

Decision No: [2013] NZREADT 10

Reference No: READT 052/11

**IN THE MATTER OF**

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

**BETWEEN**

**REAL ESTATE AGENTS  
AUTHORITY (CAC 10006)**

**AND**

**GARY DAVID ROBERTSON**

First Defendant

**AND**

**GAVIN BARRY HAMILTON**

Second Defendant

**AND**

**GARY RUSSELL KENNY**

Third Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

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

**APPEARANCES**

Mr M J Hodge, Counsel for the Committee  
Mr R J B Hern and Mr A P Colgan, Counsel for the defendants

**HEARD** at Auckland on 6 December 2012

***Introduction***

[1] In September 2009 the complainants Mr Hughey and Ms Byun listed their property at 16 Chard Place, Mission Heights, Auckland for sale with the Professionals Howick (Star Real Estate Ltd). The first defendant Mr Robertson was their listing agent, the second defendant Mr Hamilton is the licensee for Star Real Estate (branch manager) and the third defendant Gary Kenny is an agent who works at Star Real Estate and who presented an offer to the complainants. Unfortunately the property was sold at mortgagee sale. The discovery that the complainants were facing a mortgagee sale raised concerns in Mr Hamilton about a potential GST liability and he set about trying to establish if there was a GST liability. He was concerned that Mr Hughey and Ms Byun might lose a significant sum in GST. The issues in this case arise from the way these inquiries and concerns were actioned by Star Realty.

### ***The evidence for the Authority***

[2] Mr Hughey told the Tribunal that he and his wife had listed their property for sale with the Gary Robertson of the Professionals in September 2009. They had a valuation (done in November 2009) on the house for \$780,000. However they insisted on a listing price of \$899,000 which is where they believed that the property stood in the market. Mr Hughey told the Tribunal that Mr Robertson had said that he felt this was too much money for the property but listed it in accordance with their instructions. The property was listed without any serious enquiry for about two months. Mr Hughey then said that in about November 2009 the Westpac bank told them they were going to commence mortgagee sale proceedings and that he told Mr Robertson this. He said that Mr Robertson was sympathetic to his dilemma and said that he would try and help him. Mr Hughey said that Mr Robertson asked how much money he owed the bank so that he could see whether he could get enough from the sale to repay the loan. Mr Hughey said he told him it was about \$840,000. Mr Hughey also said that Mr Robertson asked him the name of the recovery manager at Westpac saying he might know that person. Mr Hughey did not disclose this person's name as he felt that this was an unprofessional question and information that was personal to him and his wife.

[3] Mr Hughey said that following this initial phone call Gary Robertson rang again in November and told the couple that he might have an offer for them to consider. In this conversation he also raised the issue of possible GST liability (for the Hughey's) if the house was sold by mortgagee sale. Mr Hughey said that Mr Robertson said that if the property was sold by mortgagee sale then they would "*lose the GST value*" on the house. His evidence was that Mr Robertson said that not many people knew about this but that it "*was true*" but that they should not contact the bank about it as they would not want them to know this fact. Mr Hughey said that he and his wife were highly anxious about this information and wanted to make their own enquiries before speaking with the bank manager. He said that he and his wife lost a "*lot of sleep*" over this statement. They worked out that if the property was sold for about \$780,000 then they would lose approximately \$86,000 in GST. He said that a few days later he had a call from Gavin Hamilton, the manager at Star Real Estate who reiterated that there was an offer to consider and also told them about the GST loss on mortgagee sales. Mr Hughey said that he told them that even though the offer that was coming in was low they should consider it and take it to the bank as they would lose much more at a mortgagee auction if they had to pay GST.

[4] Mr Hughey said that he and his wife were very distressed but said that they would consider the offer. On Saturday 14 November Mr Gary Kenny, the third defendant came around with an offer. Mr Kenny presented the offer for \$740,000. This offer was from Mr Kenny's daughter and son-in-law. Mr Kenny had calculated the amount of money that the couple would lose on a mortgagee sale if the GST was taken off the sale price. He said that even if the house was sold for \$840,000 they would lose approximately \$93,000 leaving them with only \$747,000. Mr Hughey said he did not countersign the offer as it was far too low. He then contacted his bank and found that they would not be losing GST on the mortgagee sale.

