

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 96

READT 017/13 & 018/13

IN THE MATTER OF

an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN

MURRAY AND SHARON SHARP

Appellants

AND

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

First Respondent

AND

GRANT YOUNG

Second Respondent

AND

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BETWEEN

MURRAY AND SHARON SHARP

Appellants

AND

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

First Respondent

AND

LYN JORDAN

Second Respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC -- Chairperson
Ms C Sandelin -- Member
Ms N Dangen -- Member

HEARD at AUCKLAND on 18 September 2013

APPEARANCES

Mr and Mrs Sharp via videolink from Wellington
Ms J McGibbon for First Respondent
Mr P Napier and Ms A Hyde for Second Respondents

Background

[1] Mr and Mrs Sharp now live in the Wellington region. In 2010 they were the owners of two vacant sections and a section with a bach on Waiheke Island. These properties were situated at 32, 34 and 36 Waiheke Road, Onetangi. This appeal concerns only Lot 1 (36 Waiheke Road) ("*Lot 1*"). Unfortunately the Complaints Assessment Committee decision referred to the relevant property as Lot 3.

[2] The sections were listed for sale with Harcourts Waiheke Island. Lyn Jordan was the owner (at the time) and the principal of Harcourts. Grant Young was one of the salespeople at Harcourts.

The Issues

[3] Mr and Mrs Sharp said that they wished to complain about Ms Jordan for three reasons:

- (i) That there was a misrepresentation to the purchaser of Lot 1 that the property had power and phone connected; and
- (ii) Ms Jordan spread gossip on Waiheke Island to the effect that Mr and Mrs Sharp had misled the agency and thus the buyer about these facts; and
- (iii) Ms Jordan altered 2009 agency agreements without authority.

[4] In respect of Mr Young the complaints are:

- (i) That he had a counterproductive attitude (to the sale of the Sharp's properties); and
- (ii) He had a reluctance to market the properties; and
- (iii) There was an endemic pervasion of gossip and hearsay "*within their Waiheke office*".

Mr and Mrs Sharp felt that their position had been compromised by these matters as they felt that they had always been open and honest with Harcourts.

Particulars:

[5] Mr and Mrs Sharp were seeking a full and unreserved apology from Lyn Jordan and Grant Young plus a refund of the commission paid to Harcourts Waiheke Island for the sale of 36 Waiheke Road and an amount by way of a cash settlement from Mr Young as compensation for his breach of privacy, his unsatisfactory conduct and his misconduct.

[6] The Complaints Assessment Committee had dismissed Mr and Mrs Sharp's complaint. They said as follows:

- There was a lengthy delay between the complaint and the alleged events.
- That while Jude Watson, the agent who listed Lot 1, made a mistake on the listing form showing that there was power and phone to the section when in fact there was only power and phone to the other section and the property, it was a simple error which had been remedied by the immediate actions of Ms Jordan. Ms Jordan had also told the Complaints Assessment Committee there was a possibility that the complainants had told Ms Watson there was power and phone to Lot 1. The CAC were unable to make any finding on this point.
- With respect to the Sharp's complaint that Ms Jordan discussed aspects of the sale with Graham Smith an electrician, Ms Jordan had denied this had happened as did the electrician. Because it was unsupported by any other evidence the Committee decided to take no further action.
- Mr and Mrs Sharp also made an allegation that the licensee wrote over historical agency authorities. This part of their complaint was also dismissed.
- The complaint against Mr Young was also dismissed.

[7] Mr and Mrs Sharp appealed. In their evidence and submissions they set out for the Tribunal what they considered were their major issues:

- (i) The misrepresentation about the power and phone to Lot 1.
- (ii) What they said were the altered 2009 agreements (these were lapsed agency agreements entered into and subsequently withdrawn before sale by the Sharps).
- (iii) Allegations of malicious gossip about Mr and Mrs Sharp. Mr Sharp told the Tribunal that Graham Smith the Electrician had met him on site and told him that he (Mr Sharp) had "*better watch what he said because his wife worked for Harcourts*".
- (iv) With respect to the complaint against Mr Young they said that they had never given consent to him to disclose confidential and personal information about them. They also considered his e-mails reflected their concerns that there had been gossip.

[8] Mr and Mrs Sharp said they delayed before making a complaint because of personal issues. The 2009 agency agreements which appear in the bundle of

documents and in the Sharp's bundle of documents are difficult to read. They are only copies. The originals do not exist. The agency agreements were cancelled in 2009 and new agreements entered into in 2010. The Sharps state that these documents were altered to make it appear as if power and phone were connected to all three lots. They also point to the fact that an unsigned copy of the agency agreement for Lot 3 has an incorrect area and seems to be a direct copy of the agreement for Lot 1.

