

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 24

READT 060/15

IN THE MATTER OF

charges laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC407)**

Prosecutor

AND

ALLAN TOWERS

Defendant

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Ms N Dangen – Member
Mr G Denley – Member

HEARD at AUCKLAND on 19 February 2016

DATE OF DECISION 17 March 2016

APPEARANCES

No appearance by the defendant
Ms U Keller – for respondent

DECISION OF THE TRIBUNAL

[1] At the time of the events in question Mr Towers was a real estate agent employed by Barfoot & Thompson in Auckland. He faces a charge related to his conduct in texting the complainant Susan Blackledge. The charge that Mr Towers faces is as follows:

Charge 1

Following a complaint by Susan Blackledge (complainant), Complaints Assessment Committee 407 charges Allan Towers as follows:

Misconduct

The Committee charges Allan Towers (defendant) with misconduct under s 73(a) and/or s 73(c)(iii) of the Real Estate Agents Act 2008 (Act).

Particulars:

- (a) In early May 2015 the defendant contacted the complainant to discuss a property that the complainant had privately listed for sale. They discussed the property on the phone. The complainant terminated the call.
- (b) The defendant continued to attempt to contact the complainant, by phone and by text message. The complainant contacted the defendant's manager, asking him to have the defendant cease contact with her.
- (c) The defendant sent the following text message to the complainant:
"You stupid stupid woman. I was calling on behalf of my wife's friend who is interested in the apartment advertised, not in the capacity as a real estate agent. How dare you try and put my weights up with barfoot & thompson. Due to your stupidity you pathetic individual my wife will now have to call her friend and tell her the owner is not interested in selling. I take it you are the owner because if your not the your even more stupid than we give you credit for. Allan Towers."
- (d) The defendant sent further text messages to the complainant, after his manager had advised him not to contact her:
"Whats wrong with you, can you not read. Go ahead and call the Reaa. I'll gladly explain this has nothing to do with them. I was calling you as a byer not as an agent, you stupid stupid woman."
- (e) The complainant replied to say "Don't send any more texts", however the defendant continued to contact the complainant as follows:
"Have spoken to wifes friend. She now not interested, due to your behaviour. You're a very strange individual. ☺"
- (f) Following their phone conversation, the defendant sent a number of text messages to the complainant calling her a "stupid stupid woman" and "a pathetic individual".
- (g) In his interview with the Committee's investigator the defendant sought to justify his conduct and continued to use derogatory language to describe the complainant.
- (h) This conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. It is also a reckless or wilful contravention of the prohibition contained in r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 that licensees must not engage in any conduct likely to bring the industry into disrepute.

The evidence

[2] No oral evidence was called and Mr Towers himself did not take part in the hearing. The first question for the Tribunal is whether it could or should proceed in Mr Towers' absence. The Tribunal are satisfied that Mr Towers was aware of the hearing. In a file note dated 28 October 2015 Mr Gouvenour, REAA investigator, advised the Tribunal that Mr Towers had phoned him to advise that he had no intention of taking part in the process and would be surrendering his licence. According to the REAA records he has now surrendered his licence. The Tribunal Secretariat spoke to Mr Towers on the telephone in mid-October 2015 and advised

him of the hearing date and also received from him a note written on top of the letter sent by the Tribunal to him advising of the charge which read:

"You have been advised that I will not be acknowledging this rubbish. Texting someone 'they are a stupid woman' is not a crime. My next move if the REAA doesn't back off will be the media. This is PC madness, stop wasting the taxpayer's money."

[3] It appears from the evidence of the Committee's investigator that the defendant did not deny sending the texts but justified his actions.

[4] The complainant says on 13 April 2015 Mr Towers phoned her and said words to the effect that his name was Allan Towers and he was a real estate agent. He went on to say *"I have a person who may be interested in buying"* [an apartment she was selling]. The parties appeared to have a discussion concerning the Body Corporate fees and this became heated. Ms Blackledge hung up the phone on Mr Towers. Ms Blackledge then searched Mr Towers' name on the internet and found that he was a real estate agent working for Barfoot & Thompson. Mr Towers called her cell phone three to four times after she hung up but Ms Blackledge did not want to speak to him again. She called Barfoot & Thompson Onehunga and spoke to the manager Bruce Holmes and asked that Mr Towers not call her again. Shortly after this Ms Blackledge received the first text from Mr Towers which read:

"You stupid stupid woman. I was calling on behalf of my wife's friend who is interested in the apartment advertised, not in the capacity as a real estate agent. How dare you try and put my weights up with barfoot & thompson. Due to your stupidity you pathetic individual my wife will now have to call her friend and tell her the owner is not interested in selling. I take it you are the owner because if your not the your even more stupid than we give you credit for. Allan Towers."

