

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 60

READT 26/13

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

BETWEEN **HAI BING YU**

Appellant

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

First respondent

AND **YU (GEORGE) GUO**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson

Ms N Dangen - Member

Ms C Sandelin - Member

HEARD at AUCKLAND on 30 June 2014

DATE OF THIS DECISION 5 August 2014

COUNSEL

Ms E Kuo for licensee second respondent

Ms S M Earle for the Authority

No appearance by or for the appellant

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Hai Bing Yu, the appellant, has appealed against a 26 April 2013 determination of Complaints Assessment Committee 20006 to take no further action in respect of his complaint against Yu (George) Guo ("the licensee") who is a licensed salesperson working for Barfoot & Thompson Ltd, Howick.

Factual Background

[2] In March 2008, Mr Yu and his father bought 16A Nan Place, Pakuranga, through the licensee (Mr Guo).

[3] In 2010, Mr Yu decided to move back to China and enlisted the licensee to sell the property. Accordingly, on 15 September 2010, Mr Yu and his father signed a

sole agency listing agreement with the Barfoot's agency for the period 16 September 2010 to 24 December 2010. Mr Yu gave the licensee the keys to the property.

[4] On 20 November 2010, Mr Yu and the licensee, who had become friends, travelled to Melbourne. Mr Yu deposited a large sum of money in a joint account at the Crown Casino for the period 20 November 2010 to January 2011. Mr Yu alleges that, during this time, the licensee incurred a gambling debt to him of \$49,500. The licensee denies the debt and submits that he agreed to write out a fake lending note to the effect that he had borrowed the money from Mr Yu so that Mr Yu could tell his father that he had lent the money to the licensee.

[5] The property had not sold by January 2011. The licensee submits that Mr Yu then considered lowering the price of the property for a quick sale and advised the licensee that he had already sold some of the furniture and a car. The licensee says that Mr Yu told him that the remaining chattels were available to be offered for sale to any potential buyer.

[6] On 23 January 2011, prior to Mr Yu leaving for China, the licensee and Mr Yu met and discussed the relisting of the property. The licensee says that he then had completed a new listing agreement but Mr Yu suggested leaving it with him and that he would sign it and the licensee could pick it up from the property later.

[7] On the day Mr Yu departed for China, the licensee took him to the airport and asked if he had signed the listing agreement and left it at the property. Mr Yu stated he had forgotten to sign it and had, accidentally, packed it in one of his bags. He further stated that he would sign the agency agreement and return it to the licensee.

[8] The licensee states that, around 27 January 2011, he received from Mr Yu that signed listing agreement for the sale of the property. The sole agency period was from 27 January 2011 until 30 April 2011. However, the listing agreement had two sections that were incomplete. Mr Yu had not included his email address nor signed off a declaration regarding weathertightness issues.

[9] The licensee claims that he contacted Mr Yu about these two matters and was advised to fill in his own email address and forward it to him and to also tick off the disclosure declaration. The licensee states that he filled in his email address but did not tick off the leaks disclosure.

[10] Mr Yu now alleges that he (Mr Yu) did not sign the listing agreement for the sale of the property and that the licensee forged his signature on it. The licensee states that the listing agreement was all completed in his handwriting with the exception of Mr Yu's signature.

[11] In May 2011, the licensee presented an offer for the property to Mr Yu (sent to China, presumably) from a potential buyer. That prospective purchaser wanted to include a number of the remaining chattels. Mr Yu responded that he would sell the chattels with the property for an extra \$5,000. The licensee states the Mr Yu instructed him to make a list of the remaining chattels and to sell them for him if the sale did not proceed. The licensee then prepared an authority to dispose of the chattels and sent it to Mr Yu to sign along with the Sale and Purchase Agreement.

[12] During negotiations to sell the property, Mr Yu advised the licensee that he should contact Mr Yu's father. The licensee stated that when he contacted Mr Yu's father, the latter told the licensee that if he (Mr Yu's father) did not agree to the offer,

the sale and purchase agreement could not be signed. Mr Yu's father also allegedly told the licensee that, since the licensee owed the gambling debt to Mr Yu and his father, the licensee was to agree not to take any commission from the sale. The licensee states that he told Mr Yu's father that he did not owe any money to him or to Mr Yu.

[13] Subsequently, no agreement was reached as to the price of the property and the chattels, and the offer from the prospective purchaser lapsed. Mr Yu now claims that the licensee arranged disposal of his chattels without permission.

