

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 81

READT 060/13

IN THE MATTER OF

a charge laid under s 91 of the
Real Estate Agents Act 2008

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC 20005)**

AND

MOHIJIT SENGUPTA

Defendant

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Ms C Sandelin – Member
Mr G Denley – Member

HEARD at AUCKLAND on 22-23 April 2015

DATE OF DECISION 17 November 2015

APPEARANCES

Mr L Clancy for the Real Estate Agents Authority
Mr Wimsett for defendant

DECISION OF THE TRIBUNAL

Background

[1] Mr Sengupta faces one charge of misconduct. The charge relates to his departure from Buy West Realty Ltd and Buy West Property Management Ltd on 30 March 2012. Mr Sengupta was a property manager for Buy West until this date. The charge provides:

“Following a complaint by Joseph Voordouw Complaints Assessment Committee 20005 charges Mohijit Sengupta with misconduct under s 73A of the Real Estate Agents Act 2008 in that his conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful”.

Particulars:

Taking confidential information from Buy West Realty Ltd/Buy West Property Management Ltd without consent for use in a competing business First Property Management Ltd.

The Facts

[2] Mr Sengupta does not really challenge the facts of this charge but instead disputes whether they amount to disgraceful conduct. Mr Sengupta agrees that after his departure from Buy West Realty Ltd, where he had been employed for some years as a Property Management Consultant, he took with him a number of documents and photographs, the property of Buy West Realty Ltd.

[3] The Tribunal heard from Diane Voordouw, the wife of the complainant, who is also a director of Buy West Realty Ltd and Buy West Property Management Ltd. This company is a franchise of Ray White Real Estate. Ms Voordouw told the Tribunal that Mr Sengupta was employed as a real estate agent by Buy West prior to 2007. In 2007 he went into property management and worked for Buy West Property Management. His most recent contract with Buy West was dated 1 April 2011. This contract made it clear that whatever information he obtained whilst a member of Buy West Realty was to remain confidential. The contract said that office files and computer information remained the property of the company. Mr Sengupta agreed not to solicit Buy West clients when this contract was terminated and to all the other terms.

[4] Shortly before the end of March 2012 Mr Sengupta gave notice that he did not intend to renew his contract. He left by agreement on 30 March 2012. He told Mrs Voordouw that he had not decided what he wanted to do after his departure but he was going to take things easy for a while. He said he had no plans to continue in property management. However within a week of Mr Sengupta leaving Buy West five owners of eight properties terminated their property management agreements with Buy West. These people had all been contacts and clients of Mr Sengupta. Mrs Voordouw then learnt that Mr Sengupta had commenced his own property management business called First Property Management Ltd on 5 April 2012. Mrs Voordouw and her husband obtained a Court Order enabling them to search Mr Sengupta's computer records and to see whether he had taken a copy of the client data base. They hired a private investigator who spoke to Mr Sengupta and asked him to become a property manager for him. The computer forensic examination found Mr Sengupta's computer contained a large number of documents from Buy West. Proceedings were issued and Mrs Voordouw told the Tribunal that Mr Sengupta had settled the dispute by agreeing to pay compensation to Buy West of \$14,275 and also pay costs of \$53,678 for the loss of eight rental properties.

[5] Ms Natalie McKeown, the daughter of Mrs Voordouw told the Tribunal that she was the manager of the property management side of the business. She said that Buy West Realty had a propriety database system called Real Base Palace Live which enabled property managers to have a database, accounting functions and details of properties – tenants, outgoings etc – available on their computer and phone.

[6] Ms McKeown said she learnt that Mr Sengupta was going to resign on 26 March 2012. She then met with Mr Sengupta and asked him why was he heaving? He told her that he felt that Buy West was not happy with him and he was not happy with the company and so it was time for him to move on. He also told Ms McKeown that he did not have any future plans and wanted to think about what his options were. He told Ms McKeown that he might go back to property management in the future but gave her the definite impression that he would not be doing anything in property management for some time. Ms McKeown said she had

asked Mr Sengupta to give back his keys, his mobile phone and anything else belonging to the property. Most property was returned but he insisted he should be allowed to keep the mobile phone. He was allowed to do. On 2 April she emailed all of Mr Sengupta's clients advising that he had left but that his services would be picked up by other managers. Within a short space of Mr Sengupta's leaving five people had terminated their management services with Buy Realty and that by 20 April eight rental properties had been lost.

