

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 89

READT 102/14

IN THE MATTER OF

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

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC 20004)**

Prosecutor

AND

GURPREET SINGH

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 14 December 2015

COUNSEL

Mr M J Hodge for the prosecuting Authority
Ms C Fisher for the defendant

DECISION OF THE TRIBUNAL ON APPLICATION TO STRIKE OUT

Background

[1] The defendant originally faced two charges laid by Complaints Assessment Committee 20004 on 7 November 2014. However, on 6 August 2015 charge 1 was withdrawn by leave so that the charge document now reads as follows:

“Complaints Assessment Committee 20004 (Committee) charges Gurpreet (Gary) Singh (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. ...

Charge Two – Jessica Oliver

Particulars

On 5 March 2013, the defendant approached Jessica Oliver, a woman he had not met before, in the car park of a McDonald’s restaurant in Manurewa. Ms Oliver was with her two daughters aged twelve and nine. The defendant engaged Ms Oliver in conversation, before handing her his Harcourts business

card and telling her to contact him if she wanted “casual sex, no strings attached”.

[2] We record that in the defendant’s Response to Charge form, dated 21 November 2014, he denied the charge and declared that he was not at McDonalds Manurewa on 5 March 2013 and that he has not met Jessica Oliver, nor engaged her in conversation, nor handed her a Harcourts business card, nor offered her “casual sex, no strings attached”.

The Strike-out Application

[3] On 27 August 2015 the defendant applied to strike out charge 2 (set out above). That application is made on the grounds that the charge alleged does not amount to misconduct pursuant to s 73(a) of the Real Estate Agents Act 2008 (“the Act”) such that the defendant’s conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; and as appearing in the submissions of his counsel (Ms Fisher) filed in support.

Strike-out Principles

[4] As Ms Fisher note we must proceed on the basis that a charge should be struck out if, after accepting that the facts are as alleged by the complainant, there is still no case to answer: *AG v Prince* [1998] 1 NZLR 262. Accordingly, Ms Fisher put it that, while the defendant does not accept the facts as alleged, they are assumed for the purposes of this application to strike out.

[5] As Ms Fisher also put it, the conduct complained of must be “disgraceful” to amount to misconduct. In *CAC v Downtown Apartments Limited* [2010] NZREADT 2006 the Tribunal said:

“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.”

And further:

“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.”

[6] Turning to what is the nature and popular meaning of “disgraceful”, according to Collins’ Thesaurus of the English Language, it means:

“shameful, shocking, scandalous, mean, low, infamous, degrading, unworthy, ignominious, disreputable, contemptible, dishonourable, detestable, discreditable, blameworthy, opprobrious”.

[7] According to the Concise Oxford Dictionary, “disgraceful” is defined as “shameful, dishonourable degrading”.

The Relevant Provision of the Act

[8] Section 73 of the Act defines “*misconduct*” and s 73(a) and reads:

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee’s conduct—

- (a) *would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
 ...”

Case Law

[9] The most relevant case on the issue of what is “*disgraceful conduct*” is *Brake v Preliminary Proceedings Committee of the Medical Council of New Zealand* [1997] 1 NZLR 71. The High Court in that case was concerned with a charge brought by the Preliminary Proceedings Committee of the Medical Council of New Zealand against the appellant for “*disgraceful conduct in a professional respect*”. The High Court referred to the Privy Council decision of *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, 763 where the test for “*disgraceful conduct in a professional respect*” was said to be met:

“If it is shown that a medical man in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency ...”

[10] The High Court confirmed that it is an objective test to be judged by the standards of the profession at the relevant time.

[11] The onus of proving that the conduct amounts to disgraceful conduct is on the Committee; but, for the purposes of the current application, the onus of proof rests with the applicant/defendant and the standard of proof is the balance of probability.

[12] As Mr Hodge put it there are a number of authorities that provide assistance to us on the test to be applied.

[13] We have held that the guidance set out in *Pillai v Messiter* [1989] 16 NZSWLR 197 (CA) is relevant to the assessment of disgraceful conduct under s 73(a). In *CAC v Cui* [2015] NZREADT 1 we said as follows:

“[15] We have previously applied the well known dicta in Pillai v Messiter (No 2) (1989) 16 NSWLR 197 (CA) ..., namely: “Departures from elementary and generally accepted standards, of which a ... practitioner could scarcely be heard to say that he or she was ignorant, could amount to such professional misconduct ... But the statutory test [misconduct in a professional respect] is not met by mere professional incompetence or by deficiencies in the practice of the profession, something more is required, it includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration ...” This dicta applies in s 73(a) cases (disgraceful conduct)”.

The Stance of the Applicant/Defendant

[14] Ms Fisher submits that the alleged conduct has no connection to real estate work and is of a personal and sexual nature outside of any work context.

[15] She puts it that the Harcourts card, which it is alleged was handed to the complainant, was used for the purpose of providing contact details and not for any purpose relating to real estate work. She submits that, in so using his business card with his telephone number on it, the defendant was not in any way implicating Harcourts in his arbitrary endeavours but only providing his contact telephone number on it in the event the complainant wished to make contact with him.

