

Decision No: [2012] NZREADT 63

Reference No: READT 027/12

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

BETWEEN **MARK ELLIS**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 10069)**

First Respondent

AND **DR WILLIAM REEDY**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

J Donovan, Solicitor for the appellant
Mr Clancy/Ms MacGibbon for First Respondent
No appearance for Second Respondent

HEARD at AUCKLAND on 4 October 2012

Introduction

[1] This is an appeal by Mr Ellis against the Complaints Assessment Committee decision of 22 December 2011 and the Penalty Decision dated 16 April 2012.

Summary of Complaints

[2] The second respondent Dr William Reedy was one of three trustees at a property owned by the Reedy Mouncey Family Trust at 28 Waller Avenue, Bucklands Beach. The complainant complained that Mr Ellis had sent in an e-mail requesting access to 28 Waller Avenue and despite being sent an e-mail by Dr Reedy saying the property was not for sale and was tenanted he nonetheless approached the tenant and asked for permission to go through the property. The complainant said that there was no agreement by all owners that he could have access, there was no legal agreement to

sell the house and that he had no right to inspect or view the property. His complaint was that the agent had broken the law by trespassing when specifically told he was not to visit a residential property, he requested access less than 12 hours before he required it by e-mail, he ignored the response, he was colluding with the other parties and trustees and he intimidated the existing tenant.

The Committee's Findings

[3] The Complaints Assessment Committee found that Mr Ellis did not have the authority to offer the property for sale, he had ignored a clear instruction from one of the owners not to offer the property for sale and was aware that there was friction between the parties but continued to deal with one party and caused further conflict and confusion. They therefore found that Mr Ellis had breached s 72 of the Real Estate Agents Act 2008 and found him guilty of unsatisfactory conduct. He was fined the sum of \$2,000 and ordered to pay costs to the complainant of \$500.

[4] At the hearing before the Tribunal on 4 October counsel for Mr Ellis produced an agency agreement between the trustees and Ray White dated 12 January 2010. This was for a sole agency which had expired. Clause 8F provided that on the expiry of the sole agency the client appointed Ray White as a general agent for the sale of the property. Evidence was given by Mr Ellis that he was unaware that there was a general agency at the time that he approached the owners but subsequent enquiries discovered that the property was still under general agency to Ray White and that no notice of cancellation had been received.

[5] Mr Ellis's evidence was that he had a buyer who wanted to move into the Bucklands Beach area. She was relocating from Australia and had a budget of up to \$1.3 million. She was on a visit from Australia in early 2011 with a view to trying to find a property to purchase. Mr Ellis showed her a number of properties which were not suitable. He sent a text message to all of the agents in his office asking if there were any other properties on the market and one responded by saying that the property at 28 Waller Avenue, Bucklands Beach had been for sale and he believed it could still be available. The client was driven past the property and liked it. Mr Ellis therefore tried to find out who the owners of the property were and was given a contact address for Ms Nicola Mouncey. He spoke to her and then her father and was told that the property was the "*remnants of a marriage separation*" which was "*somewhat non amicable*". Mr Rob Mouncey, the father of Ms Mouncey, said that the property was tenanted but Ms Mouncey a trustee for the Mouncey Reedy Family Trust did want to sell the property if the price was right. Mr Mouncey suggested that he e-mail both partners, Ms Mouncey and Dr Reedy and gave Mr Ellis an e-mail address to contact Dr Reedy. Mr Ellis then went to the Ray White office in Halfmoon Bay and e-mailed both parties. This e-mail was sent at about 9.00 p.m. His evidence was that he waited in the office for about 45 minutes to an hour but did not get a response. Dr Reedy sent an e-mail dated 9.59 p.m. saying:

"Thank you for your e-mail. The house at 28 Waller Avenue is not for sale and is currently tenanted."

[6] On the following day Mr Ellis did not go to the office or pick up his e-mails but instead picked up the client and told her that the property was tenanted and that it may

not be possible to view it. He subsequently received a phone call about 11.00 a.m. from Ms Mouncey saying she was trying to locate the tenant and would need a little longer. Approximately half an hour later Mr Rob Mouncey called to ask whether there had been any response from Dr Reedy. When Mr Ellis said that he had not received any reply from Dr Reedy he was told that Ms Mouncey had said it was okay to go to the property, knock on the door and if someone was home ask whether access could be arranged. Mr Ellis's evidence was that he went to the property, he knocked on the door and the door was answered by the tenant who he had met before at previous open homes. She said it was not convenient to view the property at that time and that the property was not on the market but perhaps a time could be arranged to see the property the next day. Mr Ellis said that the client was leaving the country so that would be fine but the tenant said that the client could look at the back garden if she wanted. Mr Ellis asked the client and she agreed, the tenant unlocked the side gate and the client then viewed the garden. That was the entire interaction that Mr Ellis had with the tenant or the property. Mr Reedy phoned Mr Ellis at about 2.00 p.m. and was very upset and subsequently made a complaint.

[7] The Complaints Assessment Committee considered that this was unacceptable behaviour. Having had the opportunity of hearing Mr Ellis, reviewing the e-mails and particularly understanding that, even though unknown to Mr Ellis, there was a general agency agreement in place the Tribunal do not share the Complaints Assessment Committee's concerns. In our view Ray White had a general agency agreement and were able to take clients to the property whilst the agreement remained in place. Mr Ellis should have checked his e-mails from Dr Reedy to see whether he had responded, given the fact that he knew that it was a relationship property break up. He did not do so and he freely acknowledges that this was an error. However we do not consider that his actions in subsequently receiving approval from one of the owners and then knocking on the door of the property and asking the tenant for access, and then being refused and going away did amount to a breach of Rule 6.2, [the requirement to act in good faith and deal fairly with all parties engaged in a transaction]. Further we do not consider that there was any breach of Rule 9.15, that is unless authorised by a client through an agency agreement a licensee must not offer or market any land or business.

[8] In our view Mr Ellis was just doing what many agents do which is knock on the door to see whether a property is for sale or access can be obtained. He went away when he was told it was not, and while it certainly seems to have inflamed the already rocky relationship property dispute we do not consider that the large fine and costs awarded to Dr Reedy can be sustained in this case. One of the requirements of any disciplinary finding is that the conduct must warrant such a sanction, we do not find this in this case.

[9] We accordingly quash the finding of the Complaints Assessment Committee and substitute our own view that there has been no breach of the rules by Mr Ellis.

[10] We do note however that Mr Ellis needed to be able to access his e-mails to see whether there has been any reply. Mr Ellis acknowledges that and advises the Tribunal that Ray White have now arranged for all the agents to have iPhones so that their e-mails can be accessed at all times. We consider that this is a sensible plan. We also

note that if the agency agreement had been provided to the Complaints Assessment Committee its decision may well have been different.

[11] Pursuant to s.113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s.116 of the Act.

DATED at AUCKLAND this 25th day of October 2012

Ms K Davenport
Chairperson

Mr G Denley
Member

Ms J Robson
Member