[14] The licensee claims that he had discussed with Mr Yu some slight water damage to the front and side windows of the property and was instructed by Mr Yu to find a builder to provide a quote for necessary remedied work. The licensee obtained a quote from a builder at \$800. The licensee states that Mr Yu agreed to the price and instructed the licensee to organise having the work done. The work was completed on 3 June 2011 and the licensee paid the builder. Mr Yu has not paid the licensee the \$800 and claims that the work was carried out without his permission.

[15] In April 2011, the licensee advised Mr Yu that he had misplaced the keys to the property. The licensee says that, when he became aware the keys were missing, he immediately had a locksmith change the locks for security at the property. He also states that he contacted Mr Yu and informed him that the locks had been changed at the licensee's cost. Mr Yu denies that the locks have been changed.

[16] On 6 June 2011, Mr Yu advised the licensee that he no longer wanted him to sell the property and that he was to give the keys to a neighbour. The licensee did this and withdrew the property from the market on 7 June 2011.

The Committee's Decision

[17] In a full and clear decision of 26 April 2013 the Committee decided to take no further action against the licensee and found:

- [a] that any money lent to the licensee by Mr Yu was a personal matter and did not fall within the ambit of real estate agency work;
- [b] that the second sole agency agreement was signed by Mr Yu;
- [c] Preferred the licensee's evidence, that he had negotiated the possible sale of Mr Yu's chattels on instruction from Mr Yu, as more consistent and credible;
- [d] That the licensee's evidence regarding work carried out on the property was more credible than Mr Yu's and that there was no breach of any obligations owed by the licensee to Mr Yu; and
- [e] Preferred the licensee's evidence that the locks had been changed when he realised that the keys to the property had been misplaced.

[18] In determining that Mr Yu signed the second sole agency agreement, the Committee was provided with signatures by the licensee, Mr Yu, and Mr Yu's father. The Committee obtained a report by a document examiner of a forensic examination of the handwriting samples. That report opined that the signature on the agency agreement was more likely to be Mr Yu's.

[19] We have before us all the material previously before the Committee, as well as the further material filed by the parties for the purposes of this appeal.

[20] We record that the Registrar has kept our Chairperson in touch with his efforts to have Mr Yu, as appellant, return from China for this hearing. Until Monday 30 June 2014, the hearing fixture date, we were unsure whether he would attend, but suspected he would not and he did not. This led to the following application from counsel for the licensee.

The Application of Counsel for the Licensee

[21] Ms Kuo submits that the appellant has failed to prosecute his case and, in the interest of natural justice, we should now dismiss the proceedings pursuant to our powers from Rule 15 of the Real Estate Agents (Complaints and Discipline) Regulations 2009. She also put the following submissions to us.

[22] First, that the appellant has not taken any action since 7 October 2013 when his then counsel filed submissions on behalf of the appellant. These made allegations of procedural error and unfairness, mistakes of law, and bias by the Committee.

[23] There has been an eight month delay since then. The appellant was represented by counsel until recently and has a history of not complying with directions to file his documentations.

[24] Ms Kuo also puts it that the appellant has failed to meet timetabling directions since earlier this year and the second respondent licensee is unable to respond as a result; and such delay has prejudiced the second respondent as there is uncertainty and the proceedings hang over his head.

[25] Second, it is submitted by Ms Kuo that the appellant's failure to advance his case and his non-appearance means that she is unable to cross-examine him. She noted that in *Whitby Forest Management Ltd v B & W Helicopters 19/11/91*, Master Williams QC, HC Masterton CP 10/86, the unavailability of the defendant's principal and crucial witness was decisive in the Court's striking out the proceedings.

[26] Further Ms Kuo submits, s.27(1) of the New Zealand Bill of Rights Act 1990 states that every person has the right to the observance of the principles of natural justice by any Tribunal or other public authority which has the power to make determination in respect of that person's rights, obligations, or interests protected or recognised by law. She referred to our High Court stating in *Udompun v Ministry of Immigration (2003) 7 HRNZ 238 (HC)* at paragraph 142: "*The learned authors of the New Zealand Bill of Rights note that "natural justice" is a creature of the common law with two distinct components: first, the duty to hear both sides of a dispute before making a decision; second, that no person should be a Judge in his or her own cause*".

[27] Finally, Ms Kuo submitted that the Authority has decided to take no disciplinary action against the second respondent and, if the appellant believes that such decision is incorrect, he should have advanced his reasons because he has the onus of proof (to the balance of probabilities) instead of relying on us to make such inquiry for him.

