

Decision No: [2012] NZREADT 72

Reference No: READT 015/12

IN THE MATTER OF

of charges laid under s.91 of the Real Estate Agents Act 2008

BETWEEN

**REAL ESTATE AGENTS
AUTHORITY (CAC 10064)**

Prosecutor

AND

RAM VINODH

Licensed Salesperson

Defendant

AND

Reference No: READT 021/12

IN THE MATTER OF

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

BETWEEN

RAM VINODH

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 10064)**

First respondent

AND

MICHAEL HAWES

Second respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mr P Moodley and Ms N Law for Mr Vinodh
Mr L J Clancy for the Real Estate Agents Authority

HEARD at AUCKLAND on 7 November 2012

Introduction

[1] Mr Vinodh is charged under s 73(c)(iii) of the Real Estate Agents Act 2008 as follows:

That his conduct consists of wilful or reckless contravention of Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules.

(Charge 1.1)

[2] In acting as salesperson in the sale of 10 Andover Way, Goodwood Heights, Manukau (property) from Sanjana Dutt and Pramendra Kumar to Michael Hawes the defendant provided false information about:

Particulars:

- (a) The address of the property; and
- (b) The current valuation of the property.

(Charge 1.2)

[3] The Committee further charges the defendant with misconduct under s 73(c)(iii) of the Act in that his conduct consists of a wilful or reckless contravention of Rule 9.7 of the Rules.

Particulars:

Misleading Mr Hawes about the listing price for the property.

[4] Mr Vinodh also appealed against the decision of the Complaints Assessment Committee to charge him but by agreement this appeal was dealt with by hearing the charge. The appeal will also be determined by the Tribunal in this decision.

Background

[5] Mr Hawes was buying his first house in 2010. Mr Hawes wanted to purchase a property in the Goodwood Heights area of Manukau in Auckland. He liked the area and given the real estate market in 2010 felt that he could afford to buy a property. He wanted to buy a property selling for less than the CV. He began looking at properties and contacted Mr Vinodh over a property that was for sale in Goodwood Heights. Mr Hawes says that his instructions to Mr Vinodh were that he wanted to see properties that were selling in the area for below CV. He was shown a property

at 18 De Havilland Drive, which he says he liked and made an offer in writing through Mr Vinodh for \$450,000 (with a CV of \$490,000). He says the offer was declined but he did not get a copy of this offer from Mr Vinodh.

[6] In the first week of May 2010 Mr Vinodh then showed Mr Hawes two other properties – 45 De Havilland Drive and the property in Andover Way. Mr Hawes said that Mr Vinodh showed him the property which he believed was 12 Andover Way; he told him that the CV of the property was \$450,000 and the list price was \$479,000. Mr Hawes said that he knew that the property was not formally listed with Ray White when he viewed it but that Mr Vinodh knew the vendor. He told the Tribunal Mr Vinodh told him to meet him at the property and told him to come to Number 12 Andover Way. The property was labelled 12 Andover Way on the letterbox. The Number 12 was also screwed onto the fence. In fact despite these labels the property was actually correctly 10 Andover Way. On 14 May 2010 he made an offer to purchase the property for \$430,000. This initial offer was subject to finance, a builder's report and a LIM. The Agreement for Sale and Purchase contained the address of 12 Andover Way but the legal description was for 10 Andover Way. Mr Hawes claimed that Mr Vinodh told him that the offer should be rushed through as the property had not yet been advertised. The sale price was concluded at \$435,000. Mr Vinodh said that in order to conclude the deal he had to drop his commission but Mr Hawes says he knew nothing about this.