[7] The Tribunal then heard from Mr Spence, the Private Investigator who had been instructed by Buy West's lawyers in 2012 to undertake a search and analysis of Mr Sengupta's computers. Mr Spence could not recall any details of what he examined but relied upon his written report. The written reports said that he confined his search to the Mac desktop computer (home) and found in it approximately eight gigabytes of documents in various files. One file called "Casual TA" had scanned images of Ray White property rental agreements. These were scanned on 23 March 2012, but most of the folders were created on 29 March 2012 and they contained images and letters. Mr Spence was able to deduce that it was likely that most of the data was copied onto the hard drive at one time.

[8] Mr Barrow also gave evidence that he had approached Mr Sengupta pretending to be a potential user of his property management services. He made contact with him on 23 April. He said that Mr Sengupta told him that he had left Ray White and started his own property management business so he could give customers a better personal service. Mr Barrow met Mr Sengupta at his home where Mr Sengupta talked about his experience in real estate and his fee structure. He said that he had four to five clients and he was managing 11 properties for them and they were all ex-Ray White customers who had given notice to Ray White. He told Mr Barrow that he had a lot more Ray White customers who wanted to come over to him immediately. He said that he discouraged them from doing so and advised them to "go slow" as he did not want Ray White stressing out and him getting into trouble. He repeated that he had existing Ray White clients who had changed to him and he would have approximately 50 Ray White clients within the next three months.

[9] Mr Sengupta did not dispute much of this evidence but told the Tribunal that he had mistakenly believed that because he had worked on the properties himself and had built up the number of clients he managed he thought he was equally entitled to the database. He said however that even though he had copied the documents he understood that he was not able to solicit clients. He said the clients that had come to him were people who had personal association with him and who asked him to take over management of their businesses. He told the Tribunal that he did not have any intention of forming a property rental company when he left the business but shortly thereafter (on or about 2 April) changed his mind and decided that he would form a property business. He established the company, set up a bank account and began managing the properties. He told the Tribunal that he was unhappy at Buy West, that his relationship with Natalie McKeown was strained, and that she did not like him. He said that the rental agreements which he copied were modified to use in his own business.

[10] Mr Sengupta also called evidence from Mr Fernandes, one of his friends who moved his properties into Mr Sengupta's management from Ray White. He said that Mr Sengupta had not contacted him about leaving Ray White. However when he was notified by Ray White that Mr Sengupta had left the business he contacted him and Mr Sengupta offered to help him complete the work on the properties that he had

not done while at Ray White for nothing. Mr Fernandes said he did not learn until after the Easter holidays (approximately 8 April) that Mr Sengupta was going to start his own property business. Mr Sengupta also called two witnesses, Ms Henderson and Ms Tower (now Parker) who had been previous employees of Buy West. They gave evidence about the difficulties of working for the company and how the property managers worked.

[11] As this recital of the evidence shows the question for the Tribunal is whether Mr Sengupta's acknowledged conduct amounts to disgraceful conduct or not.

[12] As a property manager Mr Sengupta was not carrying out real estate work. Thus to be an offence against the Real Estate Agents Act his must be disgraceful conduct or it is not an offence.

[13] The Tribunal have examined the meaning of the term disgraceful conduct on previous occasions.

[14] In *CAC v Downtown Apartments Limited*.¹ The Tribunal 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 of '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.

(Emphasis added).

[15] In *E v REAA and N*,² a complaints assessment committee had determined to take no further action when Mr N, a former salesperson employed by Mr E, was alleged to have copied Mr E's company's database. It was accepted that the conduct

¹ *CAC v Downtown Apartments Limited* [2010] NZREADT 06.

² *E v REAA and N* [2013] NZREADT 27 [Tab 1].

was not real estate agency work and the Committee found it did not meet the threshold for laying a charge for misconduct. The Tribunal found on the appeal that:

[19] We have considered the facts of what is essentially an employment dispute between [Mr E's company] and Mr N. There might be (limited) circumstances where an employment dispute could be said to amount to disgraceful conduct (such as Smith) ...

