BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 49

READT 087/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**STUART MCNIE**
	Applicant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20004)**
	First respondent
AND	**JAMIE PROUDE**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

HEARD ON THE PAPERS BY CONSENT

DATE OF RULING 25th June 2013

COUNSEL

Mr K M Quin, barrister for appellant
Ms J MacGibbon, counsel for Authority
P Hunt and J Tomlinson, for second respondent

RULING OF THE TRIBUNAL ON APPLICATION FOR STRIKE OUT

Nature of application

[1] Counsel for the second respondent licensee applies to us to strike-out this appeal on the basis that it is an abuse of process.

[2] It is put that the complaint which led to the decision referred to below of the Complaints Assessment Committee of the Authority is factually identical to a civil proceeding brought against the second respondent's real estate agency employer, Lower North Island Ltd (Bayleys), and other defendants which was discontinued following an 18 August 2011 settlement agreement. We have been provided with copies of the pleadings in that litigation.

[3] Generally speaking, that dispute related to the mortgagee sale of a farm property of the applicant and his wife who, inter alia, alleged against Lower North

Island Ltd breach of contract/instructions, breach of duty of care to them, breach of duty of loyalty, and negligence in marketing the farm to obtain the best sale terms reasonably available, and with detailed allegations along those lines.

[4] Paragraph 4 of the relevant settlement agreement provided that:

> *"**The Parties undertake not to pursue any claim whatsoever against a party to this agreement including their employers and contractors or any other person in relation to or in any way directly or indirectly arising from the claim.** This agreement may be pleaded as a bar and as a complete an[d] absolute defence to any action **proceeding** which may at any time hereafter be instituted by a party to this agreement in any matter in relation to or in any way directly or indirectly arising from the Claim."*
>
> [Emphasis added]

[5] The appellant's complaint against the licensee is, broadly, of alleged deceitful conduct in marketing the said farm.

The Decision of the CAC

[6] In its decision of 19 October 2012, the Committee of the Authority detailed the facts, but we do not need to refer further to them at this stage, and the evidence then before it and then carefully analysed the facts and the issues. The Committee held that the complainant has failed to establish unsatisfactory conduct on the part of the licensee second respondent and dismissed the complaint. Technically, the Committee determined under s.89(2)(c) of the Act to take no further action.

The Stance of the Second Respondent

[7] Counsel for the second respondent licensee submits that this appeal is a *"proceeding"* as set out in the settlement agreement. The Real Estate Agents Act 2008 ("the Act") recognises that a hearing before us is a *"proceeding"*; see ss.105, 106, 109 and 113 of the Act. In particular, s.109(5) refers to it as *"judicial proceeding"*. Counsel for the second respondent maintains that it would be an abuse of process for us to permit the present appeal to be heard, because the complaint which forms the basis of the appeal has already been settled and the appellant has expressly agreed not to bring any further proceeding arising out of the settled claim against any person in any way directly or indirectly arising out of the claim.

[8] Counsel for the second respondent accepts that we may regulate our procedures as we see fit, subject to the rule of natural justice: s.105; but submits that we should use our power to prevent misuse of our processes.

[9] Counsel for the second respondent accepts that we must act in accordance with the purposes of the Act to promote to protect the interests of consumers in respect of real estate transactions and to promote public confidence in the performance of real estate agency work (refer s.3), and that a main purpose of that is to provide accountability through a disciplinary process which is independent, transparent, and effective. It is submitted that this must be balanced against the public interest and that our processes must not be used to produce unfairness which, it is put, would arise if this matter proceeds to a full hearing *"when the appellant has already agreed to discontinue his claim in exchange for a substantial settlement"*.

[10] Essentially, counsel for the second respondent submit that we should recognise the terms of the existing settlement as a final determination of the appellant's complaint against the second respondent.

[11] Counsel for the second respondent provided thoughtful typed submissions designed to show:

> *"(1) The correct interpretation of the settlement agreement requires recognising the parties' consented to bringing the McNies' grievance concerning Mr Proude to a close. The CAC, and the Tribunal by virtue of its broad powers, have the power to acknowledge that parties can mediate the outcome of a complaint in certain cases. So recognising a settlement per se cannot be illegal;*
>
> *(2) Mr Proude is not submitting the Tribunal should be prevented from an enquiry. He is just saying that in appropriate cases the Tribunal has the power to recognise that parties have settled a complaint and that no useful purpose is served in allowing a Tribunal procedure to be used to pursue that grievance."*

[12] Earlier it had been put for the second respondent that:

