

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 85

Reference No: READT 014/15

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

BETWEEN

BRIAN MUDGE

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC307)**

First Respondent

AND

GARETH ROBINS

Second Respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC - Deputy Chairperson
Ms N Dangen - Member
Mr J Gaukrodger - Member

APPEARANCES

Appellant: Mr Mudge in person
Counsel for the REAA: Ms K Lawson-Bradshaw
Counsel for Second Respondent: Mr C Matsis

DECISION

[1] The appellant appeals against the decision of the Complaints Assessment Committee 307 (Committee) to not inquire into his complaint against licensee Gareth Robins.

[2] The appellant, Mr Mudge, is a registered property valuer. Mr Mudge was engaged by Mr Robins to appraise a property Mr Robins and another party were

interested in purchasing at 7 Kabul Street, Khandallah. Mr Robins has failed to pay for the valuation and Mr Mudge complained about this and other matters to the Real Estate Agents Authority (REAA). Mr Robins also apparently did not provide this valuation to the vendor but obtained another (and lower valuation).

[3] The Committee determined that no further action would be taken in regard to the complaint in its decision dated 20 February 2015. The Committee concluded that:

- [a] the conduct complained of did not amount to real estate agency work and therefore could not be unsatisfactory conduct under section 72 of the Real Estate Agents Act 2008 (the Act); or
- [b] the conduct complained of was not serious enough to reach the threshold of misconduct under section 73 of the Act.

[4] They therefore decided to take no further action.

[5] The issue on appeal was whether Mr Robins' conduct:

- [a] comes within the definition of real estate agency work pursuant to section 4 of the Act; and
- [b] is serious enough to be considered possible misconduct pursuant to section 73 of the Act.

Evidence and Submissions

[6] Mr Mudge was the only person who gave evidence. He spoke to his comprehensive statement of evidence dated 24 August 2015. His evidence was that he (via Appraisal Property Consultancy Ltd) had been instructed by Mr Robins on 5 June 2014 to obtain a valuation of a property at 7 Kabul Street, Khandallah. Mr Mudge understood that the property was for sale and been marketed by Leaders Real Estate. The property was inspected on 8 June and a valuation was completed and sent to Mr Robins. The invoice for \$700 plus GST was also sent to Mr Robins. Mr Mudge told the Tribunal that Mr Robins had subsequently called him saying that he believed that the valuation was too high. However he received no further written communication and the invoice was not paid. However, on 6 December 2012 Mr Robins emailed Mr Mudge and asked him for a copy of the valuation report to be readdressed to him so that it could be passed to the Bank for security purposes for another property. Mr Mudge offered to readdress the valuation if he was given the bank's details and pointed out to Mr Robins that his invoice had still not been paid.

[7] Mr Mudge heard nothing further from Mr Robins. On 22 July 2013 a letter was sent by Appraisal Property Consultancy Limited asking for payment of the invoice. On 2 May 2014 another letter was written by Mr Mudge to Mr Robins asking for immediate payment of the invoice.

[8] A further letter was written to Mr Robins on 22 May 2014 stating that Mr Mudge was very concerned that he had not been paid and he had decided to put

the matter into the hands of a debt collection agency and also to refer the issue to the Real Estate Agents Authority.

[9] On 5 June 2014 Mr Mudge did this. His complaint to the REAA was that *“he valued the property at \$970,000, that Mr Robins purchased the property for \$887,000, that Mr Robins disputed the valuation figure and then requested a copy of the valuation for the purchase of a further property and he has not paid the invoice despite several follow up letters and his actions in respect of the valuation and purchase of the property appear to be in breach of the Real Estate Agents Act and Regulations”*. The remedy that he sought was *“payment of our invoice plus interest”*.

[10] Mr Mudge’s initial complaint related to Mr Robins’ failure to pay for the valuation but Mr Mudge was apparently advised by the REAA that Mr Robins could obtain a second valuation without any concern. This worried Mr Mudge and he later asked the REAA whether the REAA *“deem it acceptable and ethical practice by licensed agents to shop around to get a valuation that suits his/her purpose and produce the preferred valuation to the vendor to comply with section 135 of the Real Estate Agents Act 2008”*.

[11] The Committee made no comment on Mr Mudge’s request for confirmation concerning the ethics of this position when they decided to take no action on the initial complaint.