[21] Could the conduct of Mr N in retaining the database (in the circumstances he has explained) be said to amount to a marked and serious departure from the standards of an agent of good standing? We have considered the evidence which we have and do not consider that in the circumstances of this case Mr E will be successful in his appeal.

[16] In *Miller v REAA v Robinson*³ the Tribunal considered an appeal from a complaints assessment committee decision to take no further action in respect of an allegation that a salesperson, after ending his employment relationship with an agency, removed files from that agency. The Committee initially characterised the allegation as an 'employment issue' and decided to take no further action.

[17] On appeal, the Tribunal accepted the submissions of Mr Withnall QC for the appellant, that actions on the part of a licensee undertaken with the intention of 'poaching' from an employer (or former employer) – in terms of clients, knowledge base or goodwill – should be denounced as conduct contrary to standards of ethical, professional and commercial conduct.⁴ The Tribunal went on to say:

[72] Also, as we have indicated above, in endeavouring to make use of his current files at the time of his transition between real estate firms, the licensee's conduct was deficient in terms of the Act.

[73] Unlike the Committee, we think that an outcome of no further action being taken is inappropriate. We find the licensee's conduct to have been 'unsatisfactory' in terms of s 72 of the Act. Indeed, depending on the facts of a particular case, the type of background outlined to us could sometimes well amount to misconduct.

[18] Each case of course is fact-dependent and we need to determine whether in this case where Mr Sengupta acknowledged having in his possession a large number of photographs and documents which he copied from an employer his conduct is so culpable that it should be regarded by other agents as disgraceful.

Counsel's Submissions

[19] The Complaints Assessment Committee submit that the evidence does establish misconduct on Mr Sengupta's part. They submit the following facts taken together constitute a marked and serious departure from the standards expected of a licensee which would be viewed by members of the public or agents of good standing as disgraceful. The evidence that the CAC identify to support this submission is:

- (a) Mr Sengupta took the confidential information with the intention of using it.
- (b) He knew he was contractually prohibited from taking the information.

³ *Miller v REAA and Robinson* [2013] NZREADT 14 [Tab 2].

⁴ *Ibid* at [60].

- (c) He took a large volume of confidential information which requires some forethought and planning.
- (d) There was an element of deception in his dealings with Buy West around the time of his resignation.

Mr Clancy emphasised that this must have been a planned decision by Mr Sengupta because the information was on his home computer without a satisfactory explanation. The fact that the documents were copied on either 20 March 2012 or 29 March 2012 support the Complaints Assessment Committee's submission that it was always Mr Sengupta's intention to copy material and use it for his own business. He submitted that Mr Sengupta's reasons for doing this were that he needed it for working from home or took the information to protect himself from a potential claim from Buy West. He submitted that Mr Sengupta's explanation that he needed the documents in case Buy West withheld commission payments was "inconsistent and unconvincing". Instead the Committee submitted that the overwhelming inference was that Mr Sengupta took the information with the intention to grow his new business because:

- (a) He resigned on 26 March, finished work on 30 March and incorporated his new company on 5 April.
- (b) By 15 April he had opened a bank account and set up a PO Box and his claim to have formed the intention to set up the business only on 2 April when contacted by a client was not credible.
- (c) He had attracted five clients within a week of leaving Buy West and the evidence of the private investigator was clear that he expected to have a number of former Ray White clients within the next three months.

[20] Mr Clancy submitted that the most likely and believable explanation of Mr Sengupta's intentions came from his own evidence that he believed that he was entitled to the information. Mr Clancy submitted that other factors which were highly relevant to determining the question of misconduct are Mr Sengupta's awareness that the material belonged to Buy West and the very large amount of information that had been copied by Mr Sengupta. Mr Clancy therefore submitted that the conduct of Mr Sengupta, coupled with the large amount of confidential information which he knew to be Buy West's constitutes a marked or serious departure from the ethical standards expected of licensees and a departure which should be viewed as disgraceful conduct.

[21] Mr Wimsett submits that the conduct is clearly not disgraceful conduct. He acknowledged that the taking of information was unacceptable and that Mr Sengupta had paid for this. He submits however that Mr Sengupta honestly believed that he was entitled to the information that he took and this misunderstanding was genuinely held by him as a result of Buy West using an entirely inappropriate employment contract.

