

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 37

READT 006/12

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

BETWEEN **PETER J STRATTON**

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20006)**

First respondent

AND **BRENT A MATHEWS**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD at WELLINGTON on 8 March 2013

DATE OF DECISION 13 May 2013

COUNSEL

Mr A N Isac for appellant/licensee
Mr R M A McCoubrey for the Authority
Mr G A Paine for the second respondent complainant

DECISION OF THE TRIBUNAL

Introduction

[1] On 19 January 2012, the Authority (through its Complaints Assessment Committee 20006) found that the licensee appellant, Mr Stratton, engaged in unsatisfactory conduct when his lawyer demanded that the complainant, Mr Mathews, pay legal fees associated with the underlying Tribunal proceedings referred to below. Mr Stratton now appeals the Committee's decision.

Factual Background

Underlying Proceedings

[2] Messrs Mathews and Stratton have an acrimonious history which has been the subject of Real Estate Agents Disciplinary Tribunal, District Court and High Court proceedings.

[3] In 2007 Mr Mathews and his then wife, Ms Capenerhurst, separated and wished to sell their farm. Mr Mathews asked Mr Stratton (who worked as an agent for CD Realty (PN) Ltd, a franchise of Bayleys) to act as the agent on the sale. Mr Mathews signed an agency or listing agreement with that company on 27 October 2007. Ms Capenerhurst did not sign that agreement.

[4] Clause 4 of that listing agreement provided, among other things, that commission was payable if the property was sold directly or indirectly by the agent or through the introduction of the agent. Clause 5 provided that anyone signing the agreement warranted that: "5. ... if not the sole owner/s of the property we have the authority of all the vendor(s)/Lessor(s) to enter into this contract."

[5] After various negotiations, Mr Mathews bought his wife's share in the property through a s.21 Property (Relationships) Act 1976 agreement.

[6] A dispute then arose about whether commission was owed to Mr Stratton on the s.21 transaction. The District Court found that it was because, it said, Mr Stratton was instrumental in organising and brokering the sale between Mr Mathews and Ms Capenerhurst. This was upheld by the High Court on appeal. In addition, both decisions found that, because only Mr Mathews signed the agreement, the real estate agency was entitled to seek the entire commission from Mr Mathews only.

Tribunal Proceedings

[7] Following those decisions, Mr Mathews complained to the Real Estate Agents Authority about Mr Stratton's conduct. He argued that Mr Stratton should have ensured that Ms Capenerhurst's signature was on the listing agreement and/or that Mr Stratton should have explained to Mr Mathews the impact for him of her not signing the agreement. However, Complaints Assessment Committee 10062 decided take no steps on the complaint; and this was upheld by this Tribunal on 26 August 2011 in [2011] NZREADT 22.

The Present Case

[8] On 18 October 2011, Mr Mathews' counsel tendered a cheque to Bayleys Real Estate for \$6,474.25. This payment related to a costs order made against Mr Mathews during the course of High Court bankruptcy proceedings brought against him by Bayleys related to the said underlying proceedings. The cheque was tendered as "*full and final settlement of all matters*" between Mr Mathews, Bayleys and Mr Stratton and his real estate agency company so that, if accepted, "*no further claim of any sort whatsoever*" could be made against Mr Mathews.

[9] On 26 October 2011, counsel for Mr Stratton wrote to Mr Mathews' lawyer requiring payment of legal fees totalling \$24,479.02 incurred by Mr Stratton from his solicitors in relation to the Tribunal proceedings. The letter stated that that payment was due in accordance with cl.8 of the listing agreement which reads:

"8 We hereby indemnify and agree to hold indemnified, Bayleys, its servants and agents, against all costs, damages, expenses, liabilities or proceedings whatsoever which may arise from the agency."

[10] The letter continued that the cheque for \$6,474.25 was not accepted as full and final settlement of all claims and was accepted only as payment of the High Court

costs award for the bankruptcy proceedings; and that Tribunal proceedings were “*entirely separate*” to the bankruptcy proceedings.

The Committee’s Decision of 19 January 2012

[11] The Committee outlined cl.8 of the agreement (set out above) and considered whether the claim for legal fees amounted to unsatisfactory conduct or misconduct in terms of the Real Estate Agents Act 2008 (“the Act”). The Committee found that:

- [a] because the claim for legal fees was made pursuant to a clause in the listing agreement, the issue was whether the signing of that agency agreement constituted “*real estate agency work*” in terms of s.4 of the Act and that;
- [b] the signing of the agreement was “*real estate agency work*” because the parties signed the agreement to bring about a transaction; and
- [c] notwithstanding that Mr Stratton’s basis for claiming is contractual under the agreement, the inclusion of such a clause is a breach of Rule 9.12 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (“the Rules”). That Rule is set out below.

Relevant Sections of the Act

[12] The offences of “*unsatisfactory conduct*” and “*misconduct*” are respectively defined in ss.72 and 73 of the Act as follows:

“72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) is incompetent or negligent; or*
- (d) would reasonably be regarded by agents of good standing as being unacceptable.*

“73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee’s conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
- (c) consists of a wilful or reckless contravention of—*

- (i) *this Act; or*
- (ii) *other Acts that apply to the conduct of licensees; or*
- (iii) *regulations or rules made under this Act; or*
- (d) *constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee."*

DISCUSSION

Does r.9.12 apply to the Listing/Agency Agreement?

