

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 47

READT 002/14

IN THE MATTER OF

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

BETWEEN

**MARK AND SHEYENNE
FOLDSZIN**

Appellants

AND

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 20008)**

First respondent

LEANNE LEEF

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

HEARD ON THE PAPERS

DATE OF THIS DECISION 2 July 2014

REPRESENTATION

No contact from appellants
Mr L J Clancy and Ms N Copeland, counsel for the Authority
Mr J Waymouth barrister for the second respondent

DECISION OF THE TRIBUNAL

Introduction

[1] On 6 January 2014, Mark and Sheyenne Foldszin (“the complainants”) appealed to us against the 6 December 2013 decision of Complaints Assessment Committee 20008 to take no further action on their complaint against Leanne Leef (“the licensee”).

[2] By application of 30 May 2014, counsel for the licensee applies that this appeal be dismissed for lack of prosecution.

Background

[3] In February 2012, the complainants purchased a house in Rotorua which had two woodburners. The complainants claim that the licensee failed to disclose, and inform them of, a by-law change that would result in the woodburners being non-compliant. However, the complainants obtained a building inspection report (on the property) which referred to the woodburners but not to any issue or possible problem in relation to them.

[4] In May 2012, the new by-law took effect. That meant the two woodburners in the property became non-compliant. The complainants contend that, if the licensee had advised them of the pending by-law change, they would have reduced their offer or 'walked away' from the transaction.

The Committee's decision of 6 December 2013

[5] The Committee found that the licensee should have been aware of the pending by-law change given there was an extensive publicity campaign within the real estate industry about it. The Committee noted that, ideally and optimally, this information, could, possibly, have been drawn to the attention of the licensee's customers.

[6] In finding that the licensee had not breached the Real Estate Agents Act 2008 ("the Act") or rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, the Committee found that the licensee had no reason to believe that the woodburners were not compliant. Further, the licensee advised the complainants to obtain a building inspection report and also suggested that their building inspector check the local Council file on the property. Rule 6.4 requires that a licensee 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.

[7] The Committee also found that it would have been going too far to suggest that an agent should have mentioned to every potential purchaser the by-law change that may affect the use of the woodburners.

Discussion

[8] Our Registry is simply unable to communicate with the appellants, having made every reasonable endeavour to do so throughout this year. Our Mr G Ngaiorae, as case manager, has had his emails to the address provided initially by the appellants rejected and cannot obtain a response to postal mail nor ascertain relevant phone numbers.

[9] Mr Waymouth records that neither he nor Mr Clancy has been able to make contact with the appellants since they filed their appeal to us on 6 January 2014. He notes that the grounds of appeal are brief and, he puts it, "unsubstantiated". He has also experienced that the email address supplied by the appellants simply records the failure of receipt of message. Accordingly, he submits, on behalf of the licensee, that in terms of s.105(2) of the Act there has been a failure by the appellants to submit to and undertake the appeal in accordance with the rules of natural justice so that the licensee is being severely prejudiced by a failure to progress this case. We can accept that there is prejudice to the licensee.

[10] Mr Waymouth also submits that in terms of Rule 15(c) of the Real Estate Agents Act (Complaints and Discipline) Regulations 2009 there has been a clear and substantial failure by the Complainants to appear, such failure being an arranged telephone conference for 30 May 2014, so that we should dismiss the proceedings, and he applies accordingly. That Rule 15 provides that if a party fails to appear at “*the*” hearing of this Tribunal we may, inter alia, dismiss the proceedings. We would not regard a timetabling conference by telephone as “*the hearing*” but it contributes to the context of non-prosecution of their appeal by the appellants.

[11] Counsel for the Authority has advised that they do not disagree with any of Mr Waymouth’s submission in this matter and that the Authority will abide by our decision.

[12] We record that under Rule 17 of the said complaints and discipline rules, our Chairman may make such arrangements as are practicable to ensure the orderly and expeditious discharge of our functions. We consider that extends to striking out proceedings for non-prosecution within a reasonable time.

[13] In terms of the circumstances we have set out above we conclude that there has been a failure by the appellants to prosecute their appeal in a fair and reasonably prompt manner. Accordingly, it is hereby struck out for non-prosecution.

[14] 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

Ms C Sandelin
Member