[7] On Saturday 15 May Mr Vinodh contacted Mr Hawes concerning his lawyer's details and it was subsequently arranged that he would pick up a copy of the agreement from Mr Vinodh's office. At that time Mr Vinodh told Mr Hawes that he was going overseas and that his partner Aaron Jokhan would take over from him in handling the purchase. Mr Hawes said that both Mr Vinodh and Mr Jokhan told him not waste his money on getting a LIM report. Mr Hawes said he naively agreed not to obtain a LIM but later changed his mind. He subsequently arranged a builder's report and obtained a LIM for the property from the Manukau City Council. The LIM report was for 12 Andover Way [which was still what he believed to be the address of the property] and showed a CV of \$450,000. However upon checking the LIM he discovered that the name of the owners recorded on the title were not the same as the vendors on the Sale and Purchase Agreement. The building plans also appeared to be for a separate property. He discussed this with his lawyer and was advised to go back to the Council. He rang Aaron Jokhan and told him about the problem. Mr Jokhan immediately asked him if Ram (Vinodh) had not told him that the house numbered 12 was actually 10 Andover Way. Mr Jokhan subsequently met with Mr Hawes and showed him that the post boxes for numbers 10 and 12 had been incorrectly placed and that the CV for 10 Andover Way (the property he wanted to buy) was \$420,000 [not \$450,000]. Mr Hawes therefore felt he had paid \$15,000 above the CV rather than \$15,000 below as he had believed.

[8] Mr Hawes said that he did not then want to complete the property purchase but was told by his lawyer that he was bound to complete the sale. He met with the manager of Ray White and said that he felt he had been misled. He discussed with Ray White repayment of \$15,000 to reduce the price paid for the property to what he felt to be the correct price. On 27 May a letter was delivered from Ray White to Mr Hawes accepting that there had been an error in the identification of the property but advising that no compensation would be offered, although they would reimburse the fee for the LIM report. The letter said that the price paid for 10 Andover Way was

fair. Mr Hayes then saw the property advertised in the Manukau Courier for \$459,000, which was \$20,000 less than he said he had been told was the listing price. He did however settle the purchase.

[9] The vendor also gave evidence. He said that the property had always been incorrectly listed as Number 12 on the mailbox. He confirmed that the listing agreement was signed on or about 15 May and that he needed to receive \$440,000 from the sale in order to build a new house. He said he would have cancelled the agreement if the purchaser wished (once he knew the problem) and had told Mr Jokhan this. Mr Hawes had denied he had been told.

[10] Evidence was also given to the Tribunal by Charlotte Gerard who is an authorised investigator for the Real Estate Agents Authority. She provided the Tribunal with a copy of Mr Vinodh's questions and answers to the complaint in an interview by Mr Gouverneur.

[11] Mr Ram Vinodh gave evidence through a Hindi interpreter. The Tribunal were told that his English was acceptable but for an important matter such as this he wished to ensure that he fully understood the questions. Mr Hawes was also from India but did not speak Hindi so he and Mr Vinodh had communicated in English. Mr Vinodh told the Tribunal that he showed Mr Hawes 18 De Havilland Drive and that Mr Hawes had not liked the property because he said it was like a 'compound' and had not made an offer for the property. He said Mr Hawes liked the property at 10 Andover Way and even though a formal listing agreement had not been signed with Ray White Manukau Mr Kumar was prepared to let prospective purchasers through the property. Mr Hawes said that he had carried out an appraisal of the property and the property was worth between \$429,000 to \$459,000. The property was listed for sale with Ray White between 10 and 15 May for a sale price of \$459,000. Mr Vinodh said that he told Mr Hawes the CV was \$420,000. He said that he advised Mr Hawes of this verbally and showed him a printout from the Property Guru website which showed the correct CV of \$420,000. He said he also showed him CVs for the properties at 18 De Havilland Drive, 45 De Havilland Drive and 3 Fairchild Avenue. Mr Vinodh took Mr Hawes through the property three times. When Mr Hawes indicated he wanted to make an offer he then prepared the offer.

[12] Prior to preparing the offer Mr Vinodh said he again informed Mr Hawes of the list price of \$459,000 and the CV of \$420,000. He told the Tribunal that the agreement had been concluded with a purchase price of \$435,000 by him agreeing to drop his commission. Mr Vinodh says he told Mr Hawes of this fact. He agreed that the following morning Mr Hawes came to the office and received a copy of the agreement. However he denied that he had ever told him not to obtain a LIM. He said that he was never told by Mr Hawes that he only wanted to purchase the property below valuation. His clear understanding was that Mr Hawes wanted a family home situated in Goodwood Heights, Manukau for around \$450,000. He denied that Mr Hawes had ever made an offer on De Havilland Drive. He also denied that he had ever told Mr Hawes that the CV on 10 Andover Way was \$450,000. He says that the only incorrect information on the agreement was the street address number, which was wrongly recorded by himself as a result of an inadvertent error. He denied that he put any pressure on Mr Hawes to reduce the time for the receipt of the LIM or rushed through of the sale of the property. He said that he told Mr Hawes he may wish to seek legal advice prior to making an offer.

