Decision No: [2012] NZREADT 56

Reference No: READT 112/11

IN THE MATTER OF	s.111 of the Real Estate Agents Act 2008
BETWEEN	**MR E**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10043)**
	First Respondent
AND	**MR N**
	Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mr Vautier, Counsel for the Appellant
Mr Clancy for the First Respondent
Mr Bigio for the Second Respondent

HEARD at AUCKLAND on 7 August 2012

Introduction

[1] Mr E is a real estate agent who is the managing director of X X Limited. Mr N was formerly a salesperson with X X. His employment was terminated on 4 November 2010. The reason given for the termination of his employment was that he had copied the X X database. He subsequently joined X X and Mr E asserts that despite having undertaken that no confidential information had been retained by him belonging to X X he accessed a copy of the database that he had taken with him to send out a number of letters to X X clients, including client letters to a false address whose details had been put into the database to ensure that any copying of the database was able to be identified by X X.

[2] Mr E made a complaint to the REAA on 7 December 2010. He complained that Mr N's conduct was such that it would have been reasonably regarded by agents of good standing as disgraceful. He requested Mr N's licence be cancelled as he was "*inherently dishonest and guilty of theft*" of the database from X X.

[3] The Complaints Assessment Committee (CAC) investigated the matter and on 3 October 2011 issued its decision which was that the conduct of the licensee was not sufficiently serious to amount to misconduct in terms of s 73 of the Act. As the conduct did not fall within the definition of real estate agency work (and thus under the Act had to amount to disgraceful conduct under s.73). The CAC found that the dispute was more in the nature of a civil dispute between the parties. The Committee also found that the explanation provided by Mr N was a plausible explanation for the steps that he had taken during his time at X X Limited. They resolved not to prosecute Mr N.

[4] Mr E has appealed this decision. The grounds of Mr E's appeal are:

[a] That the Committee ought to have exercised its discretion pursuant to s.89(2) to determine that the complaint be considered by the Disciplinary Tribunal.

[b] The second respondent had admitted making a false statement to the appellant that he had deleted all client data.

[c] Subsequently using the data unlawfully obtained from the appellant after claiming to have deleted all such data.

[d] The second respondent made misleading or false statements to the REAA including:

[i] That he created a personal database of names and addresses from the calls that he personally made while working for the appellant;

[ii] That X X had a similar database containing all the information which the appellant had collated whilst working for the appellant.

[e] The statements are inconsistent with his use of the seeded "dummy" addresses.

[f] That he knowingly and dishonestly used addresses obtained from the appellant which were in fact seeded "dummy" addresses.

[g] The wrongful and unlawful obtaining of data from and making deliberate false statements to another agent would reasonably be regarded as disgraceful.

[5] The hearing was held to determine a preliminary issue raised by the second respondent, namely whether or not an appeal could be brought from a prosecutorial decision not to prosecute or lay a charge under s 73 of the Act. Mr Bigio argued that there was clear precedent in a number of cases to show that Courts would not (or be very slow to) interfere in the exercise of a discretionary screening power not to lay a charge. He submitted that *Hallett v Attorney General* [1989] 2 NZLR 1996 and

Polynesian Spa Limited v Osborne (CIV-2003-463-521 HC Rotorua, 22/12/04 Randerson J) at 61 to 63 illustrated the point that the Court would not interfere with a prosecutorial decision by enquiring too closely as to whether or not a prosecution should have been commenced. Mr Bigio also submitted that if the Tribunal overturned a decision not to lay a charge and directed that a charge should be laid, it would mean that the ultimate decision maker had already accepted that there was a *prima facie* case against the defendant which would give rise to issues of predermination and undermine the presumption of innocence, see *Hallett* [supra].

[6] Mr Vautier for Mr E submitted that the Tribunal should consider the appeal because the CAC failed to give due weight to the admission of a licensee that he had continued to use the database even though he thought he had deleted it and that the licensee sent mail out to fictitious persons at fictitious addresses which were contained in the complainant's database. He submitted that there is a right of appeal contained in the Act under s 111 and that this appeal was not limited in any way.