[5] Mr Hughey told the Tribunal that they were very upset by this behaviour by Star Real Estate and felt that they were being tricked into accepting a low offer with the false information about the GST. He spoke to Mr Kenny on 19 November and told him that he was going to lay a formal complaint with the Real Estate Agents

Authority. He subsequently did so. The house was subsequently sold at mortgagee sale for \$793,000.

[6] Heesoo Byun also gave evidence and told the Tribunal that the conversation about the GST with Mr Robertson was on speakerphone while she and her husband were in the car. She said that she heard Mr Robertson say that the GST would be lost but not to contact the bank. She said that she did not meet with Mr Kenny but was in the house when he came around with an offer. She said that she eventually contacted the bank and found that the information about the GST was not correct and that they would not lose the GST on a mortgagee sale. She confirmed how distressed the couple had been over the way in which the information about the GST had been given to them.

### ***Evidence for the Defendants***

[7] The evidence given by the defendants is essentially similar. However Mr Robertson denies that he ever told Mr Hughey and Mrs Byun not to contact the bank. He says, on the contrary, he told Mr Hughey to clarify the GST position with their bank. He also said that he was genuinely concerned that there might be a loss of GST on a mortgagee sale and simply wanted to do his best for the couple. Mr Robertson said he found out about the mortgagee sale only when one of his colleagues told him that the property was listed for mortgagee sale with Barfoot and Thompson. He said he was somewhat annoyed to discover this as the vendors had not told him themselves and it was his view they would have known about the potential for a mortgagee sale for some time. He said that he contacted Mr Hughey about the mortgagee sale and did raise the issue of GST but told them not to panic but to clarify the GST position with the bank. He said he was aware that Mr Kenny's daughter and son-in-law were interested in the property. He agreed that they should prepare an offer of \$740,000 [with the appropriate disclosures about the purchaser being a relative of the agent, pursuant to ss 63 and 64 of the Real Estate Agents Act 1976]. He said he did not have anything more to do with the complainant after this call but did ring Mr Hughey after the mortgagee sale was completed to say that he was pleased the property had been sold.

[8] Mr Hamilton said that he was the licensee branch manager and shareholder of Star Real Estate Limited. He said that in late 2008 he was concerned to ensure that Star Real Estate were taking steps to become compliant with the Real Estate Agents Act 2008, which was just about to come into force. He told the Tribunal that they had received a lot of information about the need for agents to alert vendors and purchasers of any particular problems with a sale of property. He said that when he was told by Mr Robertson that 16 Chard Place was to be sold by mortgagee auction he recalled that he had discussions with the ANZ Recovery Unit on an unrelated matter about the potential GST liability on a mortgagee sale. He raised this with Mr Robertson and told him to ask Mr Hughey to find out the correct position. He said that he rang Mr Hughey and offered to call the bank officer in charge of the sale to confirm the GST position. He also mentioned to Mr Hughey that a possible offer might be coming in and he said that they should consider it, given the potential loss on a mortgagee sale if GST was deducted. He also said that he told Mr Kenny not to leave the offer with Mr Hughey and Ms Buyn until the GST position was clarified.

[9] The Tribunal then heard from Mr Gary Kenny. Mr Kenny had been working as a real estate agent for only six months at the time of these events. He had been showing properties to his daughter and son-in-law and they had been through the

open home for Chard Place. In early November he told his daughter that there was now a mortgagee auction and that they should consider making an offer. Mr Kenny's daughter and her husband went through the property again during an open home conducted by Barfoot and Thompson. They wished to make an offer. The offer was prepared in the second week in November. He said he was told by Mr Hamilton how to complete the offer so that it complied with ss 63 and 64 of the Real Estate Agents Act 1976. However, when giving evidence he did not appear fully to appreciate the fact that a valuation was required to comply with his obligations under ss 63 & 64 of the Act (and as was provided for in the Agreement) rather than being simply a step that his daughter needed to take to obtain finance from her bank. He told the Tribunal that he went to see Mr Hughey and showed him the Agreement for Sale and Purchase but told him that Star Real Estate were not prepared to present the offer until he had clarified the GST position. Mr Kenny told Mr Hughey however that he should consider the offer as if the property was sold at mortgagee sale and the GST lost then the offer that he was presenting would be better than the amount that he would get at a mortgagee sale. He gave Mr Hughey the calculations he had done on the GST payable. He told him to take the offer to the bank. He also told the vendors that the offer was just an opening offer. When questioned by the Tribunal Mr Kenny said that he wasn't acting for the vendor, he was acting for the purchaser, his daughter. He said his obligation was to his daughter as purchaser to see if he could achieve a sale at a lower price, given the potential GST liability. He told the Tribunal that he left the property with the agreement and called the vendor on the 18<sup>th</sup> to ask about progress (and GST) and was told that a complaint would be made.