[13] Evidence was also given by Aaron Jokhan, Mr Vinodh's partner. Mr Vinodh and he worked together and shared all commissions. He said that he met Mr Hawes first after the agreement was signed and then when he turned up in the office after he had obtained a LIM report for 12 Andover Way rather than 10 Andover Way. He said that he realised that Ram (Vinodh) must have failed to tell Mr Hawes that the letterbox was incorrectly marked and the property was actually legally 10 Andover Way. Mr Jokhan said that he told Mr Hawes that after discussing the problem with the vendor the vendor told him that he had no problems with the purchase not being completed. The vendor told Mr Jokhan that he could tell Mr Hawes that he was welcome to cancel the contract and walk away. Mr Jokhan was adamant he told Mr Hawes this. Mr Hawes denied receiving this information. Mr Jokhan categorically denied that he told Mr Hawes not to obtain a LIM report for the property in discussion.

This concluded the evidence.

[14] The issues for the Tribunal are whether Mr Vinodh in carrying out the conduct set out above is guilty of wilful or reckless contravention of Rule 6.4 and Rule 9.7 of the Real Estate Agents Professional Conduct and Client Care) Rules. Rule 6.4 provides that:

"A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client".

Rule 9.7 provides that "*A licensee must not mislead customers as to the price expectations of the client*".

Discussion

[15] It is undeniable that Mr Vinodh put the wrong address for the property on the Agreement for Sale and Purchase. The Tribunal accept the evidence from Mr Hawes that when he first came to the property he met Mr Vinodh and was told to come to Number 12. Clearly Mr Hawes thought he was purchasing 12 Andover Way and was unlikely to have been (and was) unaware of the fact that the legal description was not for 12 Andover Way.

[16] However the Tribunal must determine whether or not Mr Hawes told Mr Vinodh that he wanted to purchase a property below CV, and what Mr Vinodh told the Mr Hawes about 10 Andover Way's CV and list price. In order to make a finding of misconduct under s 73 we need to find a wilful or reckless contravention of the Rules.

[17] The Real Estate Agents Authority submits that to establish s 73 the agent's conduct must objectively be regarded as intentional or reckless. The Authority submits that the Tribunal do not have to find that the Mr Vinodh knew that his conduct was in breach of the Rules.

[18] Mr Moodley for Mr Vinodh submits that the charge of misconduct is disproportionate to the wrongdoing and referred the Tribunal to a number of cases in which misconduct had been found where the conduct of the real estate agent was been significantly more serious than that of Mr Vinodh. Mr Moodley submitted that

even if Mr Vinodh had contravened the Act in some way the alleged conduct was not serious enough to charge him under s 73. Mr Moodley submitted that the inconsistencies between the evidence of the parties are significant and that there was insufficient evidence to lay a charge. Mr Moodley provided a number of definitions of wilful or reckless conduct and submitted that the conduct of Mr Vinodh did not meet this threshold.

Approach to Charge

[19] The Authority has the burden of proof to prove the charge on the balance of probabilities. If the Tribunal are not certain as to whether this burden has been discharged then it must determine that the charge has not been established.

Approach to Appeal

[20] This case involves an appeal from a decision to lay a charge.

[21] 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)”.

[22] However in the decision of this Tribunal in *Brown*¹ the Tribunal found that in determining an appeal from a decision to lay a charge the Tribunal's task on appeal is to determine that if there was *prima facie* evidence to support the laying of a charge before the matter can be heard by the Tribunal. If not then the appeal will succeed.

[23] In determining an appeal under s 111 the Tribunal has any power to confirm, modify or reverse a determination of the Committee.

Discussion

[24] The Tribunal has considered this matter carefully. It finds that the conduct of Mr Vinodh with respect to the sale to Mr Hawes was sloppy and unprofessional.

