

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 50

READT 096/12

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

BETWEEN **LORNA DYALL**

Applicant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 20001)**

First respondent

AND **JOHN LANTZ**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Mr G Denley - Member

HEARD at AUCKLAND on 13 June 2013

DATE OF DECISION 1 July 2013

APPEARANCES

The appellant on her own behalf
Mr L J Clancy, counsel for the Authority
The second respondent licensee on his own behalf

DECISION OF THE TRIBUNAL

The Issue

[1] Did the licensee fail to meet proper standards as a real estate sales person when marketing a property in Remuera Auckland which the appellant and her former husband then owned?

[2] The appellant appeals a decision of a Committee of the Authority to take no further action on her complaint against the licensee concerning his marketing of that property.

Background

[3] As the Committee of the Authority helpfully put it, the material facts are as follows:

- “2.1 The complainant and her husband had an interest in a house property in Auckland. There were proceedings between these two persons in the Family Court pursuant to the Property (Relationships) Act 1976. Substantive orders were made by the Court (the nature and terms of which are no business of this Complaints Assessment Committee) in 2010. However, it would appear that, to the extent that those substantive orders required the complainant to do certain things (including with respect to the house property just mentioned), they were not complied with. The relative proceedings came back before the Court on 11 August 2011. On this date the Family Court made various orders and directions. These related primarily to the sale of the house property. Amongst other things, the complainant was directed to “vacate the property within 14 days leaving it in a clean and tidy and secure condition.”*
- 2.2 The licensee’s firm was appointed by the Court to act on the sale of the subject property. On or around 24 September 2011, the licensee was on the subject property for the purpose of taking photographs for marketing. The complainant was also there at the time. A verbal exchange occurred between the complainant and the licensee. The licensee did not have in his possession a hard copy of the relative Court order or his letter of appointment from the Court. He did, however, have the Court order electronically stored on his cell phone and offered to show that to the complainant.*
- 2.3 The complainant alleges that the licensee was on and at the subject property illegally and it is this assertion which is at the heart of her complaint. The complaint is dated 6 October 2011 ...”*

[4] At material times, the appellant and her former husband were involved in Family Court proceedings, pursuant to the Property (Relationships) Act 1976. Substantive orders had been made by that Court in 2010. The proceedings came back before the Court on 11 August 2011 when Judge de Jong made various orders and directions in an oral judgment including:

- [a] That 134 Pukeora Avenue Remuera was to be sold under supervision of the Registrar of the Court;
- [b] That the Registrar was to determine what agent was to be appointed and what steps were to be taken to market the property;
- [c] That the appellant was to vacate the property within 14 days.

[5] In fact, the former family home in Remuera was at 1/34 Pukeora Avenue, and not 134 Pukeora Avenue as recorded in the written transcript of the oral judgment. In the body of his judgment, the Judge referred a number of times to the “*family home in Remuera*”, or “*the Remuera property*”. There is no suggestion that the relationship property included more than one property in Remuera.

[6] On 19 September 2011, Laura Tipene, Deputy Registrar at the Auckland District Court, issued a signed and stamped copy of the Orders made by Judge de Jong. That document accurately described the Remuera property as 1/34 Pukeora Avenue.

[7] The real estate agency firm for which the licensee worked was appointed by the Court to act on the sale of the property and, on 24 September 2011, the licensee went to the property to take photographs for marketing. The appellant was also there at the time and a verbal exchange occurred between the appellant and the licensee.

[8] The licensee did not have in his possession a hard copy of the Court order or his letter of appointment by the Court. He did, however, have a copy of the Court order stored electronically on his cell phone and he offered to show that to the appellant. The appellant alleges that the licensee had no legal right to come onto the property.