[7] Mr Clancy for the REAA submitted that there were a number of policy decisions why a Court would be reluctant to judicially review a challenge to a decision not to prosecute but these arguments are much less powerful where there is an appeal provided for in the legislation. In a general sense he submitted however the decision not to prosecute is one that the Tribunal will be slow to interfere with.

[8] This summary does not adequately represent the detailed arguments that Counsel provided for which we thank them. We have however considered them all carefully.

[9] The Tribunal has accepted a limitation on the right of appeal in *Brown* [2011] NZREADT 42. The Tribunal held that when considering an appeal from a decision to lay a charge the Tribunal would treat an appeal from this decision as requiring it only to conduct an enquiry as to whether a *prima facie* case had been made out. In this case the CAC made a decision not to lay a charge against Mr N under s 73. This was the only section available to it as the complaint did not involve real estate agency work. This required the CAC to find that the conduct of Mr N was such that it could amount to disgraceful behaviour.

[10] The sections which empower the CAC to consider or dismiss a complaint are s 80 and s 89. Section 80 gives the CAC the power to take no further action on a complaint if it is an old matter (s 80(1)(a)) or if the complaint is not practicable or desirable, or the subject of the complaint is inconsequential, or in all the circumstances of the case any further action is unnecessary or inappropriate.

[11] Under s 89 the CAC may make a determination either to lay a charge, make a finding of unsatisfactory conduct or a determination they take no further action with regard to the complaint. Section 89 is expressed so as not to limit the power of the CAC to make a decision under s 80. The CAC therefore has the right to stop the enquiry and decide to take no further action at any stage. These sections give the CAC sweeping powers to make determinations which best fit the case before it. There is also a general right of appeal under s.111 which enables an appeal from any determination of the CAC. Should this appeal right be limited in any way?

[12] As Mr Bigio submits, the Court has been slow to interfere with the decision of the Police not to prosecute. This in part is based on policy decisions – such as the need to

ensure the role of the Police and their independence is respected and that they can exercise their prosecution role without interference from the Court.

[13] Some of these considerations do not apply to a civil disciplinary matter under the Real Estate Agents Act. The civil nature of these disciplinary proceedings is an important factor in analysing the role of the Tribunal in considering an appeal under s 111 from a decision not to prosecute. Some of the criminal law principles do not apply or have diminished application. In the *Polynesian Spa* case Justice Randerson discussed the policy reasons why the Courts would not consider or would be reluctant to interfere in a decision not to prosecute. He referred to the proper constitutional boundaries, the fact that criminal proceedings should not generally be subject to collateral challenge as challenge may seriously disrupt the criminal justice system and that the Court retained an inherent role to dismiss stale prosecutions. The Court said that the decision to lay a charge is simply an expression of opinion which is capable of being challenged in Court and any factual errors may be tested at trial. Justice Randerson also accepted that a decision not to prosecute could be challenged on review where there was a failure to exercise a discretion or where the prosecuting authority acted in bad faith or with a collateral purpose. Many of these policy reasons do not apply, especially when considering s 3 – the purpose of the Act. It includes raising industry standards and providing accountability through a disciplinary process which is independent, transparent and effective. A general right of appeal is in keeping with achieving these aims.

[14] As part of this analysis we have to consider the role of the Tribunal on appeal. *Austin Nicholls v Stitching Lodestar* [2008] 2 NZLR 141 and *Kacem v* Bashir [2010] NZSC 112 provide general statements of principle of powers of the Tribunal on appeal.

[15] In *Kacem v Bashir* [2010] NZSC 112 the Supreme Court has clarified that the principles in *Austin, Nichols* apply to Courts exercising jurisdiction over general appeals from lower Courts, not appeals from decisions made in the exercise of a lower Court's discretion. The distinction between general appeals and appeals from discretionary decisions is set out at paragraph [32]:

> *"[32] But for present purposes, the important point arising from 'Austin, Nichols' is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment.* ***In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.*** *The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. (emphasis added)".*

[16] On other decisions on appeal the Tribunal have found that appeals under s 89 give the Tribunal power to make decisions and a general appeal giving the Tribunal wide powers to reconsider the factual determinations made by the CAC.