¹ [2011] NZREADT 42

Mr Hawes should have had the benefit of written material concerning the current valuation of the property and full information about the price if he so requested it. We accept Mr Hawes' evidence that he did want this information from Mr Vinodh but was only given it verbally. We find that Mr Vinodh's behaviour in writing up an Agreement for Sale and Purchase with the wrong address was in breach of Rule 6.4. Clearly Mr Hawes should have been told that the property labelled "12" was in fact 10 Andover Way.

[25] However on the evidence before us we have been unable to reach a conclusion on the balance of probabilities as to whether or not Mr Vinodh gave incorrect information about the CV to Mr Hawes. We have a high level of suspicion that he did as the CV for 12 Andover Way was \$450,000 (which Mr Hawes thought was the correct CV for number 10). Mr Vinodh himself may have been confused about this and given Mr Hawes the wrong information. However we have not been able to find on the balance of probabilities that Mr Vinodh did in fact deceive Mr Hawes as to the CV. The charge requires the Tribunal to find that false information was given about both the address and the CV. We have not been able to make that finding about the CV and therefore dismiss Charge 1.1

[26] Charge 1.2 requires the Authority to prove that Mr Hawes was given incorrect price information. We consider that it is unlikely and are not satisfied on the balance of probabilities that Mr Vinodh did not tell Mr Hawes the correct price for the property. We therefore dismiss charge 1.2.

[27] We also do not find on the evidence that Mr Hawes made it very clear to Mr Vinodh that he only wanted to make offers on properties that were below CV. The evidence we heard from Mr Hawes and Mr Vinodh confirms that Mr Hawes, a first time New Zealand buyer wanted to buy a property that was reasonably priced in the area in which he wanted to live. He achieved this with the purchase of 10 Andover Way. He was happy with the purchase until he discovered that he had been wrong as to the CV for the property. The price that he paid was within the range of the prices appraised by Ray White for the property and was probably a fair price. The vendor was also happy to allow Mr Hawes to cancel the agreement. We find that Mr Jokhan did tell Mr Hawes this. However the obligation is on Mr Vinodh as a real estate agent to deliver an appropriate level of service to the client and we find that the level of service that Mr Vinodh delivered to Mr Hawes was short of the standard that a reasonable member of the public would be entitled to expect from a reasonably competent licensee and contravenes the Rule 6.4. We find that the Authority have established the facts which make out a breach of this Rule. In addition it is also incompetent. This is the test set out in s.72 – unsatisfactory conduct. However for the reasons set out above this conduct has not been proved on the balance of probabilities and does not reach the level of wilful or reckless contravention of the rules set out in the charge- s.73. We also note that Mr Vinodh was in breach of Rule 9.15 by taking Mr Hawes through the house without an agency agreement. However this does not form part of the charge or appeal.

Findings

[28] We therefore dismiss the charges brought against Mr Vinodh. We do not consider that his conduct was reckless or wilful. However we have found on the facts that there was a breach of R 6.4 and that this breach was at the level of

unsatisfactory conduct under s.72. Therefore we do not allow the appeal but instead we modify the decision of the Complaints Assessment Committee by substituting our own decision by making a finding of unsatisfactory conduct under s 72 of the Real Estate Agents Act 2008 against Mr Vinodh for a breach of Rule 6.4. Our reasons are set out above.

[29] We invite submissions from counsel for the Complaints Assessment Committee and for Mr Vinodh on the appropriate penalty which should be imposed upon Mr Vinodh. We note that our concern is also as to Mr Vinodh's competence English as a real estate agent in Auckland. We would suggest that Mr Vinodh complete an English test to show he is sufficiently competent to converse and write in English, as required by the current Real Estate Agents Authority English standard. This particular test is known as an ELTS test and it is a requirement that foreign salespeople show they have completed the test to a required level as part of their salesperson's application. We request submissions from the parties on this point as part of the penalty submissions.

[30] In accordance with s 113 of the Act the Tribunal advises the parties of the right to appeal this decision to the High Court pursuant to s 116 of the Act.

DATED at WELLINGTON this 7th day of December 2012

Ms K Davenport
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member