Relevant Statutory Provisions

[9] Sections 72 and 73 of the Real Estate Agents 2008 respectively define “*unsatisfactory conduct*” and “*misconduct*” 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.”*

[10] There was reference to the following Rules in the Real Estate Agents Act (Professional and Client Care) Rules 2009, namely:

- “6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent.*
- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.*
- 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.*

- 6.4 *A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.*
- 9.15 *Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.*
- 9.17 *When authorised by a client to incur expenses, a licensee must seek to obtain the best value for the client.”*

The Decision of the Committee

[11] As noted above, the Committee determined under s.89(2)(c) of the Act “to take no further action with regard to the complaint or any issue involved in the complaint”. It is helpful to note the following passages from the reasoning of the Committee (with which we agree), namely:

- “4.3 *The gravamen of the complaint is the suggestion that the licensee was on the property which was the subject of the relationship property proceedings (referred to above) illegally. As a starting point, it is obviously important that a real estate agent has valid legal authority to be on any property. The absence of such authority (or well founded bona fide belief that such exists) could, conceivably, constitute “unsatisfactory conduct” for the purposes of the Act or perhaps, in an exceptional case, “misconduct”.*
- 4.4 *With no disregard to the complainant or the licensee, this complaint can be addressed and dealt with in relatively short order. There was an order for the sale of the subject property. The licensee was validly appointed by the Family Court to take all necessary steps to market and auction the house. He was at the house on 24 September 2011 pursuant to, and in accordance with, the directions given and authority conferred by the Court. Bluntly, the licensee was there doing his job.*
- 4.5 *The Committee would observe that in a forced sale situation such as this, (including one arising from difficult and protracted relationship property proceedings) it is and would be prudent for the licensee appointed to act on the sale, when going on to the subject premises, to have with him a hard copy of not just the relative Court order but also, even more importantly, the letter of appointment from the Court, which is, obviously, the source of the agent’s authority. The fact that the licensee did not have, at the material time, hard copies of these documents does not mean that he was guilty of ‘unsatisfactory conduct’.*
- 4.6 *The complainant attempts to make something of the point that the decision/judgment of the learned Family Court Judge referred (incorrectly) to “134 X Avenue” of the suburb in question, while the Court order ultimately issued referred (correctly) to “1/34 X Avenue”. The documentation placed before us, includes correspondence by the complainant with the Auckland Court manager. Clearly and obviously, what happened here was that the Court exercised its power to correct a clerical slip or error in the street number. We would observe that this (the exercise of the power to correct a clerical error or slip) is by no means*

uncommon and is quite unproblematic. This point in no way affected the authority of the licensee to be where he was and do what he did. ...

4.8 *We are compelled to conclude, as would be apparent from the discussion above, that this complaint is devoid of merit or substance. This Committee states that finding firmly and unequivocally. There are some cases that come before a Committee in which a decision is made to take no further action really because a conflict in factual assertions (as between a complainant and a licensee) cannot be resolved in the complainant's favour to the required standard of proof. This is not one of those cases. The licensee who is the subject of this complaint is entitled to an acknowledgement that he has done nothing wrong. This decision is such an acknowledgement. ..."*

A Time Line

[12] The appellant helpfully compiled a full time line of events as she perceives them. We set out some of those events as follows:

6 October 2011 – the appellant complains to Real Estate Agents Authority alleging that second respondent licensee illegally entered her Auckland home pursuant to an Order of the Auckland Family Court relating to number 134 in her street. She refers to there having been a second Family Court Order sealed on 19 September 2011 referring to the correct address of her property as apartment 1 at number 34 in the street. She emphasises that, apparently, the first Order, referring to the incorrect address, was given orally by the Family Court Judge and that the second printed Order was not signed by the Judge. We note that it was signed and sealed by the Court in the proper manner.

19 September 2011 – the second respondent licensee called at the property to enter it with a photographer to obtain suitable photographs for marketing purposes. Apparently, a copy of the Court Order was available on his phone but not then in hard copy.

28 September 2011 – the appellant received in mail sealed copy of relevant Family Court Order dated 11 August 2011 as signed by the Judge on 1 September 2011 together with a replacement Order dated 28 September 2011 noted by the Judge as correcting a typographical error to change the address from number 134 in the street to 1/34.