### ***Response to the Charge***

[10] The Tribunal now have to consider this evidence in light of the charge which is:

Following a complaint made by David Hughey (**complainant**), Complaints Assessment Committee 10006 charges the defendants with misconduct under s 73(a) of the Real Estate Agents Act 2008 (**the Act**), in that their conduct, in putting pressure on the complainant and his wife, Heesoo Byun, to accept an offer to purchase Ms Byun's property by providing them with misleading advice, constitutes seriously incompetent or seriously negligent real estate agency work.

#### **Particulars**

The defendants work for Star Real Estate Limited trading as The Professionals, Howick (**The Professionals**).

The first defendant is a licensed agent under the Act. The second defendant is a licensed branch manager under the Act. The third defendant is a licensed salesperson under the Act.

On or about October 2009, the complainant and Ms Byun appointed the first defendant of The Professionals as their agent to sell Ms Byun's property at 16 Chard Place, Mission Heights, Manukau (**property**).

The first defendant appraised the value of the property at around \$790,000.

The complainant and Ms Byun chose to list the price for the property at \$899,000. They subsequently increased the listing price to \$929,000. The Professionals marketed the property in accordance with the listing price.

The property did not sell.

On or about late October 2009 the mortgagee bank in respect of the property took action to exercise its right of mortgage sale in respect of the property. The mortgagee appointed Barfoot & Thompson as the agency to sell the property. This meant that if Barfoot & Thompson sold the property on behalf of the mortgagee, The Professionals would not be entitled to receive commission on the sale.

The first defendant became aware that the mortgagee had appointed Barfoot & Thompson to sell the property.

At a meeting of The Professionals staff, including the second and third defendants, the first defendant advised the meeting that the mortgagee had appointed its own agent to sell the property. The first defendant asked the meeting for any purchaser interest to be put forward.

The third defendant advised that his daughter and son-in-law were interested in the property.

About this time, the first defendant telephoned the complainant and provided misleading advice that if the property was sold by the mortgagee sale, GST would be deducted from the sale price and that the complainant and Ms Byun should not contact the mortgagee regarding this GST advice (**first defendant's misleading advice**).

A few days later, the second defendant called the complainant and provided misleading advice that if the property was sold by mortgagee sale, GST would be deducted from the sale price and that the complainant and Ms Byun should consider this if they were presented with an offer from the third defendant (**second defendant's misleading advice**).

On or about 14 November 2009, the third defendant presented an offer to the complainant and Ms Byun from his daughter and son-in-law to purchase the property for \$740,000 (**offer**).

At the time of presenting the offer, the third defendant provided misleading advice that if the property was sold by mortgagee sale, GST would be deducted from the sale price and that even if the property sold for \$840,000, approximately \$93,000 would be deducted from that price by way of GST which would mean the complainant and his wife would only receive \$747,000 from the sale (**third defendant's misleading advice**). The third defendant suggested the complainant and Ms Byun take the offer to the mortgagee to check whether it was acceptable to the mortgagee.

The complainant and Ms Byun felt pressure to accept the offer as a result of the defendants' misleading advice. Ms Byun's mortgagee subsequently advised that if the property sold by Mortgagee sale, GST would not be deducted from the sale price and the offer was not accepted.

The property sold for \$793,000 by mortgagee sale.

## ***Issues***

[11] The issues are therefore:

1. Did Mr Robertson tell Mr Hughey not to contact his bank and that GST would be payable?
2. Did Mr Hamilton stress the potential GST loss and give misleading advice and urge the complainants to consider the lower offer?
3. Did Mr Kenny give misleading advice about GST?

