Decision No: [2012] NZREADT 7

Reference No: READT 042/11 &
READT 043/11

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

BETWEEN **GRAEME STORIE**

Appellant

AND **SHALERY RAYNES**

Appellant

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

First Respondent

AND **CHRISTOPHER AND TERESA BARLOW**

Second Respondents

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

HEARD at AUCKLAND on 20 January 2012

APPEARANCES

Ms N Wilde for first respondent
Mr Storie and Ms Raynes in person
Mr and Mrs Barlow in person

DECISION

Summary of Complaints

[1] These two appeals from the decision of CAC10057 were heard together. Mr Storie and Ms Raynes are real estate agents who work for Ray White – Real Estate Out West Limited. In August 2010 Mrs Barlow complained to the Real Estate Agents Authority that she had sold a property through Ray White and as a result of the actions of agents Mr Storie and Ms Raynes was homeless. She asserted that Mr Storie told her that the settlement date on the Agreement for Sale and Purchase was 15 July 2010 when in fact it was 1 July 2010. The significance of this date was that Mrs

Barlow is a schoolteacher and could only move house during the school holidays (5 to 16 July 2010).

[2] After looking at the handwritten agreement that she signed and after questioning Mr Storie, Mrs Barlow was certain that the date for completion of the contract was 15 July. Her solicitor subsequently advised her that the handwritten date was in fact the 1st July and not the 15th. As a result Mrs Barlow complained to Ray White Henderson and a compensation arrangement was reached between Mrs Barlow and Mr Storie and Ms Raynes. The agreement is undated but signed by Mrs Barlow on 17 June 2010. That agreement (page 24 of the bundle) recorded that Mr Storie and Ms Raynes advised Mrs Barlow that settlement date was 15 July 2010 rather than the recorded date of 1 July 2010. It recorded that Mrs Barlow was to incur costs to move out of her property on 1 July 2010 and that Mr Storie and Ms Raynes had agreed to meet half of her storage costs ($843.75). Unfortunately this was not paid promptly. Mrs Barlow claimed that she was told that she would be paid by 30 June 2010. The money was eventually paid in two amounts - $200 on 12 July 2010 and a further $643.75 on 2 September 2010.

[3] In August Mrs Barlow complained to the REAA. The Complaints Assessment Committee made a decision in November 2010 that Mr Storie and Ms Raynes were guilty of unsatisfactory conduct. In a penalty decision dated 10 March 2011 Mr Storie was ordered to pay $900 being half of the $1,800 accommodation costs of the complainants and Ms Raynes the other $900. They appealed this decision. Neither of them have paid any further compensation to Mrs Barlow.

Issues

[4] The first issue for the Tribunal is was this an appeal against the finding of unsatisfactory conduct or simply an appeal on quantum? The appellants initially advised the Tribunal that this was an appeal against quantum but subsequently said that they did not believe they had done anything wrong and so the appeal also became a hearing on the correctness of the Complaints Assessment Committee's findings under s 72.

[5] The second question for the Tribunal is whether the Complaints Assessment Committee were correct to order $900 compensation per agent to be paid?

Relevant Law

[6] The principles applying to the exercise of appellate jurisdiction have been considered by the Supreme Court in *Austin, Nichols & Co Inc v Stitchting 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".*

[7] 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)".*

Issue 1: Were Ms Raynes and Mr Storie guilty of unsatisfactory conduct?

(i) We find that they were guilty of unsatisfactory conduct. First, they agreed that they had given the incorrect settlement date to Mrs Barlow and signed a settlement agreement in which they agreed to pay compensation for this error. There would be no reason to do this if they did not acknowledge an error.

(ii) Second Mr Storie accepted that he had a discussion with Mrs Barlow that she was unable to move except during the school holidays. However Ms Raynes and Mr Storie told the Tribunal on several occasions they could not recall particular conversations around the settlement date. The agreement signed by Mrs Barlow shows the completion date of 1st July. However the handwriting on the form is such that it could be 15th July (rather than 1st July). Mrs Barlow said that having seen a lot of bad handwriting she double checked this with Mr Storie and he confirmed that it was 15 July. Mr Storie cannot recall any conversation with Mrs Barlow on this point. Ms Raynes said that she felt bullied into reaching the agreement with Mrs Barlow and felt that they did not do anything wrong.

The Tribunal had the opportunity of assessing both the evidence of Mrs Barlow and Mr Storie and Ms Raynes. We prefer the evidence of Mrs Barlow. It was consistent with the documents (the compensation agreement) and the contemporaneous complaint made by Mrs Barlow. We accept that for Mrs Barlow, a teacher (with a disabled husband) the only possible time that she was able to move was during the period of the school holidays. We do not know why Mr Storie confirmed the wrong date but we find he did. We think that misrepresenting a settlement date on an agreement or not confirming clearly (when asked) with the vendor the date on which they are required to leave the property does amount to a breach of s 72.

Issue 2: What is the appropriate compensation for Mrs Barlow?

