

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2016] NZREADT 27

READT 002/15

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

**BETWEEN** **COMPLAINTS ASSESSMENT**  
**COMMITTEE (CAC 304)**

**AND** **AARON DREVER**

**MEMBERS OF TRIBUNAL**

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

**HEARD** at AUCKLAND by telephone conference on 19 February 2016

**DATE OF DECISION** 8 April 2016

**APPEARANCES** (by telephone)

Ms K Lawson-Bradshaw for the Committee  
Mr G Foley for the defendant

**DECISION OF THE TRIBUNAL**

[1] Mr Drever faces a charge laid on 15 January 2015. He faces one charge of misconduct with particulars relating to three separate complainants and three separate properties. The first complaint is the 'Deyermond Complaint' which alleges 10 particulars. The Deyermond Complaint relates to the allegations that Mr Drever:

***Particulars***

*Deyermond complaint (99 Grassmere Road, Henderson Valley)*

- (a) The Licensee invited his clients to sign an agency agreement without a material particular having been inserted into the document, namely the appraised value; and/or*
- (b) The Licensee entered into an agency agreement without providing his clients with a copy of the approved guide, and/or without receiving a signed acknowledgement that his clients had been given the approved guide; and/or*
- (c) The Licensee failed to provide his clients with an appraisal supported by comparable information on sales of similar land; and/or*

- (d) *The Licensee invited his clients to sign an agency agreement without explaining in writing how the land would be marketed and advertised; and/or*
- (e) *The Licensee invited his clients to sign a contractual document for the sale of their property without providing them with a copy of the approved guide, and/or without receiving a signed acknowledgement that his clients had been given the approved guide; and/or*
- (f) *Having agreed that two licensees would be present at open home sessions, due to the size of the clients' property and the clients' concerns regarding security, the Licensee failed to ensure that occurred; and/or*
- (g) *When bringing a customer to view his clients' property, the Licensee said to the client words to the effect of "shut your mouth, don't say a word, they're my clients"; and/or*
- (h) *The Licensee gave false and/or confidential personal information about his clients to a customer (Tammy Colquhoun), namely he said that his vendor clients were desperate to sell as they had bridging finance and it was costing them a lot of money; and/or*
- (i) *The Licensee gave false and misleading information to his vendor clients regarding the auction of a property belonging to the purchaser customers (Tammy Colquhoun and Betty Prime), in the context of negotiating a reduction in the sale price of the clients' property; and/or*
- (j) *The Licensee put his vendor clients under undue or unfair pressure to accept a reduced offer for their property; and/or*

The second complaint is the Van Eijk complaint. This complaint has eight particulars as follows:

*Van Eijk complaint (35 Archibald Road, Kelston)*

- (k) *The Licensee invited his client to sign an agency agreement without a material particular having been inserted into the document, namely the appraisal value; and/or*
- (l) *The Licensee entered into an agency agreement without providing his client with a copy of the approved guide, and/or without receiving a signed acknowledgement that his client had been given the approved guide; and/or*
- (m) *The Licensee failed to provide his client with an appraisal supported by comparable information on sales of similar land; and/or*
- (n) *The Licensee invited his client to sign an agency agreement without explaining in writing how the land would be marketed and advertised; and/or*
- (o) *The Licensee invited his client to sign a contractual document for the sale of her property without providing her with a copy of the approved guide, and/or without receiving a signed acknowledgement that his client had been given the approved guide; and/or*
- (p) *The Licensee put his client under undue or unfair pressure to accept a low offer of \$441,000 for her property, and/or failed to ensure that his client was aware*

*that she could or may need to seek legal advice before accepting the offer; and/or*

- (q) *The Licensee failed to give his client a copy of the contractual document as soon as practicable after she had signed it; and/or*
- (r) *When asked by a valuer (Tyson Gedge) about the sale of the property by his client, the Licensee gave false information to the valuer, namely that the sale price related to a different property; and/or*

The final complaint is the Lowe complaint. This has five particulars as follows:

*Lowe complaint (52 James Laurie Street, Henderson)*

- (s) *The Licensee invited his client to sign an agency agreement without providing her with a copy of the approved guide, and/or without receiving a signed acknowledgement that she had been given the approved guide; and/or*
- (t) *The Licensee failed to provide his client with an appraisal supported by comparable information on sales of similar land; and/or*
- (u) *The Licensee invited his client to sign an agency agreement without explaining in writing how the land would be marketed and advertised; and/or*
- (v) *The Licensee failed to give his client a copy of the signed agency agreement as soon as practicable after she had signed it, despite being asked to do so; and/or*
- (w) *The Licensee charged his client for an auctioneer's fee when no auction took place (\$575), advertising on the website realestate.co.nz which had not been authorised (\$280) and overcharged the client for GST (\$485.80).*

[2] Mr Drever has denied all eight complaints. The Van Eijk complaint contains the most serious allegations. Mr Drever has denied this and has said that the client was legally represented.

