

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 78

READT 94/12

IN THE MATTER OF a charge laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN **COMPLAINTS ASSESSMENT
COMMITTEE 20003**

Prosecutor

AND **PAUL WELDRAND**

Defendant

MEMBERS OF TRIBUNAL

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

HEARD at PALMERSTON NORTH on 26 August 2013

DATE OF DECISION 18 September 2013

APPEARANCES

Mr R M A McCoubrey, for the Prosecution/Authority
The defendant on his own behalf with Mr S Morpeth (as a McKenzie friend)

DECISION OF THE TRIBUNAL

The Charge

[1] Following a complaint by Mr Jeff Twigge (“the complainant”), the Authority (per CAC 20003) charges Paul Weldrand (“the licensee”) with misconduct under s.73(a) of the Real Estate Agents Act 2008 (“the Act”). The charge reads:

“Following a complaint made by Jeff Twigge, Complaints Assessment Committee 20003 charges Paul Weldrand (defendant) with misconduct under s.73(a) of the Real Estate Agents Act 2008, in that he engaged in conduct that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

- (a) *The defendant sent an email to the complainant from an anonymous account using a fictitious identity stating that the sender would ask questions at a National Bank seminar at which the complainant would be speaking about the complainant’s qualifications and rates.*

(b) *The defendant verbally abused and threatened the complainant, stating that he was from the “English Army”.*

[2] In summary, it is alleged that the licensee:

[a] Sent an email to the complainant from an anonymous account, and using a fictitious identity, stated that the sender would ask questions about the complainant’s qualifications and fees at a National Bank seminar at which the complainant would be speaking; and

[b] Verbally abused and threatened the complainant with physical violence.

Background

[3] The complainant is a building inspector who in early August 2011 wrote a report for a residential property listed with the licensee. The prospective purchasers, who are clients of the complainant, did not proceed with a conditional purchase of the property and did not want the report disclosed to the licensee.

Confrontation

[4] This aspect of the charge arises from an occasion in about late August 2011 when the licensee went to the complainant’s address. Allegedly, he started verbally abusing him and said he would go out of his way to see that the complainant did not get any business. He allegedly said that he used to be part of the English Army, and threatened him with violence. The licensee disputes this aspect of the charge. We accept that the licensee would only refer to the “British” Army.

[5] The evidence of Mrs Susan Twigge (wife of the complainant) is that she witnessed this altercation and that the licensee did threaten to hit the complainant. Both Mrs Twigge and Ms Rebecca Wimms (the complainant’s receptionist/secretary) have stated that the licensee would ring their offices frequently in the days following the pre-purchase house inspection which the complainant had conducted.

Email

[6] On 24 February 2012, the complainant received an anonymous email. It was signed by “Dave S” and appeared from an unknown email with the server address nobody. The email stated:

“... Original Message ...

From: (Unknown Email) 219.89.119.66 (<mailto:nobody@219.89.119.66>)

Sent” Friday, 24 February 2012 10:00 a.m.

To: Jeff Twigge

Subject: enquiry from plans website

Fullname: Dave S

Email:

Phone:

Enquiry:

Hi, I see Jeff Twigge is the nominated Building Inspector scheduled to appear at the National Bank First

Home buyers seminar next Thursday 01 March 2012. If I May ask, what qualifications does Jeff have to speak as a building inspector? Why are his rates the highest in the City? I will ask the same Q's at the Seminar, Dave."

[7] The complainant states that he employed IT staff to find out where the email came from. Within a few days it was tracked to JVL Prestige Realty which is the agency where the licensee is employed.

[8] The complainant then went to JVL Prestige Realty to speak with the principal, John Van Lienen, but he was not available. The licensee was present and admitted that he was "Dave S". Allegedly, the licensee then further abused the complainant, stating (the complainant puts it) that he was "*a crook, no good and he would do his best to see I never got any more business*". The licensee then followed the complainant out to his car. Later, the complainant received a telephone call from John Van Lienen who apologised for the licensee's actions and said the matter had been "*addressed*".

[9] The licensee has acknowledged that the email was from him. Further acknowledgement can be inferred from the fact that he (or JVL Prestige Realty) paid to the complainant his company's \$138 cost of hiring IT staff to trace the email as set out in an invoice dated 27 February 2012.

Evidence to Us

Evidence from Mr J B Twigge (the complainant)

[10] In early August 2011 the complainant conducted a pre-purchase inspection on the state of a residential property for a client and reported in terms of NZ Standard 4306. The client decided not to proceed with the sale and asked the complainant not to divulge the report for legal reasons. We suspect that the prospective purchaser was using the report to justify a change of mind about the purchase.