[17] In an earlier decision of the Tribunal *Smith v Brankin* [2010] NZREADT 13 the Tribunal considered an appeal from the decision to take no further action on allegations of inappropriate conduct between a licensee and her employer. The CAC had

dismissed the claim saying it was an employment dispute. In that case the Tribunal held that the conduct of a licensee could properly be described as disgraceful under s.73 of the Act so long as there was a sufficient nexus between the alleged conduct and the fitness or proprietary of the licensee to carry out the Real Estate Agency work (paragraph 19). In that case the Tribunal framed a charge and sent it back to the CAC for consideration. The allegation in that case involved scurrilous and defamatory comments allegedly made about the appellant by the Licensee. Thus the Tribunal determined an appeal on similar grounds (although the section under which the CAC had made the determination was not clear).

[18] Considering all of these matters and the important function and protection of the public contained in the purposes of the Act (s 3) we consider there is no general rule preventing an appeal from being considered by this Tribunal, however we consider that the Tribunal's role on an appeal from the exercise of a discretion not to prosecute on appeal will be limited to the consideration of the four grounds set out above, ie treated as an appeal from a decision in exercise of a discretion.

[19] Thus in this appeal the Tribunal would only consider the appeal if it could be said the decision was an error of law, took into account irrelevant considerations or failed to take into account relevant considerations or is plainly wrong. This is an approach which recognises many of the policy reasons applicable to criminal charges but still allows an appeal under s 111. In this appeal there have been no allegations that there was any breach of natural justice or any impropriety by the CAC. Instead Mr E argues that the CAC were wrong in finding that the conduct complained of could not amount to disgraceful conduct; that is a question of interpretation of the facts and application of the law to it. We have considered the facts of what is essentially an employment dispute between X X and Mr N. There might be (limited) circumstances where an employment dispute could be said to amount to disgraceful conduct (such as Smith) but the Tribunal have considered the meaning of "*disgraceful conduct*" in several cases including *Downtown Apartments* [2010] NZREADT 6.

[20] In that case the Tribunal found that disgraceful conduct required a marked or serious departure from acceptable standards. The test is an objective one for the Tribunal (paragraph 56). In paragraph 59 they summarise the test as follows:

> *The Tribunal must find on the balance of probabilities that the conduct of the defendant represented a marked and serious departure from the standards of an agent of good standing or a reasonable member of the public.*

[21] Could the conduct of Mr E in retaining the database (in the circumstances he has explained) be said to amount to a marked and serious departure from the standards of an agent of good standing? We have considered the evidence which we have and do not consider that in the circumstances of this case Mr E will be successful in his appeal. We cannot conclude that the CAC erred in the exercise of its discretion or that there was any error of law or the CAC failed to take into account relevant or considered irrelevant considerations. Mr N's conduct is essentially the subject of a civil dispute between the parties and the Civil Court is the appropriate venue for it and to protect any loss of intellectual property by X X. It is not the role of the Tribunal to protect these rights. Our role is to maintain real estate agents standards and public confidence in the profession. There are no elements of behaviour which would in our view require the intervention with the CAC's discretion not to prosecute. Mr E is clearly aggrieved at the conduct of Mr N. He should take whatever steps are appropriate in the Civil Courts.

[22] The Tribunal are aware that in indicating this decision they have not had the benefit of hearing from counsel on this point. Accordingly they invite submissions from counsel or if required for counsel to indicate if a brief hearing should be reconvened to argue this point. Can counsel please contact the Registry within seven days to indicate if a further half day is required or if submissions will be filed. The Tribunal will then set a timetable for the hearing.

[23] The Tribunal draw the parties' attention to s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 12th day of September 2012

Ms K Davenport
Chairperson

REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms J Robson
Member

Mr G Denley
Member