[13] There is no dispute that arranging and entering into the listing agreement by the appellant was "*real estate agency work*". The question is the application to that conduct of Rule 9.12 which provides:

"9.12 An agent must not impose conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent."

[14] The Act and the Rules came into force on 17 November 2009. The agreement between Messrs Mathews and Stratton (for Bayleys) was signed on 27 October 2007. Accordingly, r.9.12 did not apply at the time the agreement was entered into. Because of this, the inclusion of cl.8 of the agency agreement cannot of itself amount to unsatisfactory conduct under the 2008 Act.

[15] Of course, that is not to say that the inclusion of such a clause (as clause 8 of the agency agreement) will never amount to a breach of r.9.12 of the Rules. However, because r.9.12 does not apply to the signing of the listing agreement in issue here, we need not make a decision on that matter for this appeal.

The Demand for Payment of Legal Fees

[16] The said demand for payment of \$24,479.02 legal fees by Mr Stratton's (or Bayley's) counsel was made on 26 October 2011. Accordingly, this is conduct which occurred under the 2008 Act; that statute applies; and the demand for payment of those legal fees must be judged against it.

[17] It is put that the issue now before us is whether the demand for payment of legal fees can amount to unsatisfactory conduct pursuant to, and as defined in, s.72 of the 2008 Act, or whether, pursuant to s.73 of the 2008 Act, the Committee should have referred a charge of misconduct to us. Of course, it would also be open to us to find no guilt flowing from the appellant's conduct now in issue.

Unsatisfactory Conduct

[18] A licensee can only be found guilty of unsatisfactory conduct under s.72 of the Act if that licensee's unsatisfactory actions are done while carrying out "*real estate agency work*".

[19] Mr McCoubrey submitted for the Authority that, although "*real estate agency work*" can continue after settlement of a transaction, in the circumstances of this case the demand for payment of legal fees was not, itself, "*real estate agency work*". We agree. It seems to us that the real estate transaction of the second respondent in

purchasing in his wife's share in the farm had long been completed prior to the appellant's claim for the \$24,479.02 legal fees.

Misconduct

[20] The question was raised whether the demand for those legal fees may be seen as misconduct. This was not the finding of the Committee, but we briefly address it.

[21] A licensee can be found guilty of misconduct for conduct which does not strictly amount to "*real estate agency work*"; refer s.73 of the Act.

[22] It is a matter for us whether the demand of Mr Stratton's solicitor for payment of the legal fees may amount to misconduct by Mr Stratton and/or Bayleys under the 2008 Act.

[23] If we consider that a charge of misconduct could have been referred by the Committee to our Tribunal, we should only interfere with the Committee's decision not to refer a charge if satisfied that the Committee made an error of law or principle, took into account irrelevant considerations, failed to take account of relevant considerations, or if the decision is plainly wrong; refer *Dunn v Real Estate Agents Authority (CAC 10043)* [2012] NZREADT 56.

[24] We deal with that issue below.

Natural Justice Issues

[25] Mr Stratton submits that his right to natural justice has been breached because (he says) the Committee failed to inform him it had determined to inquire into Mr Mathews' complaint against him and did not provide him with an opportunity to respond.

[26] Some confusion seems to have occurred in that process as the Committee thought that Mr Stratton had provided a response.

[27] In any event, we agree with counsel for the Authority that the issues addressed above (rather than any natural justice issues) are determinative in this case.

Our Views

[28] We accept that Mr Isac's letter of 26 October 2011 to Mr Mathews' lawyer demanding payment of the \$24,479.02 (including GST) was written in a standard non-threatening manner in terms of a contractual claim indirectly arising out of a real estate transaction completed more than three years previously. We could not regard that conduct as part of real estate work on the facts of this case.

[29] While, technically, it can be argued that the claim letter was written on behalf of the appellant's real estate company, or Bayleys; it is based on his conduct in authorising his lawyer to send it; so he is the correct party to the complaint leading to this appeal.

[30] We appreciate that although the real estate work covered by the listing agreement ended in early 2008, this would not terminate any contractual indemnity.

[31] We commend the parties for agreeing and advising us at the end of this appeal hearing that our decision will bring this dispute to an end.

[32] Simply put, because we do not consider the conduct in question of the appellant agent to be real estate agency work (i.e. having his lawyer claim the said legal fees of \$24,479.02 from Mr Mathews), the offence of unsatisfactory conduct cannot be met.


[33] Also, we do not think there has been any error by the Committee of the Authority in not laying a charge of misconduct on the facts covered before us as it is unlikely that any of the criteria in the definition of “*misconduct*” in s.73 of the Act can be met; so that there could not be a prima facie of misconduct against Mr Stratton. The conduct in issue could not be reasonably regarded by agents of good standing, or reasonable members of the public, as “*disgraceful*” and there is no suggestion of incompetence or negligence at real estate agency work on the part of the licensee, nor is there anything wilful or reckless in terms of breach of the law.

[34] Insofar as the Committee formed the overall view that there should be no particular penalty or censure imposed on the appellant, we think that was a sensible and understandable approach at that point. However, we have been presented with much more evidence (and legal argument) than was adduced to the Committee so that, for the reasons we have explained above, a finding of unsatisfactory conduct cannot be sustained.


[35] Accordingly, this appeal is allowed and the Committee’s finding of unsatisfactory conduct is hereby quashed.

[36] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

Judge P F Barber
Chairperson



Mr G Denley
Member



Mr J Gaukrodger
Member