[3] Mr Foley has applied to the Tribunal for the three particulars to be severed and for each separate complaint to be heard separately. He submitted:

- That it would be unfair and unduly prejudicial to Mr Drever to have the three separate matters heard together. In particular he says (in his memorandum of 4 February) that *"the three separate complaints have been amalgamated into one charge which has the effect of adding together separate complaints to try and reach the required threshold of fault or misconduct"*.
- There is no statutory authority for this approach.
- Obvious unfairness can result from such an approach because complaints falling well short of the required disciplinary threshold might individually be found to satisfy the threshold.
- This is an improper way to frame charges.

- It (such an approach) is oppressive as it is open-ended in the number of complaints that could be bundled together and the period over which they could be bundled.
- That the proper approach is to have individual complaints by separate complainants to be in separate charges and heard separately.

[4] The Complaints Assessment Committee submitted that it was not oppressive to frame the charge in this way. It referred the Tribunal to the decision of *Duncan v Medical Practitioner's Disciplinary Committee* [1986] 1 NZLR 537 which provides authority for the way in which the charge has been drafted. In this case the Court of Appeal held that it was possible to frame a charge as a group of particulars on a variety of different matters which could collectively amount to disgraceful conduct. The Court of Appeal held that it may be important that the appropriate professional Tribunal should look at the practitioner's whole attitude to practice, over a variety of particulars.

[5] The Committee referred to the decision of the Tribunal in *CAC v Stevenson* [2013] NZREADT 56 at [44] which was a charge drafted in a similar way. In that case the Tribunal accepted that the conduct of the agent could be looked at in a cumulative charge.

[6] Mr Foley responded to the Complaints Assessment Committee's submissions by presenting a slightly modified position, namely that it would be acceptable to have the two least serious charges heard together, (Deyermond and Lowe) but that the Van Eijk complaint should be heard separately. Mr Foley submitted that applying the usual severance and joinder principles in the circumstances of the case, and in the interests of justice and fairness, required that the serious Van Eijk complaint be heard separately from the remaining two complaints. Mr Foley submitted that *Duncan* did not authorise a combination in a single charge of a large number of particulars comprising allegations of conduct, a portion of which might comprise a high level of misconduct or others at a lesser level of misconduct. He submitted that it was not clear on the face of the charge whether the cumulative charges on lesser matters were alleged to create a course of conduct so as to amount to disgraceful conduct. He submitted that the Court in *Duncan* noted the importance of the fact that most, if not all, of the complaints if proved, would individually constitute disgraceful conduct. Mr Foley submitted that *Duncan* suggests that a level of specificity is required in terms of the level of misconduct alleged and what combination of these lower level particulars is alleged to constitute the higher level of misconduct.

[7] Mr Foley advised the Tribunal that he had written to the Complaints Assessment Committee seeking clarification of whether the Committee alleged that all the particulars individually were alleged to be disgraceful conduct or only some of the complaints when combined with others. The Committee had responded to this request by saying that some particulars may amount to unsatisfactory conduct and others will amount to misconduct. They were not specific as to which particulars were alleged to be misconduct. Mr Foley submitted that the prosecution has a responsibility to charge in a sufficiently precise manner to properly inform the defendant of the allegations. Mr Foley submitted that the Van Eijk complaint was a serious matter which in the interests of justice should not be heard with the other two matters. He submitted that the Tribunal must balance the legitimate interests of the defendant in having charges heard separately in the interests of justice, against the

fair and efficient despatch of the Tribunal's business. Mr Foley submitted that the Tribunal should take into account the following factors carrying out this balancing act.

- (i) The defendant has limited resources and would like to apply those to the most serious Van Eijk allegation. To defend all three would necessitate allocation of resources to each complaint.
- (ii) The defendant has said that he will seek suspension of his licence until resolution of the current complaint.
- (iii) His father is terminally ill with cancer and the defendant is his primary caregiver.
- (iv) Because of the offer to suspend his licence there is no issue of public safety.
- (v) The Tribunal must consider the serious allegation objectively and independently unaffected by prejudice or favour or irrelevant considerations, and there is a potential that even with a professional Tribunal there may be unconscious bias if all three complaints are heard together.
- (vi) There is no ability to argue that there is any propensity evidence because the allegations in the Van Eijk complaint are completely and factually different from the remaining allegations, despite attempts to word them in a similar way. The similarity of the complaints relating to the provision of the documentation are relatively low level and could never be admitted as propensity evidence in the hearing of the Van Eijk complaint. The real risk is that the non provision of documentation could influence prejudicially credibility findings for the Van Eijk allegation.
- (vii) There would be very little inconvenience to witnesses and no significant prejudice to the prosecution.

