by the respondents is, as Mr Wimsett described it, in the nature of an adjournment. There are clearly different legal considerations which apply in determining whether or not the stay ought to be granted, but the effect of what we will be determining is whether the hearing of these appeals should be postponed. We therefore consider that we have jurisdiction to determine this point.

Issue Two – Should a Stay be Granted

[9] Courts have jurisdiction to grant a stay of proceedings to prevent abuses of process, where one party is being forced to defend a case based essentially on the same set of facts in more than one jurisdiction or court. The principles to be applied were set out by Ungoed-Thomas J in *Slough Estates* at page 1518:

> *"It is common ground that to obtain relief the defendants must establish,*
>
> *(1) duplication between two sets of proceedings;*
>
> *(2) oppression, vexation or abuse of the process of the court resulting from the continuation of the proceedings sought to be stayed; and*
>
> *(3 the absence of any other consideration against the relief sought such as ... unreasonable delay, or acquiescence on the part of the defendants."*

[10] In the *Slough* case the court considered whether or not there was duplication between the two sets of proceedings and determined that it was vexatious or oppressive or an abuse of the process of the court for both proceedings to go on. In *Bank of New Zealand v Rada,* the grounds put forward in support of the strike-out or stay application were that the proceedings in the High Court and in other proceedings *"also relates to or includes the same factual and legal issues that will arise in the winding up proceedings".* Tompkins J said [at p 150] it is vexatious and an abuse of the process of the court *"where there are two proceedings that are identical or sufficiently similar and where the remedies sought in each are equally effective"*

[11] We have read carefully the Supreme Court decision in *Z v Dental Complaints Assessment Committee* 2009 1 NZLR 1. In that case the court held that it was not an abuse of process to bring disciplinary proceedings following an acquittal on a criminal charge, even when the disciplinary case arose out of identical facts to the dismissed criminal case. However, the court did say that whether proceedings constitute an *"abuse of process was a broad, merits-based judgment which takes account of the circumstances including the public and private interests involved and all the facts of a case and asks whether a party was misusing or abusing the process of the court".* See paragraph [63].

[12] This seems to us to be a helpful statement of the principles which this Tribunal needs to consider and apply when determining the stay application. It is undeniable that a disciplinary appeal which has its focus upon the conduct of the agent is quite different from a High Court set of proceedings seeking damages for breach of contract and tort. However, what creates an abuse of process is the fact that the appeal by the

Keegans is not focussed on the agent's wrongdoing or otherwise but rather on the compensation which ought to flow from that. Similar compensation, although arising out of different legal principles, but the same set of facts, arise in the High Court proceedings. We agree with Mr Bigio that an analysis of the appropriate measure of damages by the High Court or compensation by this Tribunal will need evidence. The evidence is likely to be lengthy and will be a duplication in both courts. We consider, therefore, adopting a broad-based merit judgment as to whether or not there has been an abuse of process, that in this case it would be an abuse of process for the Keegans to continue with their appeal and their High Court action. Ms Peacocke and Stanaway Real Estate appeals do not have issues which would constitute an abuse of process if they continued, but it is appropriate that all appeals be heard together.

[13] We do not consider that s 110(3) assists us in any way. Clearly compensation can be ordered by the Tribunal. We therefore conclude that there should be a stay of this appeal.

[14] Having reached this conclusion, we do not consider that there ought to be a lengthy stay. In fairness to Ms Peacocke and Stanaway Real Estate and the Keegans, disciplinary matters ought to be dealt with promptly and efficiently. We have read the Minute of the Associate Judge setting out the timetable for this case. We consider that by November of this year the Keegans will have had an opportunity of having had a settlement conference or mediation conference and that at that time the Tribunal ought to review progress. Accordingly, the Tribunal makes the following orders:

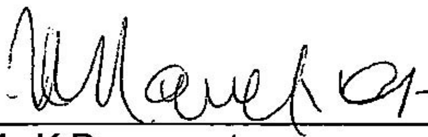
1. It stays appeal numbers 009/12, 010/12 and 011/12 until further order of this Tribunal.

2. It sets a conference date to review progress with the High Court proceedings at 10:30 am on Friday, 2 November 2012.

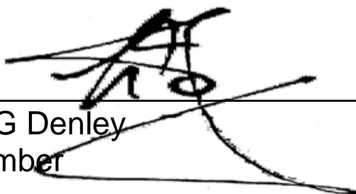
[15] Counsel may file a joint memorandum setting out progress with the High Court and what further orders are sought from this Tribunal prior to that conference.

[16] The Tribunal draws the parties' attention to the appeal provisions contained in s 113 of the Real Estate Agents Act 2008.

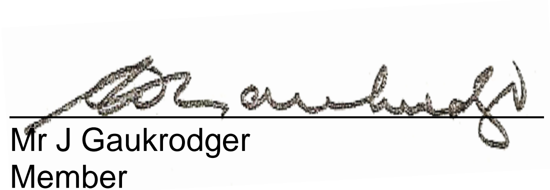
DATED at AUCKLAND this 20th day of June 2012



Ms K Davenport
Chairperson



Mr G Denley
Member



Mr J Gaukrodger
Member