

[2014] NZREADT 65

Reference No: READT 064/13

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

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE (CAC20004)**

AND **MERVYN GARDINER**

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport QC – Chairperson
Ms C Sandelin – Member
Mr J Gaukrodger – Member

HEARD at Auckland on 8 August 2014

APPEARANCES

Meredith Connell, Barristers and Solicitors, Mr R McCoubrey, Counsel for the Complaints Assessment Committee
Mr J Waymouth, for the defendant

DECISION OF THE TRIBUNAL

[1] Mr Mervyn Gardiner is a real estate agent who in 2012 was working in the Cooks Beach Area. Between May and July 2012 there were about six burglaries in the Cooks Beach Area, most of them involving uninhabited bachs. The local real estate agent, Richardson's Real Estate, where Mr Gardiner worked helped the Police by giving details of the owners of the bachs.

[2] At the end of July 2012 Mr Gardiner heard that the Police were going to execute a search warrant to search a property known as "*The Barn*". "*The Barn*" is a property owned by Mr Gardiner and his ex-wife Theresa Dufty. Miss Dufty lived on the property with her two sons. One of these, Matthew Dufty, [Mr Gardiner's stepson] was thought by the Police to be involved in the burglaries. Mr Gardiner told the Tribunal that he believed that Matthew might have some cannabis in "*The Barn*" and so he sent a text to Miss Dufty to warn her. The text says "*HB I've just heard da Police getn a search warrant for barn. If Matt got anything there he shouldn't hav he need 2 get rid of it*". About three minutes later he text again saying "*please delete that message*".

[3] The search warrant was executed approximately one week later and nothing was found at "*The Barn*". The Police then obtained copies of the phone records of Miss Dufty and found the texts mentioned above. Mr Gardiner was spoken to but not charged. The Police then wrote to the Real Estate Agents Authority with their concerns. The Complaints Assessment Committee determined to charge Mr Gardiner as follows.

The Complaints Assessment Committee 20004 (CAC 20004) charges the defendant with misconduct under s 73(a) of the Real Estate Agents Act 2008 (Act), in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

On 31 July 2012 the defendant sent a text message to his former wife warning her that the Police intended to execute a search warrant at the property she and her son lived in, namely:

"HB I've just heard da Police getn a search warrant for barn. If Matt got anything there he shouldn't hav he need 2 get rid of it".

The Issues

[4] There is one issue in this case:

- 1) Do the actions of Mr Gardiner in texting his ex-wife amount to disgraceful conduct (as the conduct was not associated with Mr Gardiner's work as a real estate agent)?

The evidence

Mr Gardiner's explanation of what transpired was that he had been concerned about the fact that his former stepson was using cannabis.

[5] Mr Gardiner claims he heard about the potential search warrant whilst standing outside the dairy in Cooks Beach. The Complaints Assessment Committee suggested that he heard about the potential search warrant in his role as a real estate agent and that he had been assisting the Police with their enquiries.

[6] He said that he thought that Matthew was "*coming right*" but the local Police attempted to find him liable for the burglaries and he supported him. He said he did not tell Matthew so that he could get rid of any stolen property because he was worried that they might find a bong or some marijuana at "*The Barn*". He also said that he sent the text in some annoyance because he was fearful that Matthew had been using marijuana and did not want the embarrassment. He said that the Police had been talking to Matthew for several days before the search warrant was executed and he would not therefore have needed to tell him to get rid of any stolen property had he stolen it. He said that he had been annoyed by Miss Dufty's boys' behaviour for many years. He said his concern was as a stepfather to try and protect his stepson from the potential discovery of cannabis, not to prevent the Police from finding any stolen property.

[7] Mr McCoubrey and Mr Waymouth both agree that the test as to whether or not the sending of the text amounts to disgraceful conduct is an objective test, but both also agree that the subjective intentions of Mr Gardiner can influence the Tribunal's analysis of this objective test. The question posed is if the Tribunal find that Mr Gardiner's only intention was to prevent the Police discovering any marijuana equipment at the property [and thus to spare himself further embarrassment] does this make the text more acceptable than an intention to prevent the Police from finding stolen property? Does the relationship between Mr Gardiner and his stepson make the sending of the text any more acceptable?

[8] The Real Estate Agents Authority submitted that the evidence speaks for itself and whatever Mr Gardiner's motivation the text was plainly aimed at ensuring that anything illegal was moved from "*The Barn*". Mr McCoubrey submitted that there was a nexus between the conduct and Mr Gardiner's licence and that no real estate agent should be tipping off anyone so to prevent the Police from being able to carry out their duty. Mr Waymouth argues that the conduct does not amount to disgraceful conduct.