## Discussion

[8] The issue for the Tribunal therefore is whether it is appropriate to allow the charge to continue as drafted or whether the Tribunal should order the charge to be amended or redrafted into two or three separate charges and/or order separate hearings for some or all charges.

[9] In *Duncan v Medical Practitioner's Disciplinary Committee* Dr Duncan faced a charge of disgraceful conduct, supported by seven particulars some which were separate complaints. The complaints were all quite diverse and ranged from incidents that had happened around the time the charge was laid to incidents that had happened some four years previously. Given the disparity of particulars Mr White, counsel for the Medical Practitioner's Disciplinary Committee submitted that:

*"His disgraceful conduct (was alleged) in a professional respect in any one of the particulars or any of them cumulatively and that it would be for the Medical Council to decide whether the facts as proved in relation to one or two more constituted such conduct."*

[10] The Court said:

*“We think that to avoid any misunderstanding an express statement to that effect should have been added to the document. No doubt this would have been supplied if there had been a request for further particulars. If this form of charge is used in any future case it will be as well to include a specific explanation ... in some ways sufficient to put the Committee’s intentions beyond doubt.”*

[11] and:

*“We do not think there can be any doubt that a charge may combine a series of similar complaints by alleging a course of conduct and the carrying out of practice and specifying the separate complaints as particulars or instances.”*

[12] and:

*“It is crucial that the practitioner understands exactly what he is charged with.”*

[13] Finally the Court of Appeal held that:

*“We can see nothing in the Act or in natural justice to prevent the Committee after investigating a range of complaints from regarding a comprehensive charge as appropriate as well as separate ones. Indeed it might be against the public interest to deny the Committee any right to present an all-embracing charge. It may be important that the appropriate professional Tribunal should be able to look at the practitioner’s whole attitude to practice.”*

[14] The Court held that in reaching the decision the Medical Council should make clear their reasons for their findings on each separate particular and then on total charge. The Court said a Tribunal should give a reasonably full explanation of their reasons for all these findings. The Court commented that it is a field in which the spirit of justice is more important than the letter.

[15] The Tribunal is a specialist Disciplinary Tribunal. It is a civil tribunal, but it has been recognised that Disciplinary Tribunals also have quasi-criminal functions when imposing disciplinary sanctions. In this case the Complaints Assessment Committee has decided to charge Mr Drever with one charge of misconduct and an alternative charge of unsatisfactory conduct. The charge is not worded to plead that each or any of the particulars may amount, either individually or cumulatively, to misconduct. This has the potential to be unfair to Mr Drever as he does not know how serious each of these diverse particulars are. We recommend that the Complaints Assessment Committee provide this information to the agent if they intend to lay omnibus charges in this way.

[16] In the context of criminal charges an application for severance is made under s 138(4) of the Criminal Procedure Act 2011. Applications are determined by the Court with reference to well established common law principles. These principles were recently summarised in *Churchis v R* [2014] NZCA 281 at [28] as follows:

- (i) Charges that are unrelated in time and circumstance should not be tried together unless the evidence of one incident is relevant to another to an extent that its probative value outweighs its prejudicial effect. That relevance may arise in a variety of circumstances such as where the facts

are so similar or the allegations are interconnected to a point that it would be artificial to present them separately.

- (ii) Joinder is appropriate evidence relevant to one charge is also relevant to one or more charges.
- (iii) The practicalities of the criminal process may be taken into account including the degree of connection between the charges, i.e. whether the charges relate to the continuous narrative of events or relevance to the accused state of mind, the impact of successive trials on the accused and witnesses and the likely effect of publicity on the first and subsequent trials.
- (iv) Prejudice to the accused is a relevant factor that must be taken into account, however the fact that the accused may be obliged to give evidence is a relevant but not decisive situation.
- (v) The Courts discretion is wide. Ultimately what is required is a balancing between the legitimate interests of an accused and the public interest in the fair and efficient despatch of the Court's business.

These principles help inform the Tribunal's decision but because this is not a criminal trial do not provide a template which the Tribunal must apply.

[17] In this case Mr Foley is seeking to have the particulars contained in the one charge severed and two or three separate charges created, which allow his client to deal with each of the allegations relating to each of the properties separately. His reasons are set out at paragraph [7].

