

Decision No: [2012] NZREADT 57

Reference No: READT 056/10

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

BETWEEN **JOANNE DEWSON**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 10050)**

First Respondent

AND **DR LAWRENCE WINKLER**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mr Michael Pinkney, advocate for the appellant
Ms McKenzie for First Respondent

HEARD at AUCKLAND on 31 August 2012

Introduction

[1] This is an appeal from the decision of the Complaints Assessment Committee dated 2 November 2010. This decision found Ms Dewson guilty of unsatisfactory conduct. The Complaints Assessment Committee found that she represented to the Winklers that there was access to the property they had purchased. The Complaints Assessment Committee found she told them that there was a shared driveway, when in fact the driveway was owned by the adjoining property and the property purchased by the Winklers had been allowed to use this driveway but had another unformed legal access. The Complaints Assessment Committee noted that the agent and purchasers had not met and dealt with each other over the internet and telephone. The Complaints Assessment Committee found that the Winklers were supplied with incorrect information about the drive-on access to their property by it being described as “communal” or “shared” when it was owned solely by the adjoining property owner without any legal right for the Winklers to use it. They said Ms Dewson agreed that her words suggested shared ownership.

[2] Ms Dewson disputes this summary of events. Her evidence to the Tribunal was that she said to Mrs Winkler (with whom she dealt) that she had a legal access to the property and the use of a communal driveway. She says that she made this very clear. She referred to an e-mail exchange between herself and Mrs Winkler in which Mrs Winkler asked the question “*who maintains the communal drive off State High 10?*” and Ms Dewson answered “*the communal drive is off Takou Bay Road approximately 100 metres and is maintained by both properties*”. She stressed that she told Mrs Winkler to obtain a LIM and to obtain legal advice and that she’d be happy to show any solicitor around the property.

[3] Mr Dewson, who was also working with his wife as a real estate agent at the time of these events gave evidence. His evidence was very clear. He said that the vendors had told them that the driveway belonged to their neighbours but they had the right to use it and they had always used it. He also told of attending a barbeque at the Winklers just after the purchase where Mrs Winkler’s words indicated she knew that her legal access was not the shared driveway.

[4] This appeal is essentially factually based. Dr and Mrs Winkler did not attend the hearing and give evidence. In a letter to the Tribunal they said they wished to pursue compensation from Ms Dewson and as the Tribunal could not order this for them under the 1976 Act they chose not to participate.

[5] Mr Dewson’s evidence was clear about his understanding of the ownership of the driveway. The way that Mrs Dewson explained it to the Tribunal it was not so clear. There could have been confusion in her use of the words “*shared driveway*” and “*use of driveway*”. However it was clear that the Winklers did use the driveway until a subsequent disagreement between their tenants and the owners of the driveway. But they did not own it or have an easement over it.

[6] As we have commented in other decisions the standards expected of agents under the 2008 Real Estate Agents Act are certainly higher than that which was expected of agents under the 1976 Act. We have no doubt that if this case had been brought under the 2008 Act the Tribunal would have expected Mrs Dewson to have explained clearly and in writing to Mrs Winkler (if they could not meet) the salient features of the access, i.e. words to the effect that the driveway was the neighbour’s but the purchaser has a right to use it, but your access way is on an unformed driveway adjacent to the neighbour’s driveway. She should have provided the title. However we accept that on the balance of probabilities, having heard the evidence of Mr and Mrs Dewson that the Winklers were advised that they had legal access to the property and the use of the metalled driveway which was adjacent to it. We may have reached a different conclusion had we had the benefit of hearing from the Winklers but we did not.

[7] The Tribunal’s role on appeal is set out in the decisions of *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. According to the judgment, a Court considering an appeal from a lower Court is not obliged to defer to the reasons of the decision appealed from. Rather, the appellate Court has the responsibility of arriving at its own assessment of the merits of the case [paragraph [16]:

“[16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court’s opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court’s assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion”.

[8] 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)”.*

[9] Section 89 of the Act confers on the Committee the power to make a determination on a complaint after it has inquired into it and conducted a hearing. Determinations pursuant to s 89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s 89 would generally be regarded as ‘general appeals’. Thus the Tribunal can consider afresh the evidence presented by Mr and Mrs Dewson.

[10] We must also remind ourselves that a disciplinary finding is a significant matter for any agent and that the Tribunal must be satisfied that the evidence establishes on the balance of probabilities that the charge has been made out. In this factually based matter we cannot be certain that the complaint by Dr and Mrs Winkler has been established. Accordingly we allow the appeal and quash the decision of the Complaints Assessment Committee and instead substitute our decision under s 89(2)(c) and order that the Complaints Assessment Committee take no further action on this matter.

[11] The Tribunal draws the parties' attention to the provisions of s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 13 day of September 2012

Ms K Davenport
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member