[11] In any case, the real estate salesperson handling the sale was the licensee. In late August 2011 he contacted the complainant wanting to know why the sale was not proceeding and, according to the complainant, persisted in such questioning by a number of telephone calls and, allegedly, verbally abused the complainant.

[12] After a while, in order to settle matters down between them, the complainant purchased a bottle of wine and, in about late August 2011, delivered it to the licensee's office. However, that evening, the licensee arrived at the complainant's home (which is also his place of work), banged on the door, and told the complainant he (the licensee) would not drink the wine even if he was paid to because it came from the complainant. Allegedly, the licensee proceeded to tell the complainant how he had been in the English Army and threatened the complainant with physical violence. In response to questioning the complainant said "*I then walked out and said I would flatten him. He then walked to his car and got in and I walked back into the office/house. He drove away.*"

[13] Some six months later in early 2012, the complainant was invited to speak at a first home buyer's seminar organised by a bank. The function was to take place on Thursday, 1 March 2012. On Friday 24 February 2012 the complainant received an

anonymous email from someone calling himself "Dave S". The email was addressed to the complainant and stated:

"Hi, I see Jeff Twigge is the nominated building inspector scheduled to appear at the National Bank First Home buyers seminar next Thursday 01 March 2012. If I may ask, what qualifications does Jeff have to speak as a building inspector?? Why are his rates the highest in the City? I will ask the same Q's at the Seminar. Dave."

[14] The complainant employed IT staff to source the email and it was tracked to JVL Prestige Realty. The complainant visited there and asked to speak to its principal, Mr J Van Lienen, but he was not available. But while the complainant was at that office the licensee came out and admitted to the complainant that he the licensee, was "Dave S". Allegedly he then abused the complainant with expletives in front of the receptionist stating that the complainant was a crook, no good, and he (the licensee) would do his best to see that the complainant never got any more business. The complainant says that he walked to his car to avoid further confrontation but that the licensee followed him ranting and raving.

[15] The complainant also gave quite some evidence outlining the business history between him and the licensee over about the previous eight years.

[16] We have had the advantage of observing the complainant cross examined by the licensee. Effectively, the licensee/defendant put a rather watered down version of his conduct to the complainant, but completely admitted sending the email of 24 February 2012 referred to above and accepted total responsibility and blame for that as a piece of stupidity on his part. Essentially, the licensee was putting it to the complainant that, he the licensee, was not a threatening person and could not have appeared violent or hostile as alleged. The complainant (and his wife and his secretary) think otherwise.

Evidence from Mrs S Twigge

[17] The complainant's wife is very much involved in the complainant's specialist inspection services business. She stated that the licensee telephoned their office many times trying to have the complainant provide information about the said house inspection. She said that the licensee was rather upset about the situation and would speak to her at length insisting that the complainant return his telephone calls.

[18] Mrs Twigge was at her office/home when the licensee came to return the bottle of wine as described above. She heard the licensee say to the complainant that he was "no good" as an inspector and she witnessed a verbal altercation between the two men. She said she saw her husband follow the licensee out to their car park and then said "I saw Mr Weldrand get out of his car and threaten to hit Jeff".

[19] She had been present in the office when her husband, the complainant, received the anonymous email referred to above. She had later drawn up the invoice (from her husband's and her inspection company) to cover the time it took a staff member to source the email and, she said, that was paid by JVL Real Estate Ltd in the usual course.

[20] Mrs Twigge was carefully cross examined by the licensee/defendant as to the detail of his visit to the complainant's property and the movements of the parties on

that occasion. In the course of that cross-examination Mrs Twigge mentioned how she had kept suggesting to the licensee that the issue of the complainant not disclosing his building inspection report was a matter for the vendor's solicitor. The stance of the licensee was that the vendor was a 76 year old lady who reposed much trust in him the licensee, and that she had lost the sale of her home due to the complainant's building assessment report and that meant that the elderly lady was unable to complete the purchase of a unit in a retirement village.