[9] There is no doubt that Mr Gardiner was very concerned about what the Police might find. Whilst he is only charged with the text sent on 31 July texts sent later in August, at around the time of the execution of the warrant show that he continued to be concerned. On 6 August there is a discussion between Mr Gardiner and his former wife about fishing rods belonging to Mr Gardiner at "*The Barn*" which the Police believe were stolen.

[10] On 7 August Mr Gardiner texted Miss Dufty saying "*HB if da cops hav access to Matt's phone you shudnt text him re rods*". Miss Dufty responds "*I don't know:- ☹*".

[11] The Tribunal conclude from this evidence and from having heard Mr Gardiner that Mr Gardiner was concerned that the Police would discover something at "*The Barn*". It may be that it was drugs paraphernalia but equally it might be that he was concerned that there might be stolen property. We can assume that the Police did not or could not establish that Mr Gardiner was perverting the course of justice by ensuring that the stolen property was hidden because he has not been charged or cautioned. The Police only spoke to Mr Gardiner. Our conclusion must therefore be that this behaviour was not criminal but was certainly most unwise. Mr Gardiner was motivated by either embarrassment, anger or a desire to protect his stepsons. In the end we conclude that these motivations do not really matter. We need to determine whether sending someone a text to warn Matthew about an impending search warrant for whatever reason amounts in these circumstances to disgraceful conduct or not?

[12] We refer to earlier decisions of the Tribunal in which the question of the meaning of "*disgraceful conduct*" has been analysed.

[13] The leading case determining the meaning of "*disgraceful conduct*" is in CAC v Downtown Apartments Limited [2010] NZREADT 2006. The Tribunal held there at [55]:

"The word disgraceful is in no sense a term of art. In accordance with the usual rule 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 of agents of good standing or reasonable members of the public".

At [57] the Tribunal said:

“The ‘reasonable person’ is a legal fiction of common law representing an objective stand against which individual conduct can be measured but under s 73 that ‘reasonable person’ is to be qualified to be an agent of good standing or a member of the public.”

At [59] the Tribunal concluded:

“The Tribunal must find on balance of probabilities that the conduct of the defendant represented a marked or serious departure from the standard of an agent of good standing or a reasonable member of the public.”

[14] An agent has been found guilty of disgraceful conduct in:

- a) Forging his wife’s signature on personal finance document (see *CAC v Dodd* [2011] NZREADT 01) and
- b) In *CAC v Subritzsky* [2012] NZREADT 19 and [2012] NZREADT 20 where the two licensees sent racially offensive text messages to a process server and behaved in a verbally and physically aggressive manner towards a second process server.

[15] However in *CAC v Beizer* [2011] NZREADT 05 the Tribunal found that the conduct of an agent who sent an offensive electronic message to a former work colleague about a client, which was intended to be private but was in fact able to be viewed on Facebook, was unacceptable but did not amount to misconduct under s 73(a).

Discussion

[16] The Tribunal have found this a difficult decision. On the one hand we can understand a stepfather’s natural desire to protect his stepchildren, however registration means that an agent must be held to standards which can be higher than those expected of members of the public. Their conduct must be modified to reflect the benefits and obligations of registration as an agent. Mr Gardiner’s conduct was certainly unwise and in telling his former wife to delete the message Mr Gardiner appears to have recognised that fact. But is it disgraceful conduct? Mr Gardiner’s concern for his stepson needed to be balanced in his mind against his obligations as a professional real estate agent. In sending this text he came dangerously close to breaching his obligations under s 73. We have considered this point carefully and consider that in this case we do not think that the conduct complained of reaches the level of disgraceful conduct as that term is described in *CAC v Downtown Apartments*. It was foolish, it was unwise, it is conduct which we condemn and it is conduct which would certainly amount to unsatisfactory conduct under s 72, but in the circumstances of this case we do not find that sending this one text is sufficient to make a finding that Mr Gardiner was guilty of misconduct.

[17] However the Tribunal would like to take this opportunity to remind the profession of the high standards of behaviour which are expected of agents. Registration as a real estate agent under the Real Estate Agents Act 2008 involves imposition of standards on real estate agents which may not have been present under earlier legislation. This

means conduct not only in their work as an agent but in all aspects of their lives. The profession needs to be warned that an agent's personal behaviour also needs to reflect their standing in the community and their registration.

[18] Accordingly in the circumstances the charge against Mr Gardiner is dismissed.

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

DATED at AUCKLAND this 21st day of August 2014

Ms K Davenport QC
Chairperson

Ms C Sandelin
Member

Mr J Gaukrodger
Member