

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision No: [2012] NZREADT 52

Reference No: READT 078/11

IN THE MATTER OF

an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

GARY MURPHY

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 10060)**

First Respondent

AND

DIANA CUSSEN

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport	Chairperson
Ms J Robson	Member
Mr J Gaukrodger	Member

APPEARANCES

Appellant in person
Mr Clancy for First Respondent
Mr Rea for Second Respondent

HEARD at Auckland on 8 June 2012

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Murphy appeals the decision of the Complaints Assessment Committee to take no further action under s 89(2)(c) of the Act with regard to his complaint. Mr Murphy had complained about Diana Cussen, a licensed salesperson with Barfoot and Thompson (Pukekohe). Mr Murphy is the owner of the Professionals Pukekohe and he complained about the actions of Ms Cussen in relation to properties listed with the Professionals. There are four complaints:

- [a] 6 Abby Close. Ms Cussen was interested in taking some clients through this property. She telephoned the Professionals listing salesperson and asked if she could take her clients through. The listing salesperson said that that day was not convenient and asked to make another time.

Notwithstanding this, Mr Murphy complains that Ms Cussen went to the property, approached the owner of the property who was working and persuaded her to let them through the property.

- [b] Second, he complains about a property listed with the Professionals at 21 Ridgeway Road, Pukekohe, where Ms Cussen contacted the vendor directly.
- [c] Third, Mr Murphy complains that Ms Cussen put handwritten business cards in letterboxes of three properties where the properties were sole agencies with the Professionals. These cards suggested that she had buyers for the properties.
- [d] Finally Mr Murphy complained about a promotional brochure prepared by Ms Cussen headed "*Pukekohe Market Report*" which he claims misleadingly shows that Ms Cussen had sold each of the properties listed when at least two had been sold by the Professionals.

[2] Ms Cussen did not appear, but evidence was given by Mr Michael Smith, the agent involved with the Abby Close sale, and by Donna-Marie Morris, another agent involved with some of the listings who received the card drop from Ms Cussen.

[3] The Tribunal always prefers to hear from both parties in person as it enables them to judge the credibility of each witness. Mr Murphy did not give evidence because he was not personally involved in any of these matters but was there to represent the agents in his agency who had complained to him about these actions. He stressed to the Tribunal that he was very concerned to ensure that proper standards were enforced within the real estate agent industry and in particular as between agents.

[4] Mr Rea on behalf of Ms Cussen submitted that the work complained of did not amount to real estate agency work within the definition of that work contained in s 4 of the Real Estate Agents Act 2008.

[5] Section 4 defines "*real estate agency work*" as:

- (a) *means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and*
- (b) *includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but*
- (c) *does not include—*
 - (i) *the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or*
 - (ii) *the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or*
 - (iii) *the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or*
 - (iv) *the lending of money on mortgage or otherwise; or*
 - (v) *the provision of investment advice; or*

(vi) *the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006*

[6] Mr Rea submits that for each of the complaints Ms Cussen was not engaged in real estate agency work, as she was not doing any work in trade on behalf of another person for the purpose of bringing about a transaction.

[7] We have considered this point carefully.

[8] After the conclusion of the hearing further submissions were received from all counsel and Mr Murphy himself as to the weight to be placed on the *Famularo* decision.

[9] The REAA urged the Tribunal to put to one side the *Famularo* decision. The REAA submitted that the interpretation of Real Estate Agency work contained in this decision was too restrictive. Instead they submit that the Tribunal should adopt a consumer protection approach which they say means that the Tribunal should prefer an interpretation of real estate agency work as follows:

“work is done or services provided in trade on behalf of another person with a broad intention that a sale of land (or other transaction) will ultimately result.”

[10] The second respondent urged a more restrictive definition on the Tribunal saying that the definition of Real Estate Agency work included a separate section relating to any work done by a branch manager. If they argued the wider definition preferred by the REAA was correct, provided then this clause would be redundant. The second respondent submitted that the Tribunal should prefer a more narrow interpretation as the wider definition would lead to difficulty *“reconciling conduct for which unsatisfactory conduct findings may be made and conduct for which an unlicensed person could properly be prosecuted under section 141”*.