## ***Discussion***

[12] Mr Hern submitted that the defendants were motivated by desire to simply provide Mr Hughey and Ms Byun with information and not by any attempt to get a 'jump' on the mortgagee sale. He submitted that the defendants wanted to ease the path of the vendors in difficult circumstances. He submitted that the offer that was presented was not too low, it was only 5.5% less than what the property was worth. He submitted that the defendants were not unreasonably expecting the vendors to go and find out about the GST issue instead of putting their heads in the sand. He submitted that the conduct of the defendants was never serious negligence under s 73 or unsatisfactory conduct under s 72.

[13] He also submitted that the defendants properly raised the issue with Mr Hughey and Ms Byun and advised them to clarify the GST issue with their bank. He submitted that Star Real Estate were not prepared to present a formal offer to Mr Hughey and Ms Byun until the GST matter had been resolved. He submits that this is evidence of being a good real estate agent rather than evidence of any breach.

[14] Mr Hodge for the Complaints Assessment Committee submitted that after the evidence had been heard there was very little difference between the evidence of all the parties. He submitted that the Tribunal had to assess a number of witnesses but by and large the defendants accepted what was said by the complainants. (Save for the evidence about whether or not Mr Robertson told Mr Hughey not to go to the bank). Mr Hodge submitted that the way in which the GST issue was raised alarmed the vendors and the defendants should simply have raised the potential for GST loss and then have left the issue for the vendors. But instead, he submitted that three successive licensees raised the GST liability. Further the offer was not allowed to be put to them until the GST issue had been dealt with. He also submitted that the price in the agreement was clearly linked to the GST issue and that Mr Kenny acknowledged he was acting for the buyer, whereas his obligation was to act in the best interest of the vendor. He concluded by submitting that the conduct of the defendants did meet the test of serious negligence.

[15] Section 73 requires the Complaints Assessment Committee to approve on the balance of probabilities that the actions of the agent(s) were seriously negligent or seriously incompetent.

[16] The test is objective. The Tribunal must determine whether the respondents have breached their obligations. The views of the complainants and respondents, while relevant are not determinative of this test.

[17] We further note that the expert for the defendant, Mr Morley and the expert for the plaintiff Ms Box both agree that in some instances a mortgagee sale may attract GST (if the mortgagee is in possession) but it is a complex issue. They both agree that an agent should recommend to a client that they seek advice about whether or not GST is payable.

[18] The question is do the facts illustrate a breach of s 73 on an objective analysis? In *CAC v Downtown Apartments Limited and Anor* [2010] NZ READT 06 this Tribunal held as follows in relation to s 73 of the Act, and s 73(a) in particular:

“49 There are now two disciplinary levels under the 2008 Act:

- a. Unsatisfactory conduct – Complaints Assessment Committees and the Disciplinary Tribunal;
- b. Misconduct – Disciplinary Tribunal only.

Leaving s 73(d) (criminal convictions) to one side, there is a clear progression from unsatisfactory conduct under s 72 to misconduct under s 73 of the 2008 Act:

- (a) Unacceptable conduct (as regarded by agents of good standing) s 72(d) → disgraceful conduct (as regarded by agents of good standing or reasonable members of the public) (s 73(a));
- (b) Negligence/incompetence (s 72(a) and (c)) → serious negligence/Incompetence (s 73(b));

- (c) Contravention of the Act/Regulations/Rules (s 72(b)) → wilful or reckless contravention of the Act/Regulations/Rules/other Acts (s 73(c)).
- 50 At a high level of generality, therefore, it may be said that s 72 requires proof of a departure from acceptable standards and s 73 requires something more – a marked or serious departure from acceptable standards.
- 55 The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word. But s 73(a) qualifies the ordinary meaning by reference to the reasonable regard of “agents of good standing” or “reasonable members of the public” (emphasis added).
- 56 The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess (see *Blake v Preliminary Proceedings Committee of the Medical Council of New Zealand*, 1997, 1 NZLR 71).
- 57 The “reasonable person” is a legal fiction of the common law representing an objective standard against which individual conduct can be measured but in s 73(a) that reasonable person is qualified to mean an agent of good standing or a member of the public.
- 58 So while the reasonable person is a mythical ideal person the Tribunal can consider *inter alia* the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the first defendant.
- 59 So in summary the Tribunal must find on a balance of probabilities that the conduct of the first defendant represented a marked and serious departure from the standards of an agent of good standing or a reasonable member of the public.”