[16] It is also submitted for the defendant that there is nothing illegal in the approach alleged to have been made by him and it is not a criminal offence to proposition someone. Indeed, it is put that attempts at contact with members of the opposite sex with a view to sex are a part of life and only the most coarse and known to be unwanted approaches can be held to account but, here, the approach was courteous, simple, direct, not in any way extreme, and merely requiring a simple “yes” or “no” answer. It is also put that the alleged suggestion of casual sex was proffered by the defendant at the end of a conversation with the alleged victim.

[17] Ms Fisher then submits that the conduct could not be categorised as “*disgraceful*” and that, at most, the alleged actions of the defendant were inappropriate enough to warrant criticism and could be described as “*inappropriate*” but not as “*disgraceful*”.

[18] Ms Fisher referred to the conduct allegedly taking place when children (daughters respectively aged 9 and 12) were present but noted that the particulars of the charge do not state that the children heard anything from the defendant. Also, Ms Fisher seems to be querying the reference to children in the particulars of the charge.

[19] Overall, Ms Fisher submits that asking someone for “*casual sex, no strings attached*” in a personal setting falls short of being regarded by real estate agents of good standing, or reasonable members of the public, as disgraceful and does not amount to misconduct in terms of s 73(a) of the Act. She submits it falls short of being shameful, shocking or scandalous.

The Stance of the Prosecution

[20] Despite the fact that the defendant was not engaged in real estate agency work at the time of the allegations, Mr Hodge submits for the Authority that there is a sufficient nexus to his position as a licensee; and that the fact that he used his real estate business card to offer casual sex to a stranger is capable of bringing the industry into disrepute.

[21] Mr Hodge noted that s 73(a) allows us to assess whether conduct is disgraceful both by reference to reasonable members of the public or by reference to the standards of agents of good standing. The section allows for disciplinary findings to be made in respect of conduct which, while not directly involving real estate agency work, nevertheless has the capacity to bring the industry into disrepute and which, for that reason, agents of good standing would consider to be disgraceful.

[22] This has been recognised in other cases. For example, in *CAC v Dodd* [2011] NZREADT 01, we made a finding of misconduct and suspended a real estate agent as a result of conduct in his personal life (forging his wife's signature on personal finance documents). In doing so, we followed our earlier decision in *S v CAC and B* [2010] NZREADT 13 that there must be a sufficient nexus between the conduct proved and the fitness of the licensee to conduct real estate agency work in order to make a finding under s 73(a).

[23] Mr Hodge acknowledges that the decision whether to strike this charge out is ultimately a matter for us to assess. He submits that the overall context and nature of the proposition is highly relevant and that the following further matters should be considered (as he, helpfully, put it to us):

- (a) They had not met before. The defendant submits that the proposition "was not said to a random stranger without some context". The allegations in the charge must be assumed to be true, and the charge alleges that the defendant had not met the complainant previously. The proposition was effectively made to a stranger.*
- (b) Location. The proposition was made during the day, in the carpark of a McDonalds, in front of the complainant's children. This was not an invitation made in a nightclub, or on a dating website.*
- (c) Nature of proposition. The defendant did not ask the complainant out on a date, to dinner, for a coffee, or to "meet up". That kind of invitation (in isolation) would not be regarded as disgraceful by agents of good standing. The defendant invited "casual sex, no strings attached". A reference to sex, effectively out of the blue, is likely to be unsettling and concerning to someone in the complainant's position.*
- (d) Connection to employment. The defendant could have offered a phone number on a piece of paper, or could have asked the complainant's phone number. Instead, he used his Harcourts business card. This puts his occupation into the picture, and immediately connected his conduct to his position as a real estate agent".*

Discussion

[24] We need to decide whether the allegations in charge 2, if proved, would constitute misconduct.

[25] We accept that it is relevant that the defendant put his profession into the picture by presenting his business card to the complainant. It is submitted for the prosecution that aspect of the defendant's conduct reflects on the real estate profession and that the defendant has propositioned someone he had just met, in a public carpark, in front of her children, referring directly to sex, without any background context.

[26] The case for the prosecution is that agents of good standing, and reasonable members of the public, would regard this conduct as disgraceful. We accept that such conduct is most undesirable and suggests that the defendant does not have the character of the type of person best suited to the real estate industry or profession. Would either agents of good standing, or reasonable members of the public, regard

the alleged conduct as disgraceful? It is certainly most unsatisfactory, but is not conduct in the course of real estate agency work. Although there is a nexus between the alleged conduct and the defendant's vocation as a real estate agent, but is that nexus strong enough to amount to misconduct? Is the stance of the defendant, as put by his counsel and covered above, valid and convincing?

[27] We think that the propriety expected of real estate agents is an important issue.

[28] It may be that the defendant's alleged conduct, reprehensible though it may seem, does not amount to "disgraceful conduct" in terms of s 73(a) of the Act. Certainly, we cannot find the defendant guilty of the lesser offence of "unsatisfactory conduct" under s 72 of the Act, because the defendant's conduct complained of did not happen in the course of him carrying out real estate work.

[29] We have not had the benefit of hearing evidence from the complainant and/or the defendant. This means that the nuances of the alleged conduct of the defendant have not been explored, i.e. we feel that we do not have a full enough context to deal with a strike-out application.

[30] We think it would be unjust to appear dismissive of a valid concern of the complainant by striking out the charge at this stage. We require that complainant and defendant have the opportunity to be heard and cross-examined.

[31] Accordingly, the defendant's application for strike-out is hereby dismissed.

[32] 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

Mr G Denley
Member

Ms C Sandelin
Member