[11] Mr Murphy says *“I am totally bewildered to understand how an unlicensed Real Estate Agent has got anything to do with this case”*. He submitted that the dropping of a flyer by a qualified or unqualified person is for the purpose of bringing about a transaction and cannot be for any other purpose.

Discussion

[12] The Tribunal have considered the submissions carefully and it is obviously an important area to determine what conduct falls within the definition of Real Estate agency work.

[13] However the Tribunal consider that some assistance can be obtained from the District Court decision of *Famularo*.

[14] In *Real Estate Agents Authority V Famularo* (DC WN CRNs 11085500439, 0440, 0441, 7 September 2011 Broadmore J) the court did not uphold a criminal charge for a former real estate agent offering services to assist vendors with private sales. The court found there needed to be a **third party** involved to constitute real estate work. We consider that in this case there was a third party and an agent and property for sale. For Abby Close we consider that taking a client to a property listed

with another agent for the purposes of showing the client the property (even though no contractual arrangement has been entered into between Ms Cussen and the vendor) is for the purpose of bringing about a sale (and presumably a commission arrangement with the other agents). It thus constitutes “*work or services ... for the purpose of bringing about a transaction*” – even if the transaction was some time in the future.

[15] We consider that every case must be determined on its own facts and that the Tribunal will determine whether any particular conduct falls within the definition of Real Estate agency work by having regard to other cases of the Tribunal, the words of the Act, the conduct complained of.

[16] The issue of whether mail drops and brochures are real estate agency work is difficult. We reserve the question of whether or not simply putting a flier or card in the letterbox of any person could amount to real estate agency work, although consider that in certain circumstances if the facts showed that it was for the purpose of inducing someone to consider selling their property then s 4 might apply. However, in this particular case the three cards that were dropped were all dropped in letterboxes of properties which were listed as a sole agency with signboards outside showing a sole agency. We consider that this also amounts to real estate agency work. The only purpose of Ms Cussen dropping the cards was an endeavour to somehow sell the property or interest the vendor in selling the property through her efforts, i.e. to become the agent to sell the property.

[17] The work done in respect of the property at Ridgeway Road also falls within the definition of “*real estate agency work*” as it was part of an arrangement with the Professionals where Ms Cussen was dealing with the vendor with an aim to see whether or not she could sell or swap another property with the vendor’s property – a third party was involved.

[18] The brochure complained of, which is in the nature of a general mailing advertisement, carries on it the logo of Barfoot and Thompson and details of Ms Cussen so a member of the public reading it would consider that it was an advertisement for the purposes of promoting the services of Barfoot’s and/or Ms Cussen. However, is it real estate agency work? What if the brochure contains misleading information? Is it excluded by clause 4(c)(ii) or can it be construed as a mail drop for the purposes of bringing about a transaction in the future? We consider that in this case the brochure is not real estate agency work. We have no doubt that, however, it could be actionable by a member of the public under the provisions of the Fair Trading Act if it was misleading or deceptive. This is not within our jurisdiction to determine but our reading of this brochure is that it suggests that it is Ms Cussen who has sold these properties. It is not clear that these are all the properties that were sold in Pukekohe. However, we determine that in this case this complaint no 4 does not amount to real estate agency work and therefore the appeal in respect of this complaint cannot succeed.

[19] We now consider the other issues raised by the appeal.

Abby Close

[20] Another issue raised by Mr Rea is that the Real Estate Agents Act intended only to regulate relationships between members of the public and real estate agents and as between real estate agents. We consider that one of the purposes of the Act is to raise industry standards. Thus relationships between agents will be governed by the Act.