[19] Any finding of professional misconduct is a serious thing for an agent and the Tribunal must be satisfied that such a finding of misconduct is warranted. The Tribunal needed to be satisfied on the balance of probabilities that the charge has been made out and that the conduct complained of warranted disciplinary sanction. If the Tribunal considers s 73 is not established but still considers a disciplinary sanction is required it can make a finding under s 72. The Tribunal must also ensure s 172 is complied with as this case predates the coming into force of the Real Estate Agents Act 2008. In this case all the defendants could have been complained about under the Real Estate Agents Act 1976 and the Tribunal may consider the charges.

[20] The GST liability assumed enormous importance to the three defendants and appeared objectively to become a tool for attempting to persuade the complainants to sell their home at a lower value when they were already under financial stress. The defendants say they were intending to do nothing more than ensure that the GST position was clarified but viewed objectively they put pressure on the complainants to clarify the situation. The only reason why this could have been important to the defendants was because of the offer that Mr Kenny intended to make and to try and ensure a sale. He acknowledges this.

[21] Having considered all of these matters and weighed up the facts and the obligations on the defendants the Tribunal finds as follows:

Charge against Mr Robertson

- (i) The Tribunal dismiss this charge. While Mr Robertson was the listing agent he played a relatively minor role in the events which unfolded. We do not find on the balance of probabilities that he told Mr Hughey not to contact his bank to

ascertain the GST position. Accordingly the Tribunal dismiss all charges against Mr Robertson.

(ii) Charge against Mr Hamilton

We find that Mr Hamilton was aware that with the changes in legislation that if he knew about potential concerns then he should draw them to the attention of the vendor. We accept that he raised the GST issue with Mr Hughey for this purpose. However he urged Mr Hughey to consider Mr Kenny's low offer. He did not consider that in doing this there was any conflict of interest between his obligation to act for the vendors and in assisting Mr Kenny's daughter in obtaining the property at a lower price because of the potential GST risk. Further Mr Hamilton instructed Mr Kenny that the offer was not to be left with the vendors. Star Real Estate had no authority to do this and seem to have misunderstood their obligations. Their obligation was to the vendor and the issue of GST was irrelevant to this and to presenting and leaving with the vendors an offer. Mr Hamilton is also responsible as a manager and supervisor of Mr Kenny, who had only had six months' experience at that time. Mr Hamilton did not ensure that Mr Kenny did understand his obligations in this sale [i.e. how to balance his obligations to vendor and his personal obligation to his daughter].

[22] The Tribunal do not find that Mr Hamilton was guilty of serious negligence under s 73 but make a finding of unsatisfactory conduct under s 72. The Tribunal find that he assisted Mr Kenny in the preparation of an offer (and urged the vendors to consider it) which in all the circumstances was a low offer (it was well below the mortgagee sale price). He subsequently instructed Mr Kenny not to leave the offer with the vendors which appeared to be a clear misunderstanding of the agent's role. We find that the agency should have raised GST and left it with the vendors. The offer should have been presented to the vendors who could have accepted or rejected it. Mr Hamilton was the architect of this approach and this conduct amounts to unsatisfactory conduct.

[23] Under s 172 if Mr Hamilton is found guilty he can face a maximum penalty up to \$750 for his conduct under the 1976 Act. In the circumstances we impose a fine of \$250 on Mr Hamilton.

*Mr Kenny*

[24] The Tribunal find that Mr Kenny the third defendant was the most culpable in this case but because he was a relatively new agent he was reliant upon the advice he received from Mr Hamilton. However he still does not seem to appreciate who he should have been representing. An agent, even a new one, should understand this fundamental principle. His obligation is to the vendor. The Tribunal find that the advice he gave to the vendors was slanted in such a way as to make them consider the low offer because of a GST loss rather than to consider the offer on its own merits. The fact that he worked out the GST loss and how much an offer would have to be at mortgagee sale to beat this offer had the effect of putting pressure on the vendors. To add to the pressure he took the offer away. We find that this was unsatisfactory conduct. However under s 172 we are unable to impose any penalty upon Mr Kenny as he could not have been penalised under the 1976 Act as a salesperson and accordingly we impose no penalty on Mr Kenny.

[25] 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 24th day of January 2013

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Ms K Davenport  
Chairman

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Ms J Robson  
Member

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Mr J Gaukrodger  
Member