

Decision No: [2012] NZREADT 77

Reference No: READT 025/12

IN THE MATTER OF

of a charge made under s.91 of the Real Estate Agents Act 2008

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC 20002)**

AND

JOHN RICHARD LLOYD

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairman
Ms J Robson - Member
Mr J Gaukrodger - Member

APPEARANCES

Mr L Clancy for the Complaints Assessment Committee
Mr Weymouth for the Defendant

HEARD at AUCKLAND on 7 December 2012

**INTERLOCUTORY APPLICATION
TO STRIKE-OUT THE CHARGE**

Introduction

[1] Mr Lloyd faces two charges under s 73(a) of the Real Estate Agents Act 2008. The complaints arise over the sale of a property owned by a company, Elephant Investments Limited in which Mr Lloyd was a shareholder and director. The property is situated in Tirau and was sold by an Agreement for Sale and Purchase dated 31 March 2007.

[2] Mr Lloyd seeks to strike-out Charge 1(a). Charge 1(a) is an allegation that Mr Lloyd forged the initials of the complainants on a document dated 7 May 2007. This document is called a Memorandum of Understanding. Mr Weymouth submits that as Mr Lloyd was not a licensed salesperson at the date of the creation of the document his actions could not give rise to any charge under the Act. Accordingly this charge should be struck-out.

[3] A similar application is made for Charge 2. Charge 2 is an allegation of misrepresentation as to whether or not resource consent had been granted for the property. Mr Weymouth submits that this allegation could never be described as serious negligence or disgraceful conduct under s 73(a). He submits that the most it could amount to would be unsatisfactory conduct under s 72. Mr Weymouth urges the Tribunal to refer this charge back to the Complaints Assessment Committee for determination as to whether or not it amounts to unsatisfactory conduct under s 72 of the Real Estate Agents Act 2008.

[4] Mr Weymouth also objects to the application by the Real Estate Agents Authority to amend the charge. The Real Estate Agents Authority wish to amend the charge by amending Charge 1(a) so that it now reads:

“The initials of the complainants on a document dated 7 May 2007 described as a Memorandum of Understanding which was relied upon by the defendant in October/November 2008 when he was a licensee”.

[5] Mr Weymouth submits that no amendment to the charge can be made until the actual hearing date pursuant to Rule 13 of the Real Estate Agents Act (Complaints and Discipline) Regulations 2009. This matter can be dealt with shortly. The Tribunal does not accept this submission. The Tribunal has power under s 105 to regulate its procedures as it thinks fit. This section gives it the power to amend if needed. The power to amend a charge has long been regarded as something that a regulatory body may do. The caveat on this right is that any amendment must not unduly prejudice the defendant and/or the conduct of the hearing. This is embodied in Rule 13 of the Real Estate Agents Act (Complaints and Discipline) Regulations 2009. However to limit the application of this Rule (when read in conjunction with s 105) by permitting an amendment only during a hearing would be a breach of natural justice. This is because limiting the power to amend an amendment at the hearing only, would seriously prejudice the defendant and his/her ability to respond to the amendment. If made now the amendment to the charge will not unduly prejudice the defendant. Mr Weymouth could not point to any actual prejudice. We therefore find that the Tribunal has power to amend a charge. Accordingly the Tribunal amend Charge (1)(a).

[6] There are two remaining issues:

- (a) Should Charge 1(a) be struck-out as Mr Lloyd was not licensee in May?
and
- (b) Should Charge 2 be sent to the CAC for further determination?

[7] We now turn to consider whether or not Charge 1(a) can apply to the conduct of Mr Lloyd. It is accepted that Mr Lloyd did not become licensed as a real estate agent until June 2007. The allegation is that the Memorandum of Understanding was prepared by the respondent Mr Lloyd and his wife and sent to the complainants on or about 7 May 2007. The complainants say they never signed this Memorandum of Understanding. The solicitor for Mr and Mrs Lloyd sent a signed Memorandum of Understanding to the solicitors for the complainants on 4 November 2008 and referred then to the complainant's signatures on the Memorandum. This was the first time the complainants say that they had seen the signed Memorandum. They deny signing it. Mr Lloyd is charged with adding the forged signatures. Did this allegation arise so as to constitute the elements of the charge prior to Mr Lloyd

becoming a real estate agent? The two options are that the date of the initial document was the date of offence (ie 7 May 2007) or the date it was tendered as a document. Mr Weymouth submits that the first step in the Tribunal's enquiry must be to determine whether or not at the time the conduct alleged the defendant was licensed under the Real Estate Agents Act 1976 as a salesperson. He submits that Charge 1(a) says that an element of the charge is that the document was dated the 7 May 2007. He submits that this is the date of the offence. As at 7 May 2007 the defendant was not a real estate agent and therefore could not be subject of a charge. He submits that it is nonsensical to suggest [as the CAC have] that the date that the initials were allegedly forged is less important than the date on which the allegedly forged document was used.

[8] The Complaints Assessment Committee submit that the date on which the forgery took place was unknown but that it was not until the allegedly forged document was used that the alleged misconduct took place. This was well after the date on which Mr Lloyd became an agent.

[9] In a strike out the Tribunal must proceed on the basis that a charge should be struck out if, after accepting that the facts are as alleged by the complainant, there is still no case to answer see *AG v Prince* [1998] 1NZLR 262.

[10] If the conduct took place before Mr Lloyd became a real estate agent then he could not be charged and the charge should be struck out. The Tribunal accept that the date on which the forged initials were allegedly put on the document is less relevant than the date on which the document was put forward as being genuine. This later date is the date of the commission of the offence as this is when the document is "used" for improper purposes. The evidence of the complainant is that this took place when they received a letter from the respondent's solicitors in or about October/November 2008. At this time Mr Lloyd was an agent. It may be when all the evidence is heard that Mr Lloyd succeeds in establishing that if there was a forgery (which is denied) that this was prior to his becoming a licensed real estate agent, in which case the charge must fail. However on the basis of the information we have at the moment this charge is not inherently flawed and therefore the Tribunal decline to strike out Charge 1(a).

[11] There has been no application in respect of Charge 1(b).

Charge 2: Not serious enough?

[12] Mr Weymouth submits that this charge is so trivial that even on its highest could never amount to serious negligence. He submits that it should be sent back to the Complaints Assessment Committee for determination as to whether s 72 applies. Part of the Tribunal's function is to ensure the efficient administration of justice. The Tribunal does have powers to make orders under s 72 if it considers after hearing a charge that such orders are required. An alleged misrepresentation could in some circumstances be serious negligence. In the context of the facts in this case where there are allegations of forgery, the misrepresentation could be sufficiently serious to warrant a finding under s 73. We will not know conclusively until trial. The Tribunal considers it would be unduly expensive to require the complainants and Mr Lloyd to undergo another investigation/determination with the CAC when all matters relating to this charge and the surrounding events could be heard together by the Tribunal.

[13] The Tribunal considers that in the circumstances of this case both charges should be heard together. The Tribunal therefore dismisses the strike out application for Charge 2.

[14] 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 21st day of December 2012

Ms K Davenport
Chairperson

Ms J Robson
Member

Mr J Gaukrodger
Member