Evidence of Ms R Wimms

[21] Ms Wimms was the final witness for the prosecution. She worked as receptionist/secretary for the business of Mr and Mrs Twigge. She met the licensee at a pre-purchase house inspection of the property which the complainant undertook in 2011. She stated, inter alia, *"In the days following this inspection, and after we had released our report to our client, Paul Weldrand phoned our office repeatedly. I spoke to him several times. He asked me to divulge the contents of the report to him; however we had been instructed explicitly by our client that the report was to remain confidential. I explained this to Mr Weldrand in the first phone call he made to our office but he continued to phone both our office and Jeff's cellphone over several days."*

[22] In her cross-examination it emerged that, previously, there had been no bad vibrations between the complainant and the licensee, and they have worked together on at least one property since the above incidents; although the atmosphere was described by Ms Wimms as *"a bit awkward"* but she said there was *"no visible animosity"*. That inspection seemed to relate to a house which the complainant had designed but was undertaking a building inspection of it for both vendor and purchaser.

[23] It seems that Ms Wimms accompanies the complainant on his property inspections, takes notes of what the complainant finds, and then types that material into a report which she considers to be completed with absolute integrity.

The Evidence of the Defendant

[24] There was no brief of evidence from the licensee defendant. He appeared very contrite about being in this prosecution situation.

[25] He emphasised that he felt a strong duty to assist his 76 year old lady client. At material times, he felt he had found the perfect retirement unit for her and was keen to facilitate the sale of her home (the said property) to achieve that purchase. However, he considered that the sale was thwarted by a seemingly adverse building report from the complainant which the licensee was never able to access. This meant that the vendor was not given the opportunity to remedy whatever problems there may have been. It infuriated the licensee/defendant that he could not obtain the answers to his questions from the complainant but only *"resistance"*, as he put it, and the answer *"no comment"*.

[26] The licensee emphasised that, eventually, the issues ascertained by the complainant were disclosed to the licensee by the vendor's lawyer and the points were as follows:

- “1. Spa bath not working – the fuse had been removed as the 76 year old client kept inadvertently switching the spa on. Fuse reinstalled and spa worked perfectly well.
2. 3 x “unknown” access plates in garage ceiling – two storey house, plates were removed with access to plumbing and electrical point.
3. “High” moisture around upstairs windows – inspection took place at 08.00 am whilst raining, further test carried out with normal readings noted.”

[27] The licensee defendant emphasised that he and his 76 year old vendor client were extremely upset that these three points were used by the prospective purchaser (a client of the complainant) to withdraw from the sale and purchase agreement with her. It emerged that the sale contract by that vendor required that she be told of any such faults so that she could remedy them. We understood that, at about that time, the licensee was so concerned about the complainant’s said report that he himself paid \$462 for another inspection which did not reveal any problems. Accordingly, he felt that the elderly lady had missed out on being able to sell her home and purchase the retirement unit and, subsequently, felt obliged to later sell her home at a lower price to purchase a different retirement unit.

[28] As we have already indicated, it is to the credit of the licensee/defendant that he has admitted liability with regard to the charge concerning the said email. He put it that his conduct related to that was “*very foolish*”.

[29] The licensee was, of course, carefully and thoroughly cross-examined by Mr McCoubrey about his rather different version of his confrontation with the complainant from that given by prosecution witnesses. He insisted that his conduct was robust in nature, rather than aggressive or violent, due to his frustration with the complainant not disclosing why he had not given a clean report about the property of the vendor. He was also, of course, cross-examined along the lines that the anonymous email had a sinister element in all the circumstances.

[30] The licensee accepted that it was stupid of him to have sent the email in those circumstances but maintained that it did not suggest violence and was “*a grave error of judgement*” by him. It was put to him that his conduct was very unprofessional. The licensee emphasised that his sending the email had been the one time in ten years of work as a real estate agent when he did not act calmly and professionally under stress, and he felt he could only apologise. We put it to the licensee that it is possible to interpret the email as “*threatening*”. The licensee insisted that it was never meant to be so.

Misconduct

Section 73(a)

[31] It seemed to be accepted that the conduct alleged against the licensee does not involve real estate agency work as that term is defined at s.4 of the Act. That is certainly so regarding the email offending. However, conduct not involving real estate agency work may, nevertheless, amount to misconduct under the Act if that conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[32] Section 73(a) of the Act provides:

“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; ...”

[33] We considered the ambit of the term disgraceful, as used in s.73, in *CAC v Downtown Apartments Limited* [2010] NZREADT 06. There, we held:

“[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is 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 to agents of good standing or reasonable members of the public.

[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 The PCC [1997] 1 NZLR 71].

[57] The ‘reasonable person’ is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s.73(a) that reasonable person is qualified to be 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 ... defendant.

[59] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant, represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public.

[34] Section 73(a) allows us to assess whether conduct is disgraceful both by reference to reasonable members of the public and agents of good standing. The section allows for disciplinary findings to be made in respect of conduct which, while not directly involving real estate agency work, nevertheless has the capacity to bring the industry into disrepute and which, for that reason, agents of good standing would consider to be disgraceful.