(i) We asked Mrs Barlow to prove to the Tribunal that she had paid the additional storage and removal costs. The storage document was contained in the bundle of documents at Tab 10 and shows that the Barlows were required to pay a month's storage of their furniture for $585. In addition Mrs Barlow told the Tribunal that she paid $849 by way of additional costs for the removal company. She was asked to provide and did provide a copy of that invoice to

the Tribunal. This means that her total out of pocket expenses were $1,434. $843.75 has been paid which leaves a balance outstanding of $590.25. We consider that *prima facie* she is entitled to receive this sum by way of additional compensation under s 93(1)(f)(ii) being the actual cost of the consequences of the error(s) of the licensees. We find that this should be paid equally by Ms Raynes and Mr Storie. The evidence from Mrs Barlow was that she did not have any actual accommodation costs.

Issues arising out of this

[8] Mr Storie and Mr Rayne raised two defences to the quantum claim. They argued that Mr and Mrs Barlow have had to meet these costs in any event. The argument raised by Mr Storie was that the next agreement for sale and purchase entered into by Mr and Mrs Barlow had settlement on 30 July 2010 and thus they would always have had to put their furniture in storage for at least a two week period. This agreement for sale and purchase is dated 9 June 2010. This shows that the settlement date was initially 15 July and was subsequently changed and initialled to 30 July. Mrs Barlow's evidence was that after entering into the agreement to sell their property and believing that the settlement date was 15 July they entered into their new agreement with Mr and Mrs Kim. After they learned that in fact the settlement date was 1 July they agreed to shift this settlement date to 30 July because an extra two weeks in the circumstances did not seem to them to be that important. She also said that they had to take storage for a month and there were no additional costs incurred by allowing the Kims to settle on 30 July rather than 15 July. We accept this and find that it was the discovery that the settlement date was 1 July which in fact meant that the Barlows were out of pocket. The extra two weeks did not increase the costs payable by the Barlows.

[9] The second point raised by Mr Storie and Ms Raynes was that the June settlement agreement entered into with Mrs Barlow was in fact binding upon her as compensation for being her entire loss. They argued she could not seek any more compensation from them. Ms Barlow submitted that Mr Storie and Ms Raynes did not pay the sum of $843.75 on the agreed date (and in fact only paid the last $643.75 in September 2010 after her complaint was made). She said that she was told by her solicitor that in circumstances where there had been a failure to honour the agreed payment date (30 June 2010) she could treat the agreement as null and void. Mr Storie and Ms Raynes claimed that the agreement never provided a date for completion and that they had no recollection of any oral agreement between Mr Sharma (the Ray White manager), Mr Storie, Ms Raynes and Ms Barlow that the monies would be paid on the 30th June.

[10] When questioned by the Tribunal as to when they expected that they would have to pay the money they both said that they would pay it as soon as they were able to do so. Ms Raynes acknowledged that she had a conversation with Mrs Barlow sometime in mid July when she said that she was not going to "*fund Mrs Barlow's holiday*". Mr and Mrs Barlow were at that stage travelling around the country visiting friends over the school holidays. Ms Raynes believed that the compensation she had agreed to pay was being used to fund the Barlows' holiday.

[11] The Authority submitted that the Tribunal were not bound by the civil agreement reached between the parties (even if it was binding as between them) as the function of the Tribunal was disciplinary. Mrs Wilde submitted that the Tribunal had power to

order that errors and omissions made by a licensee should be rectified and that this was in accordance with the purposes of the Act.

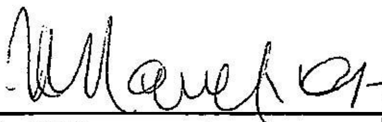
[12] We find that Mrs Barlow was not bound by the agreement to accept only the sum of $843.75. This point may have been arguable if the monies had been paid promptly to her but in fact they were not. There is no doubt that a payment in September, some six to eight weeks after the costs were incurred by Mrs Barlow and after her complaint to the Real Estate Agents Authority supported Mrs Barlow's view that Mr Storie and Ms Raynes had no intention of honouring the balance of the agreement.

[13] Finally Mr Storie argued that Mrs Barlow received an $1,800 credit from them by way of refund of the advertising costs, meaning she got further compensation. Mr Sharma from Ray White did not give evidence. But his e-mails to the Real Estate Agents Authority and the evidence from Mrs Barlow supports the fact that the $1,800 reduction in advertising was negotiated by Mrs Barlow at the time that the agreement for sale and purchase was entered into, i.e. 1 June 2010, as a way of assisting her with her decision to sign the agreement to sell at a lower figure. We therefore do not find that this $1,800 amounted to any additional compensation paid by Mr Storie and Ms Raynes for Mrs Barlow's loss.

[14] For the reasons set out above the Tribunal modifies the decision of the Complaints Assessment Committee to order that Mr Storie and Ms Raynes pay the sum of $590.25 jointly or $295.13 each to Mrs Barlow. They confirm the finding under s 72.

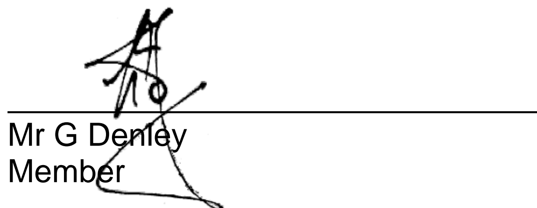
[15] Pursuant to s 113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s 116 of the Act.

DATED at AUCKLAND this 29 day of March 2012



Ms K Davenport
Chairperson

Mr J Gaukrodger
Member



Mr G Denley
Member