> *"(1) The Real Estate Disciplinary Tribunal ("the Tribunal") has jurisdiction to control its own process (s.105). This appeal is part of the regulatory process governed by the Tribunal. The Tribunal has the power to decide as a preliminary issue whether an appeal can be heard based on the agreement of the parties as recorded in the settlement agreement;*
>
> *(2) Taking the settlement agreement as a whole, and viewed objectively, the intent of the parties was to finally settle and conclude all issues between them arising out of Mr Proude's involvement in the mortgagee sale of the McNie's property;*
>
> *(3) It is not illegal for parties to a civil dispute to agree that all issues between them concerning that defined dispute are at an end. The courts have recognised that in cases which are essentially civil, such an agreement may restrain a party's rights. In this case Mr Proude is not attempting to oust the jurisdiction of the Tribunal or affect the administration of justice. He is simply saying that the Tribunal should recognise that the parties reached a final agreement and that in the circumstances of this case that should result in there being no further enquiry. Such an outcome is neither contrary to public policy nor to the purpose of the Real Estate Agents Act 2008."*

[13] In some detail, counsel for the second respondent covered that we have power to regulate our procedures as we see fit and that we can order whether or not an appeal should be heard. Counsel submitted that, in such a case as this where the parties have consented to final settlement of the issues between them, we should take the enquiry no further.

[14] Counsel for the licensee made quite detailed submissions about the context of the settlement agreement and provided counter-argument (with reference to case law) to the submission for the appellant that it would be illegal for the settlement agreement to prevent a review of the second respondent's conduct in terms of the

Act. It is put for the second respondent licensee that the cases relied on by the appellant to that effect can be distinguished as involving agreements which precluded prosecution for criminal conduct (as opposed to professional misconduct in general), and counsel for the second respondent covered quite some case law along those lines.

A Summary of the Submissions for the Appellant

[15] The appellant opposes the second respondent's application to strike-out and submits that we should dismiss it for the following three reasons in particular:

[a] That we lack jurisdiction to recognise the terms of the settlement agreement as a final determination of the appellant's complaint; and

[b] Even if we do possess such jurisdiction, the 18 August 2011 settlement agreement does not prevent the appellant from exercising his statutory right to complain to the Authority or appeal to us about the second respondent's conduct as a licensee; and

[c] Even if clause 4 of the settlement agreement does prevent the appellant from complaining to the Authority or appealing to us, that clause is illegal and therefore unenforceable.

[16] Counsel for the appellant then provided well researched and thoughtful submissions in support of the above submissions. These included an analysis of the Act to show that we do not have jurisdiction to enforce the terms of the settlement agreement, nor the general jurisdiction of a civil Court, and that we are confined to the jurisdiction given us in the Act.

[17] Counsel for the appellant detailed submissions to the effect that clause 4 of the settlement agreement does not prevent the appellant from making a complaint to the Authority or appealing to us.

[18] Counsel for the appellant also submitted that contracts which affect the administration of justice (including those impeding disciplinary proceedings against professional persons) are illegal at common law and therefore unenforceable pursuant to s.6(1) of the Illegal Contracts Act 1970. She dealt with various relevant case authorities to submit that if clause 4 of the settlement agreement prohibits the appellant from complaining to the Authority or appealing to us, it is illegal and therefore unenforceable and then put it:

> *"25. There can be no objection to parties settling a complaint after it has been filed with the Authority. The Act sets up a framework for this purpose in s.87. The decision to declare that any resulting settlement agreement is a final determination of the complaint ultimately rests with the Committee, which must bear the public interest in mind.*
>
> *26. The contrast with the present case is obvious. The second respondent seeks to stifle or impede a disciplinary process in reliance on a private bargain made before any complaint was laid or even contemplated ..."*

Discussion

[19] Of course, regarding this preliminary issue, very helpful submissions were provided for the Authority which, generally speaking, support the submissions for the appellant and our views. Accordingly, we incorporate them into the views we now express.

[20] The appellant has appealed against the determination of Complaints Assessment Committee 20004 to take no further action on his complaint against the licensee second respondent.

[21] Counsel for the licensee submits that the appeal should be dismissed on the basis that it is an abuse of process, because (it is put) the complaint is factually identical to a civil proceeding brought against the licensee's employer, Lower North Island Ltd; and that claim was discontinued following a settlement agreement.

[22] As specified above, one of the terms of the settlement agreement was, broadly, that the appellant was not to bring any further proceeding arising out of the settled claim.

[23] It is submitted for the Authority that the civil jurisdiction of a Court is separate from that of a Tribunal for disciplinary matters, so that we are not barred from determining a disciplinary appeal. We agree.