[9] Mr Sharp also told the Tribunal that he had met Mr Smith on site and he had said that he had better watch what he said as his wife worked for Harcourts.

[10] Mr and Mrs Sharp also amplified these issues in their oral presentation.

The Defendant's Evidence

[11] Mr Young gave evidence on his own behalf. He denied that he had spread any malicious gossip about Mr and Mrs Sharp. He did say however that because the Sharp's had listed the sections on other occasions and had changed the price on the properties on other occasions he felt that they were not committed to selling the properties. He said that the fact that Mr and Mrs Sharp had changed their minds about the sale of the sections was well known within Waiheke. Mr Young acknowledged that the e-mail which he sent on 3 October 2011 to Mr Sharp was 'a bit strong' but he felt was an accurate representation of how the market viewed the sections. This e-mail said:

"I'll be frank with you Murray and hopefully you will understand where I am coming from. The word in the marketplace from agents is that most don't wish to market the sections or even bring buyers and to be honest if Peter hadn't approached me I wouldn't have been chasing you for a new listing. The reasons for this are the price has changed many times in the past 2 years, we had the possibility of an auction (and a Tender when I was at Barfoot) cancelled or changed a few times now – the goal posts keep moving!"

[12] He said the properties were subsequently withdrawn from sale on 19 October 2011 and he was surprised and disappointed by the Sharp's decision and he sent Mr Sharp an e-mail about this.

[13] On 19 October 2011 the appellants withdrew the property from the market. Mr Young e-mailed the Sharps saying:

*"Why have you pulled it just before LABOUR weekend?
This weekend is our best chance for the rest of the year? Oh well if I get section buyers around your bracket I'll call you but until such time as you both mentally agree to SELL and put 'that energy out there' and let agents get on with it then I'm afraid not much will happen."*

[14] He denied discussing the Sharp's confidential information with agents other than Peter Andrews (the agent at Cooper and Co Real Estate, trading as Harcourts in Devonport who had a joint agency with Harcourts on Waiheke). He did not move from this position under cross examination.

[15] The Tribunal then heard from Ms Roke who was the agent who sold Lot 1. She said that she could not remember the exact details of how she found out that the section did not have power but it was after the agreement for sale and purchase was signed. She could not recall exactly how Mr Smith (the electrician) was asked to check the power connection. However she was aware that he did and she subsequently learnt that there was no power connected. The buyer however was unconcerned about

the lack of power connection and went ahead with the purchase anyway. When questioned by Mr and Mrs Sharp she could not recall what triggered her to question the issue about the power and the connection however she said that she wanted to make 100% sure that the power was connected.

[16] Ms Watson then gave evidence. She is a licensed real estate agent and was at the time of these events employed at Lyn Jordan Real Estate. She was the listing agent who filled in the 2010 Listing Agreement on which there was the following note:

“NB: Number 34 has bach on. Power and phone to boundary two back sections.”

She said she also produced advertisements showing that there was power and phone to Lot 1 and this was never corrected by the Sharps. She accepts that it is possible that she made a mistake in the listing agreement. She says this was completely unintentional and when she was told by Ms Roke that there may not have been power to Lot 1 she called the Sharps to clarify the situation. They told her that there was no power to Lot 1.

[17] The Tribunal then heard from Graham Smith who was the electrician who went to inspect Lot 1 and clarified that there was no power to the site. He denied ever having met Mr Sharp or making any comments to him about any information that he had obtained from Harcourts. Mr Smith thought that he was asked to go and see the property because of an e-mail from Ms Lyn Jordan but he did not recall what the e-mail said and he did not have a copy of the e-mail. He denied that Ms Jordan gossiped and that he had learnt anything negative or otherwise about the Sharps from anyone at Harcourts. Mr Sharp cross examined him but he was unmoved on this point and denied meeting Mr Sharp.

[18] Finally the Tribunal heard from Lynette Jordan. Ms Jordan was the licensee at the time the section was sold. She told the Tribunal that she was not certain how the error concerning the power had arisen but took full responsibility for the problem with the purchaser and apologised unreservedly to the Sharps for the mistake. She denied that anyone had written over the 2009 Listing Agreements. She said that it would be quite improper for anyone to have written over the 2009 listings (which had never led to a sale) given that she took immediate responsibility for the mistake and she had no incentive to do so. She denied that she had ever breached the Sharps' privacy or gossiped about them. She maintained this position under cross examination.