[5] After receiving this text message Ms Blackledge rang up Mr Holmes again and asked him to ensure that Mr Towers *"backed off"*. She was told that Mr Towers was moving to Dunedin (where she lived) and that Mr Holmes would ring him again. This was about 5.50 pm. At 5.53 pm she received the second text which said:

"What's wrong with you, can you not read, go ahead and call the Reaa. I'll gladly explain this has nothing to do with them. I was calling you as a byer not as an agent, you stupid, stupid woman. ☺"

[6] Ms Blackledge responded by saying *"Don't send me any more texts"* and Mr Towers texted back approximately half an hour later saying:

"Have spoken to wifes friend. She now not interested, due to your behaviour. You're a very strange individual. ☺"

Ms Blackledge complained again to Mr Holmes who responded by giving her his apologies for Mr Towers' texts.

[7] Mr Holmes gave written evidence that he had contacted Allan Towers advising him after the first text that he should not have contacted Ms Blackledge. After he received the further text from Ms Blackledge he had text Mr Towers a caution saying while he was not acting as a real estate agent he was still vulnerable to being judged as an agent. Mr Towers responded to him:

"I understand, thanks Bruce. By the way it was a text. Ems has spoken to her friend who is now not interested in the apartment so no more contact with this woman. Regards Allan."

Mr Holmes replied:

"That would be best Allan. Cheers, Bruce."

[8] The Tribunal therefore has to determine whether this conduct is misconduct under either s 73(a) or s 73(c)(iii) of the Real Estate Agents Act 2008.

Issues

[9] The issues to be decided by the Tribunal are:

- (a) Can the Tribunal proceed in the absence of the defendant?
- (b) Is this misconduct under s 73(a)?
- (c) Is this misconduct under s 73(c)(iii) wilful or reckless breach of Rule 6.3 (that a licensee must not engage in conduct that is likely to bring the industry into disrepute?)

(a) *Proceeding in the absence of the defendant*

[10] The Tribunal has taken guidance on how it should proceed from a decision of the High Court and from s 15 of the Real Estate Agents (Complaints and Discipline) Regulations 2009. Section 15 provides that the Tribunal may continue with a hearing in the absence of the agent if it can be established that they were aware of the hearing. If the agent was aware then the Tribunal may adjourn the hearing or hear and determine the proceeding or dismiss the proceedings.

[11] In *Hart v Auckland Standards Committee No. 1 and New Zealand Law Society* [2013] NZHC 83 The NZ Lawyers and Conveyancers Disciplinary Tribunal declined Mr Hart's application for an adjournment based on his claim that he was unwell. On appeal the High Court said at paragraph [23] that the Court must balance the reason for the non-attendance, the impact upon Mr Hart in proceeding in his absence, and his right to a fair hearing against the reasons for his absence.

[12] Given that Mr Towers has advised the Tribunal that he would not be attending and the Tribunal are satisfied he was aware of the hearing it would be contrary to justice if the REAA could not prove the charge in his absence. It seems from the facts we have set out above and the correspondence with Mr Towers referred to at paragraph [2] that he was aware of the hearing and the charge. We are therefore satisfied that it is appropriate for the Tribunal to proceed in Mr Towers' absence. We determined to proceed with the hearing.

(b) *Is this disgraceful conduct under s 73(a)?*

[13] The Tribunal has discussed the meaning of "*disgraceful*" in several cases. In *CAC v Downtown Apartments Ltd* [2010] NZREADT 06 the Tribunal said "*disgraceful conduct must be given its ordinary meaning and the Tribunal must answer objectively the question would the conduct be reasonably regarded by agents of good standing or reasonable members of the public as disgraceful?*"

[14] It is well settled that the Tribunal may make a finding of disgraceful conduct if the Tribunal finds that there is a sufficient nexus between the agent's actions (which are not necessarily actions carried out whilst he was working as a real estate agent) and an agent's real estate agency work, if the actions could bring the profession into disrepute. These principles were articulated in *CAC V Hulme & others* [2013] NZREADT 91. The conduct complained of does not have to be outrageous nor does it have to be akin to criminal behaviour but mere negligence or unsatisfactory conduct is not sufficient. It must be conduct which is sufficiently grave so that another agent or reasonable member of the public would regard it as disgraceful. This is a reasonably high standard to discharge. In this case we do not consider that the conduct is serious enough to amount to disgraceful conduct.