[35] This has been recognised in other cases. In *CAC v Dodd* [2010] NZREADT 06 we made a finding of misconduct and suspended the real estate agent as a result of conduct in his personal life (forging his wife’s signature on personal finance documents). In doing so we followed our earlier decision in *Smith v CAC and Brankin* [2010] NZREADT 13 that there must be a sufficient nexus between the conduct proved and the fitness of the licensee to conduct real estate agency work in order to make a finding under s.73(a).

[36] We note that Rule 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care Rules) 2009 states that a licensee must not engage in conduct likely to bring the industry into disrepute.

[37] We determined a matter of similar nature in *REAA v Arthur Subritzky* [2012] NZREADT 19 and in *REAA v Robert Subritzky* [2012] NZREADT 20 where we stated:

“[17] We have recognised that s.73(a) may apply to conduct by a real estate agent outside of real estate agency work. In CAC v Dodd [201] NZREADT 13 the Tribunal made a finding of misconduct and suspended the real estate agent as a result of conduct in his personal life (forging his wife’s signature on personal finance documents). In doing so, the Tribunal followed its earlier decision in Smith v CAC and Brankin that there must be a sufficient nexus between the conduct proved and the fitness of the licensee to conduct real estate agency work in order to make a finding under s.73(a).

[18] It is put that there are, therefore two important considerations in applying s.73(a) to non-real estate agency work, namely: is there a sufficient nexus with the fitness of the licensee to conduct real estate agency work, and is the conduct a marked or serious departure from the standards of an agent of good standing or of a reasonable member of the public? To quite some extent both criteria are interlinked.”

Application to Current Case

[38] It was put for the prosecution that the licensee’s conduct plainly took place in the context of his work as a licensee in a general sense; and that the relationship between the licensee and the complainant, such as it is, arose from the buying and selling of houses. We observe that, in terms of the definition of real estate agency work in s.4 of the Act, it is arguable whether the alleged confrontational conduct of late August 2011 can still be regarded as work or services to bring about a real estate transaction; but we do not need to deal with that issue. It is submitted for the prosecution that the licensee’s conduct shows an inability on the licensee’s part to act in a controlled manner.

[39] In *Arthur Subritzky*, we found that:

“[21] The nature of real estate work is, at times, stressful involving disputes and conflict in respect of transactions which are of great importance to the parties involved. Licensees must be able to be trusted to conduct themselves in a calm and professional manner at all times if consumer interests are to be promoted and protected.

[24] Licensees should be expected to conduct themselves professionally in the course of business, both while performing real estate agency work and otherwise. The recourse to personal abuse by the defendant was disgraceful. The threat made to Mr Steyn at the car on 13 August 2010 was an immediate reaction and, while clearly unacceptable, by itself (it was put) may not be seen as rising to the level of misconduct: although we may well have found misconduct for that alone. However, for the defendant to continue later with racially abusive and offensive texts, after there had been time for cool reflection, is properly to be regarded as disgraceful and we so find.”

[40] Mr McCoubrey submits for the prosecution that, like *Subritzky*, there is a sufficient nexus between the fitness of the licensee to conduct real estate agency work and the conduct in this case; and the licensee was unable to act in a professional manner. As was stated in *Subritzky*, “licensees should be expected to conduct themselves professionally in the course of business, both while performing real estate agency work and otherwise.” We observe that if the offending is not disgraceful, and only unsatisfactory, it needs to involve real estate agency work to amount to offending as unsatisfactory conduct under s.72 of the Act.

[41] The complainant and licensee had met in a professional context and are likely to meet in the same business scenario again given their occupations. It is submitted for the prosecution that such conduct reflects on the licensee’s fitness to conduct real estate agency work. We agree in principle.

Discussion

[42] Can the appellant’s conduct be considered disgraceful within the meaning of *Downtown Apartments Limited*?

[43] It is submitted for the prosecution that the conduct is a marked and serious departure from the standards expected of licensees; that the accumulation of events, while on their own can be seen as disgraceful, collectively amount to misconduct; that the licensee threatened the complainant and then, after a period of seven months, sent an email to discredit and intimidate him; and the licensee was given “time for cool reflection” yet decided to send the email to the complainant from his employing agency’s email account.

[44] It is therefore submitted for the prosecution that this was conduct which was below the standard expected of licensees and, further, would be regarded by licensees of good standing or reasonable members of the public as disgraceful.