[22] Further he submitted that whilst Mr Sengupta is said to have taken 13,219 documents this overstates the extent of the wrongdoing. He submitted that the case is essentially an employment dispute between an employee and employer and no consumers were at risk. He submitted that the Tribunal had in the past declined to make findings of disgraceful conduct in cases which were essentially employment disputes and private disputes between a former employer and the employee.

[23] Further he submitted that Buy West's work information would often travel between personal and office devices because property managers needed to be mobile. There was no evidence that Buy West asked him to return every single document or file contained on these devices. Mr Wimslett submitted that the majority of property management forms that Mr Sengupta used at Buy West were publicly available. Because Mr Sengupta had built the rent role from scratch he felt that he had the right to some of the documents. Mr Wimslett submitted that Mr Sengupta had never denied contemplating setting up his own business but his evidence was that he had only decided not to renew his contract with Buy West about a week before resigning and the combination of his unhappiness over Ms McKeown's behaviour, his resignation and a call from a former client pushed him to start his own company on 5 April. Further he took the material for self protection [against failure to pay commission] and as the two witnesses called in support of Mr Sengupta showed the information that he had was information that other property managers would have had at their home.

[24] Mr Wimsett conceded that Mr Sengupta's conduct might have amounted to unsatisfactory conduct but submitted that it did not reach the threshold of disgraceful conduct as dishonesty had not been clearly demonstrated. He said it was essentially a private dispute for which Mr Sengupta had already paid a substantial sum for information he acknowledges he wrongly took.

Discussion

[25] The conduct of any agent who takes confidential material from an employer should be denounced as conduct which is contrary to the standards of good ethical, professional and commercial conduct to be expected of a real estate agent.

[26] We would have had no hesitation in finding that Mr Sengupta's conduct was unsatisfactory conduct. In doing this we would have made a finding of fact that we consider that Mr Sengupta was on the balance of probabilities likely to have had the intention of forming his own real estate agency business prior to leaving Buy West. We find it is more likely than not that he reached this decision before he left the business, which is why he took copies of the documents. However there is no direct evidence that he actively enticed clients from Buy West, although he has paid Buy West compensation for the eight clients that did come to him in April 2012.

[27] We conclude that Mr Sengupta was aware that he should not have had these documents in his possession and he has paid the economic price for the decision to retain the information. However it is not clear whether and to what extent Mr Sengupta used the information that he had. He seems to have used amended documents which were freely available from open sources, although based on Buy West documents. He copied this material shortly prior to leaving the company, no doubt because he thought it might be useful when he set up his own business. This is conduct which is clearly wrong.

[28] However more is needed before we can reach a conclusion that the conduct amounts to disgraceful conduct. It must carry with it conduct which would be regarded by agents of similar standing as disgraceful and that it is a marked or serious departure from the standards of an agent of good standing.

[29] This question is an objective test which requires the Tribunal to balance and weigh the evidence which has been heard and to determine whether it comes down

as being sufficiently serious to amount to disgraceful conduct or not. Our reasons for finding that it comes down short of disgraceful conduct are as follows:

- (i) There is limited evidence that Mr Sengupta used much of the material in his possession.
- (ii) He has paid a significant sum by way of compensation and costs to Buy West for taking this material.
- (iii) The employment contract that he entered into with Buy West was particularly clear and it is arguable that the extent of Mr Sengupta's contractual obligations was unclear to him, although he has acknowledged that he knew that he did not have a right to Buy West's confidential information.
- (iv) He did not actively solicit clients. There appears to have been a genuine unhappiness in the property department at Buy West which makes it more likely than not that Mr Sengupta's express reasons for leaving so abruptly were in fact because of these disputes, rather than a long planned intention to operate in opposition to Buy West.

[30] For all these reasons therefore we consider that the conduct of Mr Sengupta does not amount to disgraceful conduct and we therefore dismiss the charge against him.

[31] Accordingly given that we cannot make the finding of unsatisfactory conduct because it was not real estate agency work we do not consider that it is sufficiently serious to amount to disgraceful conduct.

[32] Accordingly the charge is dismissed.

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

Ms K Davenport QC
Chairperson

Ms C Sandelin
Member

Mr G Denley
Member