[28] Ms Kuo noted that counsel for all parties had filed submissions regarding the issues with a view to our dealing with the appeal "*on the papers*". However, on

6 January 2014, our Chairperson directed a hearing because some of the issues involve findings of credibility.

The Stance of the Authority

[29] Ms Earle does not disagree with the stance of Ms Kuo for the licensee and puts it, of course, that it is for the appellant to advance his appeal and to do that he needs to be present and give evidence and argument. As we cover below, she also submits that the appeal has no merit.

[30] Ms Earle noted (as we have mentioned above) that by agreement between the parties on 30 July 2013 this matter was set down for a hearing by us "*on the papers*". At that stage, the appellant was represented by counsel and a timetable for filing of submissions was directed by our Chairperson and, eventually, the timetable was complied with by the appellant who had been tardy; but the other parties had complied with the timetable.

[31] Ms Earle also noted that on 6 January 2014 our Chairperson, having considered the submissions filed for all parties, directed that there be a hearing of the appeal in the usual way and fixture was made for 30 April 2014 with a standard timetable to that. Then the hearing date needed to be amended and the parties proposed a fixture for 30 June 2014 but our Registry could not obtain confirmation from the appellant or, indeed, a response from the appellant because on 11 June 2014 his counsel withdrew.

Discussion

[32] We agree that it is for the appellant, having brought this appeal, to advance his case and, if he does not attend the hearing, he runs the risk that his appeal will be dismissed.

[33] The appellant did not attend our forum at the fixture date and, after a time, we had him formally called. He was not present for the appeal. The licensee offered to give evidence and did so to confirm the summary of facts as covered above, the facts as found by the Committee, and the contents of the agreed bundle of documents.

[34] For the sake of completeness we now cover the submissions from Ms Earle (on behalf of the Authority), to show that, in any case, the complaint of the appellant seems to lack merit.

[35] The broad grounds of the appellant's appeal are: irrelevant considerations; procedural error; mistake of law; and apparent bias.

Irrelevant Considerations

[36] The appellant contended that the Committee took into account irrelevant considerations in preferring the oral submissions of the licensee over documented evidence on behalf of the appellant, particularly, in relation to the acknowledgement of debt.

[37] In any case, the Committee was of the view that the gambling arrangement was a personal matter for the licensee. Accordingly, the Committee did not consider the matter to be real estate agency work and found that the licensee had not contravened the Act or the Rules in relation to this part of the complaint.

[38] The Committee also preferred the licensee's evidence in several other respects, including as to the disposal of the remaining chattels, repair work, lost keys and the agency authority document. We agree that it was open to the Committee to make findings as to credibility on the evidence before it.

[39] As Ms Earle submitted, the Committee was entitled to take into account the matters it did in concluding that the complaint was not supported on the evidence. We also accept that a decision to take no further action was appropriate.

Procedural Error

[40] The appellant contended that he was never given the opportunity to respond to the licensee's submissions and was not provided with a copy of the report undertaken by the document examiner in relation to the said handwriting sample.

[41] In fact, the appellant was provided with a copy of Mr Yu's submissions by way of email and letter dated 19 November 2012. The appellant was provided with a copy of Linda Murrell's report, regarding the signature of Hai Bing, by email and letter dated 11 January 2013.

[42] While both letters state "*no further response required*" and "*the attached documents are for your information only*", the appellant had already had the opportunity to set out his complaint in detail.

[43] In any event, the appellant has had the opportunity on this appeal to respond in full to all the material before us.

Mistake of Law

[44] The appellant submitted that the Committee was mistaken, in law, in determining that the overseas gambling trip to Australia and the associated financial agreement were not real estate agency work and/or misconduct under s.73 of the Act.

[45] We agree with Ms Earle that the findings of the Committee, in relation to the trip to Australia and the financial arrangement entered into by the appellant and the licensee, were open to it on the evidence.

Apparent Bias

[46] The appellant submitted that the Committee, in preferring the evidence of the licensee, was biased and failed to conduct the hearing in a fair and objective manner.

[47] However, the Committee is entitled to make evidential findings on the balance of probabilities. Simply preferring one party's evidence does not render the decision maker biased.

Conclusion

[48] At the end of what transpired to be a fairly short hearing on Monday 30 June 2014, we granted the application for the licensee and dismissed the appeal for the reasons set out by counsel and referred to above. We did not treat the situation as that of an appellant failing to prosecute his appeal because quite an amount of evidence and submission are before us.

[49] Although there is evidence before us not only from the licensee but also from the complainant as adduced by him to the Committee, there is no evidence or reason for us to not accept the findings of the Committee which, in any case, seem sound and sensible to us. The appellant has simply not discharged the onus of proof upon him, on the balance of probabilities, to show that the findings of the Committee are in any way incorrect.

[50] Accordingly this appeal is hereby dismissed.

[51] 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