

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 76

READT 079/11 and 106/11

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008 and a prosecution pursuant to s.91 of that Act

BETWEEN **THE REAL ESTATE AGENTS AUTHORITY (CAC 10026)**

Prosecutor

AND **Mr X**
(former salesperson)

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr G Denley - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF OUR DECISION ABOUT LAYING CHARGES 30 July 2012

DATE OF THESE CONSENT ORDERS 20 December 2012

COUNSEL

Mr M J Hodge, for prosecutor
Mrs Fiona Guy Kidd, for defendant

DECISION OF THE TRIBUNAL

Background

[1] In our 30 July 2012 decision we dealt with the defendant's appeal against the Authority deciding to lay certain charges set out below. Some early paragraphs of our decision read:

"The Committee's Determination

[3] In its decision of 18 August 2011, the Committee recorded that the charges arise from two complaints made against the appellant/defendant by a Mr C now of Australia. In the usual way, the Committee investigated those complaints, conducted a hearing on the papers and, for present purposes, decided as follows: "In respect of CA 3356769 the Committee is satisfied there is evidence, if accepted by the Disciplinary Tribunal, on which the Disciplinary

Tribunal could reasonably find the licensee guilty of misconduct". The Committee went on to determine that the complaints should be considered by us and recorded that it would frame charges particularising matters and lay them before us, and that has been done.

The Charges

[4] The current two charges read:

"1.1 Following a complaint made by C (complainant), Complaints Assessment Committee 10026 (CAC 20026) charges X (defendant), with misconduct under s.73(b) of the Real Estate Agents Act 2008, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Particulars: In 2006, in advising and/or acting for the complainant on the transfer of his interest in Unit X, building X, X town in exchange for an interest in Unit Y, building Y, X town (transaction), the defendant had a conflict of interest in that he also advised and/or acted for the vendor/transferor of the interest in Unit Y building Y on the transaction and received a commission from both the complainant and the vendor/transferor of the interest in Unit Y building Y.

1.2 CAC 10026 further charges the defendant with misconduct under s.73(b) of the Real Estate Agents Act 2008, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Particulars: In advising and/or acting for the complainant on the transaction, the defendant failed to advise the complainant that long-term returns in respect of the complainant's interest in Unit Y building Y could and/or were likely to prove significantly lower than the returns payable under an initial three-year guaranteed return structure. In particular, he failed to alert the complainant to the fact that the financial projections given ended before the structure contemplated a leasehold rent review and he failed to advise the complainant how important the post-review leasehold rental could be to the viability or otherwise of the investment."

[2] We consider that we then covered the ground comprehensively and the various issues raised, some relating to jurisdiction, and we concluded as follows:

"[46] As we mentioned above, all these issues need to be analysed in the usual way at a substantive fixture at which the appellant/defendant may defend the charges. In terms of the Act, the onus of proof is upon the prosecution but the standard of proof is that of the balance of probability. We do not consider it appropriate to outline our reasoning any further as these charges and the consequential issues need full ventilation and consideration at a substantive trial in the usual way.

[47] *It has not been shown to us that there is no case to answer. Accordingly, the substantive charge will proceed. We direct that, as soon as is reasonably convenient, the Registrar arrange a telephone conference for us to set a timetable towards a fixture.*

Present Stance of the Parties

[3] Accordingly, the substantive prosecution was set down for hearing in February 2013. However, a joint memorandum of counsel has been filed with the registry on 10 December 2012 and reads as follows:

“Joint memorandum of counsel

- 1.1 *The complainant in this matter lives overseas. The complainant is not willing to participate further in this proceeding.*
- 1.2 *The defendant has applied to have the charges struck out. The Committee accepts that it is unable to proceed with the charges without evidence from the complainant.*
- 1.3 *In all the circumstances of this case the Committee accordingly seeks leave to withdraw the charges. The parties are agreed that costs will lie where they fall.*
- 1.4 *There is presently an interim suppression order in place in favour of the defendant. The defendant seeks a permanent suppression order.*
- 1.5 *The defendant’s primary concern is that the record of the proceedings, including the Tribunal’s decision on his appeal, contain allegations against him which he has not had the opportunity of testing at a hearing.*
- 1.6 *The defendant is no longer practising as a licensee and does not hold a licence under the Real Estate Agents Act 2008.*
- 1.7 *An order prohibiting publication of the defendant’s and complainant’s name and identifying details, including the names of the properties involved namely “building X” and “building Y”, the development’s manager namely “B”, the location namely X town, the name of the agency involved “XX Limited” and the name of the other party to the transaction namely “YY Limited/ZZ Limited (Q), is therefore not opposed.*
- 1.8 *The parties seek orders in accordance with this memorandum.”*

Our Conclusions

[4] We have decided to make orders in accordance with that consent memorandum so that we order as follows:

- [a] By consent the said charges are hereby withdrawn and on the basis that costs lie where they fall;
- [b] The interim suppression order of 12 February 2012 (confirmed on 14 September 2012) in favour of the defendant is hereby made permanent

so that we prohibit the publication of the defendant's and complainant's respective names or of any details which might lead to their identification. This prohibition covers both the appeal and the prosecution noted in the above entitlement.

More particularly we include in that prohibition, publication of the names of the properties involved, namely, "*building X*" and "*building Y*", the development's manager, namely, "*B*", the location, namely X town, the name of the agency involved, namely, "*XX Limited*", and the name of the other party to the transaction, namely, "*YY Limited/ZZ* or "*Q*". Any current publication is to be forthwith amended accordingly.

Judge P F Barber
Chairperson

Ms J Robson
Member

Mr G Denley
Member