[12] Mr Mudge appealed the decision. Mr Mudge submitted that Mr Robins’ actions fell short of the standards required of the agents set out in section 72. He told the Tribunal that while his initial complaint had been non payment of his fees, it *“became evident that Mr Robins was deliberately not paying the contracted invoice as a value assessed by Appraisal Property Consultancy Ltd of \$970,000 was, in his view, too high”*. Mr Mudge felt that this was in breach of the obligation of an agent not to mislead a customer or client or provide false information. He also submitted that the failure by Mr Robins to disclose he had received more than one valuation was unfair and could be *“construed as being tantamount to silent misrepresentation”*.

[13] Mr Matsis, counsel for Mr Robins, spoke to Mr Robins during the course of the hearing and was able to advise the Tribunal that Mr Robins had agreed to pay the disputed sum that evening. Mr Mudge was asked whether this would resolve his appeal and the Tribunal were told it did not. Mr Matsis submitted that Mr Robins was not carrying out real estate agency work and that section 73 could not apply because the conduct complained of could not amount to disgraceful conduct.

[14] He also submitted to the Tribunal that there was no evidence that the second respondent obtained more than one valuation and/or what was provided to the vendor. He further submitted that even if the respondent had obtained a second valuation and provided only that valuation to the vendor that wouldn’t constitute a breach of section 135 which requires the provision of a valuation, not the only valuation.

[15] The REAA submitted that the allegation of “valuation shopping” faced significant legal and factual difficulties. First, there was a lack of evidence. Second,

there were the jurisdictional difficulties posed by the High Court's judgment in *Wyatt v REAA*¹. *Wyatt* confirmed that the Tribunal did not have jurisdiction on appeals brought under section 111 to deal with a complaint that was not properly before the Committee. Thus, if there was no determination by the Committee on a particular issue then there was no ability to entertain the issue on appeal. The REAA submitted that this was the situation in this case.

[16] The Tribunal takes a dim view of any real estate professional who asks another professional to undertake work for them and then does not pay them. There is no explanation before us to show why Mr Robins did not pay the sum that was properly charged to him by Mr Mudge. We consider that this is ethically inappropriate.

[17] However, under the Real Estate Agents Act 2008, before a matter can be regarded as unsatisfactory conduct, it has to come within the definition of Real Estate Agency work. In our view obtaining a valuation for a property that an agent is interested in purchasing for themselves does not amount to real estate agency work. In such a case, the agent wishes to purchase a property for themselves and therefore the conduct does not fit within the definition of real estate agency work contained in section 4 which provides "*Any work done or services provided, in trade, on behalf of another person* [emphasis added] *for the purpose of bringing about a transaction.....*" They are acting as agent for any vendor. The agent must however comply with section 135, a breach of which can lead to cancellation of the contract.

[18] As this is not work on behalf of another person it does not fall within the definition of real estate agency work. For this reason, it cannot be unsatisfactory conduct under section 72.

[19] Could such conduct amount to disgraceful conduct and thus fall within the definition of section 73 (which does not impose the same requirement that the conduct complained of must be real estate agency work)? On the facts of this case the Tribunal cannot conclude that the conduct of Mr Robins could be disgraceful conduct. A breach of section 73 requires a marked or serious departure from accepted standards expected of an agent.

[20] There is simply no evidence to establish that the conduct of Mr Robins was in any way conduct that could be said to amount to a marked or serious departure from accepted standards. This is an objective test. The test was described in *CAC v Downtown Apartments*² as being not a term of art but to be given its natural and popular meaning by reference to agents of good standard. The only established evidence that we have is that Mr Robins asked for, and did not pay for, the valuation. We understand Mr Robins purchased the property the subject of the valuation request but it would be wrong to draw any further conclusions that this was a marked departure from appropriate standards on the very scanty evidence that we have. We therefore conclude that there is no breach of section 73.

¹ [2012] NZHC 2550.

² [2010] NZ READT 6.

[21] For these reasons we dismiss the appeal and uphold the decision of the Committee to take no further action.

Ethical Requirements

[22] We have made it clear to Mr Mudge that we are not able to give general statements of principle about ethical obligations of agents unless they are related to a factual situation. Accordingly this decision will not contain any statement concerning the question that Mr Mudge posed to the Tribunal, namely "*whether it is acceptable practice for agents to shop around and obtain a valuation that suits his/her purpose without informing the client of the number of valuations or values represented in each valuation*".

[23] We consider that the Client Care Rules 2012 and the Act provides sufficient protection for the members of the public and to prevent any ethical abuses.

[24] Accordingly the Tribunal dismisses the appeal and confirms the Committee's decision.

[25] The Tribunal draws the parties' attention to the appeal provisions in section 116 of the Real Estate Agents Act 2008.

DATED at Auckland this 7th day of December 2015

Ms K G Davenport QC
Deputy Chairperson

Ms N Dangen
Member

Mr J Gaukrodger
Member