[15] Our reasons for this are over the course of a few hours Mr Towers sent a number of rude texts to a member of the public that he had never met. He clearly should not have done this. However the conduct did not continue beyond that one day, 30 April 2015. Mr Towers was not acting as a real estate agent for any person when he did the texting, he was making an enquiry on his own capacity or for a friend and he appears to have fallen into a disagreement with Ms Blackledge. This is not an excuse but it does provide an explanation for what would otherwise be regarded as inappropriate conduct.

[16] We do not regard his hostile comments to the Real Estate Agents Authority as adding to his conduct so as to make it disgraceful conduct. These comments form part of the particulars of the charge but the Tribunal do not consider that being unconciliatory in a conversation with the REAA investigator could fairly be added to earlier conduct so as to elevate the conduct to disgraceful conduct in this case.

[17] Had this been a matter which was directly linked with Mr Towers' real estate agency work we would have found that the conduct amounted to unsatisfactory conduct. It would certainly be conduct that most people would think inappropriate for an agent. But the texts themselves are not so contumelious and degrading or offensive that we consider that the Tribunal ought to impose a finding of disgraceful conduct on Mr Towers.

[18] For the reasons set out above we do not consider that we need to determine whether there is a sufficient nexus between this and Mr Towers' real estate agency work, but it is unlikely that in the circumstances of this case we would have found a link.

[19] In the alternative the Complaints Assessment Committee charge Mr Towers with a breach of Rule 6 of the Client Care Rules (via s 73(c)(iii)). That is that his conduct amounts to a reckless or wilful breach of Rule 6.3. This Rule provides that a licensee must not engage in any conduct which might bring the industry into disrepute.

Section 73

[20] The Committee submitted that the Tribunal could make this finding even if the conduct had not amounted to disgraceful conduct. The Committee accepted that the conduct in question did not occur in the context of real estate agency work, but submitted that as the defendant was a real estate agent, and that the conduct occurred in the context of enquiries about a property for sale, it was reasonable to assume that the conduct was likely to bring the real estate industry into dispute and was unacceptable. The CAC submitted that licensees should not deal with members

of the public in the context of real estate enquiries by being rude, intimidating and abusive.

[21] The Committee submitted that as a licensee the defendant would know that his conduct was likely to bring the industry into disrepute, or at least must have known that there was a risk that it would do so. On this basis the Committee submits that he was guilty of a willful and/or reckless breach of Rule 6 and thus guilty of misconduct under section 73(1)(c).

[22] The Tribunal do not find this Rule has been breached. In order for the Rule to be breached Mr Towers must have been carrying out real estate agency work, or alternatively that the conduct was disgraceful conduct. Our decision as to whether this was disgraceful conduct is set out above. In order to find that this was a reckless or wilful breach of Rule 6.3 the Complaints Assessment Committee would need to prove that the licensee had been aware that he was engaging in conduct likely to bring the industry into disrepute and have been wilful or reckless as to the fact that the conduct was likely to do so.

[23] We cannot find anything in the facts which would support such a finding by the Tribunal. Mr Towers was annoyed, he behaved inappropriately, he was rude and he was clearly angry and frustrated with the complainant. We do not excuse his behaviour, and we share Ms Blackledge's concern that it was inappropriate, but s 73(c)(ii) requires that the conduct be wilful or reckless. The Tribunal do not consider that the facts establish a wilful or reckless breach of these rules, especially in circumstances where he was not acting as an agent. The only action which could possibly be wilful or reckless behaviour would be the final text that he sent to Ms Blackledge after receiving a warning from his manager. We have considered whether in the circumstances where Mr Holmes specifically warned Mr Towers not to send a text and he did send a final text this would be sufficient to amount to a wilful or reckless breach of the Rules?

[24] We have considered the test set out in *Pillai v Messiter* [No. 2] (1989) 16 NSWLR 197:

“The statutory test (for misconduct in a professional respect) is not met by mere professional incompetence or deficiencies in the nature 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 abuse of the privileges which accompany registration.”

[25] We are not satisfied that Mr Towers' conduct even with the last text is serious enough to meet the test posed in this case.

[26] Accordingly we do not find that Mr Towers' conduct was a breach of s 73(c)(iii).

[27] We note that any concern that any member of the public might have felt in Mr Towers' behaviour is answered by the fact that he has surrendered his licence and would need to undergo further scrutiny by the REAA were he to apply for his licence again.

[28] Accordingly the Tribunal dismiss the charge.

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

Ms K Davenport QC
Chairperson

Ms N Dangen
Member

Mr G Denley
Member