

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 36

READT 111/11

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **TINA LOUISE RAE**

Appellant

AND **THE REAL ESTATE AGENTS
AUTHORITY (CAC 10057)**

First respondent

AND **TERENCE BURCH**

Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at PORIRUA on 25 June 2012

DATE OF DECISION: 29 June 2012

APPEARANCES

The appellant – no appearance
Mr S Wimsett – counsel for the first respondent Authority
Mr T Burch on his own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] The appellant, appealed against a decision of Complaints Assessment Committee 10057 to take no further action in respect of her complaint against Mr T Burch then a licensee. This was set to be heard at 10.00 am, Porirua District Court on Monday 25 June 2012 but the appellant did not appear as we cover below.

Basic Facts

[2] The appellant bought a cross lease property unit in Paraparaumu in 2005 and in late 2010 found that about half her garden shed had been built on her neighbour's land in the adjoining unit. She alleges that in 2005 the second respondent indicated to her that the shed was part of the property she was purchasing and that the established fences properly represented the boundaries of that property and the adjacent property.

[3] The appellant complained to the Authority against the second respondent in respect of his alleged misrepresentation to her.

[4] The Committee found that there was insufficient evidence to show that he had misrepresented the boundaries of the property to the appellant and there was nothing to put him on notice that the relevant land was not part of the property being purchased by the appellant.

[5] Essentially, her complaint against the second respondent is that he misrepresented to her the location of the boundary of the property she purchased in 2005, and that misrepresentation caused her loss because she will have to buy half the land on which the shed stands from her neighbour.

[6] The second respondent denies making any such representation about boundaries and has stated "*I have not advised any buyer on boundaries or fences. In the companies I have worked for, it has always been a strict company policy not to do so*". In July 2005 he was a real estate agent with over eight years experience.

[7] The Committee takes the view, from the papers, that there is insufficient evidence to show that the licensee misrepresented the location of the boundary of the property and, inter alia, that one cannot tell from an aerial photograph of the property, or from a copy of the title, that the garden shed encroached on the adjoining property, and that there is no reason for the licensee to have thought otherwise. The Committee opined that there is no evidence to suggest that the licensee misrepresented the boundary of the property to the complainant nor that the actions taken by the licensee could be considered unsatisfactory or fall within the definition of misconduct under the Act. On that basis the Committee decided to take no further action on this complaint. We observe that there would appear to be oral evidence available from the appellant to support her stance. Presumably, that would be refuted by the oral evidence of the licensee so that the issue would be one of credibility for us to decide. However, the onus of proof is on the appellant and the standard of proof is that of the balance of probabilities.

The Fixture Date

[8] As it happened the appellant did not attend the fixture at the Porirua District Court due for 10.00 am, Monday, 25 June 2012. The Tribunal waited for her, or for some communication from her, until at least 10.50 am that day. Both the Registrar and counsel for the Authority endeavoured to make contact with her. Eventually, a text from the appellant came to hand advising that she would not be attending the hearing because she had been vomiting and had a stomach bug. She said she had arranged for that advice to be given to District Court staff at 9.00 am.

[9] An important aspect is that even if unsatisfactory conduct could be found against the second respondent, we have no jurisdiction to make orders against him by way of penalty because his alleged relevant conduct in this case took place prior to the Act coming into force on 17 November 2009. This is because he was merely an approved salesperson at the time of the alleged conduct and the then available penalties could only be made against an approved salesperson's employing agent. Accordingly, the legislative framework prevents us from awarding the appellant the compensation she seeks should she have been successful in proving her claim.

[10] Mr Wimsett helpfully advised that the appellant had been in touch with Ms J McGibbon, a litigator in his firm, on about 27 April 2012 and that Ms McGibbon explained our said lack of powers to the appellant in response to a question from her. The appellant then appeared to be of the view that there was little point in her pursuing this appeal. That telephone call was in terms of a fixture being due on 2 February 2012. There was also a short notice telephone directions conference before me on 3 February 2012 because the appellant had emailed the Tribunal the previous Friday stating she was not ready to proceed with the fixture of 2 February 2012. The appellant represented herself and the second respondent did not take part. The appellant had stated she was not ready to proceed on 2 February 2012 due to her daughter having been ill and other personal matters. A further reason given by the appellant in an email of 27 April was that she had been unable to obtain legal aid and could not afford a lawyer. I reluctantly agreed to postpone the hearing until 25 June 2012 on the basis that it would go ahead on that occasion "*no matter what*" and there would be no further adjournment.

[11] On 25 June 2012 the second respondent expressed his concern to obtain closure to these proceedings against him. He pointed out that they had been ongoing for the past 18 months and concerned alleged conduct of his seven years ago which he strongly denied. He is no longer a real estate agent so has been somewhat passive until today. He has lost time in coming to Court today and over his previous limited involvement in procedures towards a fixture. He made it clear that he stands by his written submissions responding to the appellant's allegations.

Outcome

[12] It has been suggested that we should infer that the appellant is deliberately procrastinating, probably, to irritate the second respondent. Certainly, her delays cause cost in that conferences and fixture expenses have come to naught.

[13] Accordingly, in the context covered above, this appeal is struck out for non prosecution by the appellant, but if a convincing medical report is provided to the Registrar within seven working days from Monday, 25 June 2012 we shall reconsider the strike-out. Such a medical report needs to come from a registered medical practitioner who can certify

[14] That, in his or her opinion, the appellant was too ill on 25 June 2012 to attend this Tribunal fixture at the Porirua District Court at 10.00 am. The Registrar communicated this outcome to the appellant on 25 June 2012.

Judge P F Barber
Chairperson

Ms J Robson
Member

Mr J Gaukrodger
Member