[18] It is important for the Tribunal to consider the facts in order to judge whether or not there is any similarity in the evidence between each of the diverse particulars to see if they suggest a common course of conduct. The Tribunal has the statements of evidence filed by the Complaints Assessment Committee. The first complaint by Mr and Mrs Deyermond arises out of a sale in early 2013. The allegations made by the complainants are around Mr Drever's conduct in managing the sale process and alleged failures to provide documentation how Mr Drever conducted open homes and the information that he relayed to Mr and Mrs Deyermond. There is an allegation Mr Drever lied to the complainants.

[19] The Van Eijk complaint arises out of a sale in mid-2013 and includes allegations about Mr Drever failing to complete documentation, or to do a proper appraisal and allegations around the negotiation of the sale price, including the serious allegation that Mr Drever pressured Mr and Mrs Van Eijk to sell the property at \$438,000 when it was subsequently listed a few weeks later for \$690,000.

[20] The Lowe complaint arises out of a sale in August 2013 and contains allegations that Mr Drever did not give the complainant a copy of the listing agreement, or provide other documentation, allegations concerning a demand for payment for advertising that had not been done and a dispute about what monies should be refunded to Ms Lowe.

[21] The Tribunal does not have any information from Mr Drever save his denial of the charges. The Tribunal can gather from this brief review of the evidence that the particulars are over a similar period of time and have some similar elements

concerning Mr Drever's attention to the procedural steps of listing and selling a property. Both the Deyermond and Van Eijk contain allegations that Mr Drever lied to them and/or pressured them. However the Van Eijk allegation is the most serious allegation.

[22] As a specialist Tribunal the Tribunal is used to evaluating agents' conduct and determining whether each act or alleged act of misconduct or unsatisfactory conduct or has been established and at what level of misconduct or whether the evidence does not meet the threshold for a disciplinary finding.

[23] The Tribunal has considered the following matters (with reference to the subparagraphs in the *Churchis* decision):

- (i) Are charges related in time and circumstance?

The particulars are related in time.

The particulars appear to be related in terms of allegations of Mr Drever's attention to detail and the evidence of lack of documentation. This may provide a course of conduct allegation if appropriately pleaded. There are serious allegations of pressuring the vendors. The Van Eijk allegation is the most serious allegation.

- (ii) Is the evidence of one charge relevant to the other?

This is probably unlikely except insofar as it relates to a course of conduct of lack of care as to documentation a process and procedure by Mr Drever. There is a possibility that evidence may show Mr Drever put pressure to sell on two of the three vendors.

- (iii) Not applicable to this Tribunal.

- (iv) Is there prejudice to the accused?

The prejudice to Mr Drever can only arise in these circumstances if the Tribunal were unable to fulfil its proper function to analyse each of the particulars separately and independently because of the prejudice caused by the evidence of the other transactions and complaints. The Tribunal is a specialist Tribunal made up of a lawyer and two lay-members or two lawyers and a lay member. It is, unlike a jury, used to the process of analysing evidence of each complaint separately and on the basis of the evidence before it. The Tribunal does not consider that any prejudice could arise to Mr Drever given the specialised role of the Tribunals.

- (v) Exercise of the Tribunal's discretion. In this case the Tribunal does not propose to exercise its discretion to have three separate hearings or two separate hearings and the Van Eijk matter dealt with separately. This would be costly and time consuming to Mr Drever and the Complaints Assessment Committee. The Tribunal cannot understand Mr Foley's submission that it would be cheaper to have two hearings – unless Mr Drever intended to plead guilty to some of the particulars. However there is no suggestion of this. Mr Drever's sad personal circumstances would also suggest a need for an earlier and quicker decision. The Tribunal does not consider that there is such compelling evidence of prejudice to Mr Drever so as to require two or three separate hearings. However it is appropriate that the Complaints Assessment Committee



should provide more information of the alleged degree of severity of each particular as requested by Mr Drever.

[24] The defendant's submission that Judges deliberately do not know the previous conviction history of those appearing before them is not apt or helpful. The Tribunal will focus solely on the three complaints before it and will be able to determine whether or not the charge has been made out on some or all of the particulars. This is particularly important when considering the Tribunal's role to uphold public safety and maintain standards, which means that course of conduct charges involving failure to document can be potentially as serious as a complaint of improperly persuading someone to sell at an under value. In all the circumstances, therefore, provided that the charge is particularised so that Mr Drever is aware of the allegations made in respect of each of the particulars of the charge the Tribunal sees no prejudice to Mr Drever. Accordingly the Tribunal declines the application to sever the charge.

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

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Ms K Davenport QC  
Chairperson

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Ms N Dangen  
Member

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Mr G Denley  
Member