[21] Mr Murphy complains that Ms Cussen's behaviour in going to the property and requesting entry from the vendor when she had been asked not to do that (or at least had been told that time with another agent would be arranged) amounts to a breach of Rules 5.1, 6.2, 6.3, 6.4 and 9.1. We have considered these Rules. Rule 6.2 says: "*A licensee must act in good faith and deal fairly with all parties engaged in a transaction.*" And at 6.3: "*A licensee must not engage in any conduct likely to bring the industry into disrepute.*"

[22] We consider that the type of conduct that Ms Cussen exhibited could be a breach of Rule 6.2 or 6.3. The vendor who eventually sold the property to Ms Cussen's clients did feel that she should let the potential purchasers through her property. However, the evidence has not reached the threshold that must be reached before a professional disciplinary finding can be made. We consider the behaviour to be on the margins of acceptable behaviour and not behaviour to be encouraged but do not think it is significant enough in this case (it being one time only) to cross the serious threshold required for a finding of professional misconduct.

Ridgeway Road

[23] In respect of the complaint against 21 Ridgeway Road, Pukekohe, unfortunately the evidence did not seem to support Mr Murphy's complaint in that the owner of the property, a real estate agent himself, was not seen to be concerned about the contact and thought he was being contacted in his capacity as a potential buyer. This evidence was confirmed by Ms Morris.

Dropping the fliers

[24] We accept the evidence of Ms Morris that her clients were concerned about the dropping of Ms Cussen's card in their letterbox. These cards, which were provided to us, say:

"Hi there, I have a very nice couple that would love to live in your street. I'd be grateful if you could call me and have a chat."

and:

"Hi there, your street is very appealing to a couple I have asking for a home. I'd be grateful if you could call me and have a chat."

and:

"The next eight weeks are the best time to sell. I have buyers out looking. I would be grateful if you could call me and have a chat on 2373101."

[25] These cards would make the average vendor consider that there was someone who was interested in buying their property. We consider that it is inappropriate for an agent to suggest that they have buyers interested in the property unless they actually do. The cards are potentially quite misleading and unfair to vendors who are vulnerable in that they want to sell their property and could be stressed by the suggestion that there is a buyer who has not been introduced to the property by the listing agents. However, other than an email exchange between Ms Cussen and Donna-Marie Morris which Ms Cussen denied having a purchaser interested in the property, we again cannot find that there is sufficient evidence to make a serious disciplinary finding against Ms Cussen.

[26] Mr Murphy also put forward some evidence about a sign which breached the by-laws but as this was not part of the initial complaint we do not consider this. If we were to consider it we would consider that this was something that would best be dealt with by the Council.

Comment

[27] There is no doubt that Ms Cussen's marketing tactics do seem to us to be very close to the line of what is acceptable. Obviously Mr Murphy and his sales staff have found it difficult to deal with the assertive tactics which appear to be employed by Ms Cussen. We set out below our recommendations for agents dealing with each other over properties. We consider that in the interests of vendors and purchasers a less aggressive and more co-operative and friendly approach is the one to be preferred for the industry. It certainly assists to increase industry standards if the parties can achieve that. Our recommendations are:

[28] The listing licensee at the time they sign up the new listing contract must explain to the vendor that there may be cards or personal introductions/enquiries from other companies salespeople about potential buyers for the property, (these buyers may not be real) the vendor/client must be given business cards to hand to the person enquiring and be told by the vendor that all enquires be directed through the listing licensee.

[29] Interfering in another member's sole agency is an ethical breach. All enquiries to be directed to the sole agent noted on the sign board.

[30] Contacting the vendor direct instead of working through the sole agent is putting the vendor at risk to double commissions.

[31] Putting out a marketing brochure which suggested that all the properties in Pukekohe had been sold by her rather than by other agencies is misleading and in breach of the Fair Trading Act. It should not be encouraged.

[32] In the circumstances we dismiss the appeal by Mr Murphy to take no further action by the Complaints Assessment Committee.

[33] We draw the parties' attention to s 116 of the Real Estate Agents Act which contains the parties' right to appeal this decision to the High Court.

DATED at AUCKLAND this 23rd day of August 2012

Ms K Davenport
Chairperson

Ms J Robson
Member

Mr J Gaukrodger
Member