Jurisdiction

[24] We perform a different function to the civil jurisdiction of a Court. The Supreme Court has in *Z v Dental Complaints Assessment Committee [2009] 1 NZLR 1 (CA) at [128]* stated that the purpose of disciplinary proceedings:

> *"[28] it is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus ...."*

[25] As McGrath J put it in *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal* [2006] NZSC 48 at [102], the purpose of a disciplinary Tribunal *"is not to punish misbehaviour"* but *"to ensure that appropriate standards of conduct ... are met"*.

[26] Our focus is different from that of the High Court in civil proceedings. Our primary focus pursuant to s.3 of the Real Estate Agents Act 2008 is *"to promote and protect the interests of consumers in respect of transactions that relate to real estate and promote public confidence in the performance of real estate agency work"*.

[27] We focus on licensee behaviour to ensure that all agents undertake a satisfactory level of conduct in all real estate endeavours. Conversely, the High Court focuses on liability and remedies which were what the settlement agreement was concerned with. There may be, as in this case, an overlap in remedies, but that is provided for within the Act to ensure there is no 'double recovery'. Section 155(1) of the Act states: *"That nothing in this Act affects any civil remedy that a person may have against an agent, branch manager or salesperson."*

[28] Logically, the reverse must also be true: that no civil remedy shall affect any disciplinary proceedings against an agent. Otherwise we and/or the Authority might be unable to discipline whenever civil litigation existed in relation to the same matter.

Powers of Complaints Assessment Committees

[29] A Committee may only make determinations of complaints or allegations as provided in s.89 of the Act.

[30] Under s.87 of the Act a Committee may direct that a complaint or issues be addressed by (inter alia) mediation. Matters such as settlement agreements may be taken into account under s.87(3(b) of the Act. With the agreement of all parties, the terms of the settlement may come to be all or part of a final determination of the complaint by the Committee. That still allows room for the possibility that the Committee considers the complaint further.

[31] It is put that the committee's powers are not binding on private settlement agreements which do not stem from mediation directed by the Committee.

[32] Complaints Assessment Committees have their own obligations. Under s.78(b) of the Act, a Committee on its own initiative is to inquire and investigate allegations about any licensee. As such, even if the appellant was not a party to the dispute, the Committee could investigate a complaint and determine conduct arising from that.

[33] Given that our function is to hear any appeal from a determination by the Committee (including a determination to take no action) under s.102(c) of the Act, we may traverse matters of a disciplinary nature outside of a settlement agreement in the civil context.

Relevance to Orders

[34] Although there is no jurisdictional issue that would prevent a Complaints Assessment Committee nor us from hearing the matter, any agreement stemming from the same complaint is relevant to any order awarded.

[35] Any fear regarding compensation orders duplicating damages sought in civil proceedings is dealt with by way of s.110(3) of the Act:

> *"(3) The making of an order under this section for the payment of compensation to any person does not affect the right (if any) of that person to recover damages in respect of the same loss, but any sum ordered to be paid under this section, and the effect of any order made under this section for the reduction, cancellation, or refund of fees, must be taken into account in assessing any such damages."*

[36] This provision cures any prejudice to a licensee that a double remedy could be sought.

[37] Section 110 sets out the Orders we may make in the event of our finding a licensee guilty of misconduct and (s.110(4) should we only find unsatisfactory conduct. Section 155 reads:

> *"**155 Civil remedies not affected***
> *(1) Nothing in this Act affects any civil remedy that a person may have against an agent, branch manager, or salesperson.*

(2) Subsection (1) is subject to section 110(3).”

[38] We consider that, having regard to both ss.110 and 155, the disciplinary provisions of the Act are completely separated from the civil jurisdiction in our Courts. The Act envisages disciplinary proceedings which overlap with civil claims and provides accordingly.

[39] Noticing that the Complaints Assessment Committee made a finding of no further action on this complaint, counsel for the Authority submits that we have jurisdiction to consider the appeal but puts it that does not necessarily mean that the substantive appeal should succeed on the merits.

Outcome

[40] Accordingly, we dismiss the second respondent’s application for strike out. However, we observe that does not necessarily mean that the appellant’s views will prevail at the substantive hearing. We shall be certainly taking into account, as a factor in our reasoning, that there has been a settlement agreement in the civil courts.

[41] Accordingly, we direct the Registrar to arrange a directions hearing by telephone between our Chairman and the parties to reinstate a procedure towards a substantive fixture for this appeal.

[42] 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.

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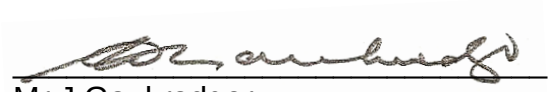
Judge P F Barber
Chairperson



Mr J Gaukrodger
Member

Ms N Dangen
Member