[45] We consider that the facts speak for themselves regarding the email incident and the licensee’s conduct in that respect amounts to misconduct as defined in s.73 of the Act, and he accepts that finding.

[46] Effectively, the sale and purchase agreement referred to above was conditional upon the purchaser obtaining within five days a satisfactory report on the weathertightness and structural integrity of the building; and that clause is followed by a further condition to also obtain within that period a Residential Property Information Enquiry to ascertain that there is nothing detrimental in issue. Both conditions required notice to the vendor of any matters arising and what the purchaser requires by way of remedy of them. The provisions infer that the vendor be given the chance to remedy matters.

[47] Simply put, the wording of that condition of the contract shows that the outrage of the licensee/defendant had quite some justification in that the intending purchaser seems to have used the complainant’s building assessment report to withdraw from the purchase without disclosing proper grounds to the 76 year old vendor. As we indicated above, this should have been treated as a legal problem for the vendor’s lawyer. It is very unacceptable conduct for the licensee to have gone to the extremes he did with the complainant, although trying to resolve matters for the vendor.

[48] However can we be sure, even on the standard of the balance of probabilities, that the licensee's conduct at the home office of Mr and Mrs Twigge was as abusive and threatening as they have interpreted it? Although there is a conflict of evidence in the description of that confrontation or meeting, we are satisfied that the confrontational conduct of the licensee/defendant, which we have described above, was "*disgraceful*". There was a rather concerning level of abuse and threatening conduct by the defendant/licensee somewhere between the two versions put to us.

[49] As explained above, while it appears that the purchasers ought not to have been able to cancel the contract which the licensee had arranged for the sale of the vendor's property, his reacting conduct was most unprofessional and disgraceful overall and we are satisfied that it amounted to misconduct. He has pleaded guilty to misconduct over the email offence described above.

[50] At the end of the hearing, we briefly indicated our findings and suggested that penalty be dealt with then or very soon. We accepted that we should find the confrontational conduct to be at a relatively low level. We considered for a time treating the confrontational conduct as unsatisfactory conduct under s.72 of the Act; but are conscious that might lead to argument as to whether it took place in the course of real estate agency work. In our view it did as the defendant still seemed to be trying to achieve the sale of the said vendor's property.

[51] At that point we indicated our views about penalty to be that, all in all, the matter should be dealt with by monetary penalties such as a \$500 fine against the licensee and he also contributing \$1,500 towards our costs. However, we allowed counsel for the prosecution to take instructions on the proposed penalty and for a succinct reply submission on penalty to come from the licensee/defendant if he wished.

[52] The Authority's submission is that a sterner penalty is appropriate for the misconduct proved against the licensee. Mr McCoubrey put it that "*whilst the misconduct in Mr Weldrand's case may not be the most serious to have come before the Tribunal, the Authority notes that the maximum fine available is \$15,000, and submits that Mr Weldrand's misconduct should be met by a fine greater than \$500*". Mr McCoubrey went on to state that the complainant has informed him, since the hearing, that the time of his staff devoted to these issues, including time at the hearing before us, had cost him and his business \$1,200 in lost earnings. He submitted that we consider a contribution towards this amount under s.110(2)(g) and s.93(1)(i) of the Act. We have referred above to evidence that the licensee or his company paid the complainant's invoice of \$138 for the cost of tracing the email.

[53] In response, the licensee noted that he had admitted misconduct with regard to the email which he had sent to the complainant as described above at a relatively early stage; and that we found the threatening or violent behaviour to be proved but as not the most serious such conduct to have come before us. He put it that our initial sentencing suggestion is appropriate. Also, he queried how the claimed \$1,200 loss of earnings by the licensee is calculated and noted that he had also lost work time.

[54] We consider that a contribution to the complainants alleged loss of earnings is not appropriate in all the circumstances and, in any case, is vaguely put.

[55] For the above reasons, we find misconduct proven against the licensee.

[56] Having stood back and looked at the question of penalty on the particular facts of this case and in terms of the said submissions on penalty, we accept that our initial thoughts on penalty were not stern enough – as Mr McCoubrey puts it. Accordingly, we Order that, within 15 working days of this decision, the licensee/defendant make the following payments:

- [a] A fine of \$1,500 to the Registrar of the Authority at Wellington;
- [b] \$1,500 as a contribution towards our expenses payable to the Tribunals Unit, Ministry of Justice, 86 Customhouse Quay, Wellington.

[57] 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 J Gaukrodger
Member

Ms N Dangen
Member