24 September 2011 – the licensee entered the property and there seemed to be some verbal hostility with the appellant.

13 October 2011 – the appellant was notified that the Authority had decided to take no action.

22 August 2011 – the appellant makes complaint about the Judge to Judicial Conduct Commission.

26 September 2011 – the property was sold by auction.

14 October 2011 – Ombudsman acknowledges letter of complaint from appellant.

[13] Thereafter, there were various communications between some of the above persons and the appellant, and a letter from the appellant to Associate Minister of Justice (The Honourable Chester Borrows) and to an investigator of the Authority.

A Summary of the Appellant's Submissions

[14] Essentially, the appellant's complaint is that the second respondent licensee illegally sold her home. She maintains that, over the period 19 to 24 September 2011, he illegally entered her property and arranged for the front door locks to be changed to and for a photographer to enter her home to obtain marketing material; that the second respondent licensee had no right to so act and was wrong in assuming that he was acting under an Order of the Family Court; and that he facilitated an illegal sale of her home. She alleges breach of the Treaty of Waitangi and of Real Estate Agents Act 2008. She developed those themes in some detail.

[15] The appellant also referred to our decision in *CAC 10064 v Vinodh* [2012]. We do not see it as particularly relevant to this case but refer to it below.

[16] The appellant analysed her disagreement with the reasoning of the Committee of the Authority referred to above. She seemed to be concerned that the above events had caused her prejudice, and that there had been racism, sexism, and arrogance towards her. She requires that her said home be returned to her and alleges that her ex husband received the money from its sale because he and his solicitor acted illegally in the matter.

[17] It appears that the appellant also relies on the Rules set out above. She also seeks compensation for the loss of enjoyment of her home and the humiliation and stress she has experienced over these matters.

[18] The appellant gave evidence covering the above matters and made herself available for cross-examination by both Mr Clancy and the licensee.

[19] There was much reference to the education and background of the appellant but suffice to say that she is extremely well educated and experienced in public administration.

The Stance of the Licensee

[20] The stance of the licensee is simply that he acted properly at all times in terms of his instructions from the Family Court to market the property by way of auction sale. He believed he had proper legal authority to act as he did. He explained that although there did seem to be a typographical error in the first form of Order issued by the Family Court, in that the property was referred to as number 134 in the street instead of apartment 1 at number 34, he at all times acted with a copy of the certificate of title of the property and, therefore, knew that he was dealing with the property the subject of the Family Court order.

[21] He insists that he acted properly towards the appellant at all times but was threatened by her and he did not threaten or show any disrespect to her at any stage. He also points out that having changed the locks of the house in terms of his instructions from the Family Court to market the property he allowed the appellant to take her property from the house and indeed assisted her physically in doing that.

[22] It is helpful to set out the following extracts from statements of the licensee:

*"We carried out the instructions of the Family Court Order and with the exception of not having a hard copy in my possession at the time that Ms Dyall was at the property (and the fact that a Court Order had been filed that she was **not to trespass on the property**), I have done nothing which violates the Code of Conduct or any other breach of the Act.*

I did not argue with Ms Dyall when we were both at the property and in fact, helped her move the remaining items that were in the house to the front porch so she could collect them at a later date. I remained courteous and profession at all times.

The complaint seems to revolve around the fact that I have acted inappropriately because of the 'typo' that had appeared in the Court Order and that I entered the house illegally and sold the house illegally based upon this typo which was no fault of mine.

Ms Dyall also phoned the Auckland Police to advise them that I had broken into the house illegally and I received a phone cal from Gordon Campbell from the Police regarding the matter. I then emailed him the Family Court Order and have heard no further from the Police in this matter. If this were a legal matter, surely the Police would have made further contact with me and the appropriate actions taken. They also dismissed her claim of my inappropriate and illegal behaviour.

All of my actions were conducted as instructed by the Family Court and it was the Judge who signed the sale and purchase agreement the night of the auction. ..."