Discussion

The 2009 Agreements

[19] Altered agreements. The Tribunal have looked very carefully at the 2009 agreements which are unfortunately not at all clear. They are copies and it appears that the originals no longer exist. Ms Jordan does not own the agency anymore and she is not certain that they would have been kept. It is clear that there has been writing on top of some parts of the Listing Agreements but they appear to the Tribunal to relate only to the price changes. The only other place in which there could be overwriting is in respect of the listing for Lot 3 where under “*remarks*” the writing on “*power and phone*” is not clear, it appears to have been written over.

[20] The Tribunal must assess the evidence on the balance of probabilities, that is, is it more likely than not that the agency (or a person employed/engaged by the agency) altered the property Listing Authority entered into in 2009?

[21] The Tribunal do not consider that it has enough evidence to reach the conclusion that these documents were altered in any way. Those are serious allegations and the more serious the allegation the more proof is needed to prove them (see *Z v Dental Complaints Assessment Committee* [2008] NZSC 55). In this case there is not enough evidence to find that Lyn Jordan or anyone from Harcourts Waiheke Island altered the agreements. We therefore conclude that this ground of the appeal does not succeed.

Issue 2

The error in respect of power and phone to Lot 1.

[22] In respect of the acknowledged error about the phone and power, Mr and Mrs Sharp have concerns about when it was that the agency discovered the mistake, and how they become aware of the problem and why and when was the electrician asked to visit the property. They say that Ms Jordan did not unreservedly apologise to them for the Harcourts mistake but she apologised to them for the way in which they felt regarding the mistake. They also want to know how, if Ms Jordan did not speak to anyone outside the office regarding the power and phone, did the electrician find out that there was a problem? They also contend that Ms Jordan did discuss the matter with Mr Smith.

Discussion

[23] Having heard the evidence, it seems that no one can recall how the issue of the power came to be raised. However the mistake arose, Ms Jordan and Harcourts Waiheke took responsibility for it. They addressed the problem with the purchaser and they did not ask Mr and Mrs Sharp to be involved in this. There is no evidence to support the concern of Mr and Mrs Sharp that there was any discussion about their affairs with the electrician or with others. The electrician was asked to check out the site. He did but he denies ever meeting Mr Sharp. On the balance of probabilities we cannot conclude that the agency was guilty of any impropriety over the power issue. They seem to have dealt with it promptly and efficiently. We do not uphold this ground of the appeal.

Issue 3

Discussing the agency and the listings with other agents.

[24] Mr Napier submitted that the agency agreement contains an authorisation by Mr and Mrs Sharp for the agency to promote and discuss the sale of the sections with anyone who might be interested in purchasing them. Ms Jordan denies there was any malicious gossip about the Sharps. Mr Young, while denying that there was any malicious gossip does say that he discussed the marketing of the section with Mr Andrews from Cooper & Co in Devonport (the joint agency) and at coffee with agents on the island in an endeavour to find out whether anyone had a purchaser who might be interested in purchasing a section. He does freely acknowledge that he felt a certain amount of frustration about the marketing of the property because of the decisions made by Mr and Mrs Sharp not to continue to market the property in the way which he suggested or with Waiheke Real Estate.

[25] Having considered the matter and the evidence we can understand why Mr and Mrs Sharp were distressed about the content of the e-mails from Mr Young. They were certainly to the point in telling them that they had made a mistake. They perhaps also unwisely related the views he attributed to others about the sale of the section[s]. However unwise the words in the e-mail of 3 October 2010 were we do not consider that it has crossed the threshold into the realms of unsatisfactory conduct which requires there to be a departure from the standards of accepted behaviour by real estate agents. An agent must be able to provide feedback to an owner even if the feedback is unpalatable. We understand how this could cause concern to the Sharps. However having heard Mr Young we accept his explanation. This ground of appeal is dismissed.

Conclusion

[26] We have a great deal of sympathy for Mr and Mrs Sharp who obviously felt themselves to be the target of malicious gossip relating to the sale of the section. However having considered all of the evidence carefully we do not consider there is sufficient evidence to find that Ms Jordan or Mr Young breached any of their obligations as agents. Accordingly the appeals are dismissed.

[27] The Tribunal draw the parties' attention to s.116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 7th day of November 2013

Ms K Davenport QC
Chairperson

Ms C Sandelin
Member

Ms N Dangen
Member