[23] And

"To The Real Estate Agents Authority,

In response to the following complaint by Dr Lorna Dyall, we had been issued a Court order by the Family Court to sell the property located at 34 Pukeora Avenue, Remuera. We were also instructed by the Court to have a locksmith come to the property to change the existing lock as we did not have access to the property. Upon arrival to do the photography at the property, the complainant verbally abused me and the photographer that we had no right to be there and went on in great detail that I was 'abusing her because I was a white male' and furthermore something to the effect of abusing Maori women and their right to own property. After she calmed down, I informed her that we had a Court order to carry out their instructions. While I did not have the printed paperwork on hand (as I did not expect to be confronted by her), I did inform her that I had the Court order on my phone via an email and offered to show it to her. She informed me that she had personal belongings in the house and was there to retrieve the articles. Knowing what was in the house, and the articles that she was referring to (of no significant monetary value), I offered and assisted her to remove the articles from the property and put them on the doorstep so she could gather the items at her convenience.

Throughout the campaign, we continued to receive lengthy abusive and rambling email about the Maori Treaty and how we were violating her rights as a Maori woman and how white men abuse their power against Maori women. This continued for some time even after the property was sold. ... She has slandered my name throughout the neighbourhood that I sold stolen property and has continued to do so for some time now. ...”

The Stance of the Authority

[24] In final oral submissions, Mr Clancy emphasised that we are concerned only about the conduct of the licensee, rather than the concerns of the appellant as to whether she received justice in the Family Court. Mr Clancy simply put it that, on the evidence, the licensee was carrying out a formal sealed Order of the Family Court and the fact that there had be a typographical error in Family Court documentation for a time does not alter the substance of the situation; and, accordingly, it is simply for us to decide whether the licensee’s conduct in any way fell below acceptable standards.

Discussion

[25] The copy of the Court order with which the licensee was provided by the Court was signed, sealed, and dated 19 September 2011. It correctly described the property as 1/34 Pukeora Avenue.

[26] We find that the Committee was correct to conclude that the licensee did have valid legal authority to be on the property and, quite clearly, he had a reasonably founded honest belief that he had such authority.

[27] The appellant cites our decision in *CAC v Vinodh* [2012] NZREADT 72 in support of her appeal, but the facts in *Vinodh* were materially different to the facts here. *Vinodh* involved a salesperson himself recording the wrong address for a property on a sale and purchase agreement, and the Tribunal found that conduct to be “*sloppy and unprofessional*” amounting to unsatisfactory conduct. In this case, no such error was made by the licensee. While the transcript of the Judge’s oral ruling contained an error and referred to 134 rather than 1/34 Pukeora Avenue, that slip entailed no culpability on the part of the licensee. The signed and sealed copy of the Court Orders which he received referred to 1/34 Pukeora Avenue, and he went to that address, the former family home, which was clearly the subject of the Family Court decision.

[28] Quite frankly, it is rather sad that such a highly educated and intelligent person as the appellant will not accept that the Family Court decision was made by an experienced Family Court Judge who, inter alia, Ordered the sale of her home and that order properly led to the licensee being instructed to sell it by auction. As already indicated, we understand from the appellant that the net proceeds of that auction sale of the home of her and her former husband were disbursed to the former husband rather than to her; but we only have jurisdiction to focus on the standard of the licensee’s conduct.

[29] It seems to us that, as directed and instructed by the Family Court and by the real estate agency for which the licensee worked, the licensee entered the property pursuant to a Court Order and proceeded to make marketing arrangements for an auction in terms of that Family Court Order. He was confronted by an

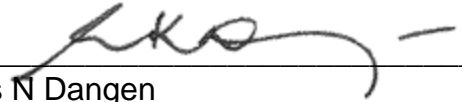
understandably obstructive appellant who was still angry and strident before us. However, the licensee has not stepped out of line in any way.

[30] We consider that the reasoning and decision of the Complaints Assessment Committee 20001 of 6 December 2012 is correct.


[31] Accordingly we dismiss this appeal.

[32] 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



Ms N Dangen
Member



Mr G Denley
Member