

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 46

READT 079/15

UNDER THE REAL ESTATE AGENTS ACT 2008

IN THE MATTER OF AN APPEAL UNDER SECTION 111 OF
THE ACT

BETWEEN ALASTAIR GUSTAFSON
Appellant

AND THE REAL ESTATE AGENTS
AUTHORITY (CAC 404)
First respondent

AND ALAN CHAMBERS
Second respondent

Hearing: 25 May 2016

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

Appearances: Mr Gustafson in person
Mr A Chambers in person
Ms K Lawson-Bradshaw for the Committee

Decision: 1 July 2016

DECISION OF THE TRIBUNAL

[1] Mr Gustafson is a commercial real estate agent practising in Wellington. In June 2015 he assisted Mr Chambers to find new premises in Newtown. Mr Chambers had previously been renting premises in Mansfield Street, Newtown for his joinery business but there was a fire in the business and the premises were badly damaged. There was some to-ing and fro-ing between Mr Chambers and his landlord about whether or not he would remain in the premises. However he ultimately decided to move. Mr Gustafson was the agent who assisted him to rent

new premises at 14 Kingsford Smith Street. At the time the new lease was signed Mr Chambers had not told his landlord of his decision to move. The day after Mr Chambers signed the new lease agreement and before he had told his landlord that he was leaving, Mr Gustafson rang Mr Chambers' landlord. Mr Gustafson acknowledged that he knew that Mr Chambers had not told the landlord when he made the call. There is dispute as to what Mr Gustafson said to the landlord. Mr Gustafson said he asked "what was happening with the premises at 275 Mansfield Street". The complainant said that he received a message from the landlord saying "I have been contacted by an agent who said you were moving out".

[2] In his appeal Mr Gustafson presented an email from the landlord about the call. The landlord said that he had a call from either Mr Chambers or Mr Gustafson. He could not recall who. Mr Chambers' initial complaint said that the landlord had rung him and left a message saying "what was he up to?" as he had had a call from a real estate agent wanting to discuss being the leasing agent for the building.

[3] Mr Gustafson gave evidence at the hearing which amplified his initial statement. Mr Gustafson's evidence was:

[a] He made a call to the landlord of the premises which had been previously rented by Mr Chambers. At the time that he made this call he was aware that Mr Chambers had not told his landlord that he was leaving the premises. Mr Gustafson said that he said words to the effect of "what's happening with your property on Mansfield Street?"

[b] Mr Gustafson's manager said to him after he had made this call that he was an "idiot" to have done so and he should have waited some time before making this call.

[c] Mr Gustafson admitted that with the benefit of hindsight it would have been prudent if he had waited to make the call.

[4] The Complaints Assessment Committee found Mr Gustafson guilty of unsatisfactory conduct. It found that he disclosed confidential information about

Mr Chambers without authorisation to his landlord. It concluded therefore that he breached R 5.1, 5.2 and 6.3. Mr Gustafson appeals this decision. He submits he did nothing inappropriate.

Discussion

[5] The Tribunal do not agree that Mr Gustafson breached these rules. Mr Gustafson did not disclose personal information about Mr Chambers but did make an enquiry, (however he worded it) that led the landlord to conclude (rightly) that Mr Chambers was moving out of the premises before Mr Chambers had an opportunity to tell him this. This could have had potentially serious consequences for Mr Chambers in a number of areas. Mr Chambers set out these concerns in his initial complaint. The Tribunal echo the words of Mr Gustafson's manager and agree that he should not have made the call. An agent has a duty to act in good faith and to ensure that his or her actions do not harm any party to the transaction. The premature call to the landlord had the potential to do serious harm to Mr Chambers. The fact that there were limited adverse consequences to Mr Chambers was providential. R 6.2 provides "a licensee must act in good faith and deal fairly with all the parties engaged in a transaction". In these circumstances the Tribunal conclude that Mr Gustafson put his own interests before Mr Chambers' interests and did not act in good faith towards him. In these circumstances he breached R 6.2.

[6] Accordingly the Tribunal modify the decision of the Complaints Assessment Committee by substituting a finding that Mr Gustafson breached R 6.2 for the Complaints Assessment Committee's findings.

Penalty

[7] Mr Gustafson also appeals the penalty imposed upon him by the Complaints Assessment Committee. In particular he was unhappy that he was required to take an ethics course. He has provided information to the Tribunal setting out his request to the provider of the ethics course, [the Open Polytechnic] as to what he would learn from this ethics course.

[8] The Tribunal have an outline of what the ethics paper covers, it includes “ethics, honesty, fairness and impartiality, consistency of behaviour, rights to privacy, respect of culture, professional integrity and practical applications”. On the facts of this case where Mr Gustafson still seems uncertain about what he did wrong, the Tribunal consider this paper would assist him to better understand the obligations of an agent to his clients. If Mr Gustafson’s manager said to him that he was “an idiot” to have made the call then the Tribunal can assume that further education of Mr Gustafson so that he too can understand why the call was inappropriate would assist his work as a real estate agent. As the Tribunal noted, it was fortunate for Mr Gustafson that there were no serious repercussions from his actions but it could potentially have been very damaging for Mr Chambers. The Tribunal considers that the ethics paper will assist Mr Gustafson to reach his own appreciation of this, and why he should not have preferred his own business needs to those of Mr Chambers.

[9] Mr Gustafson also copied his appeal to other people that he thought would be interested in the appeal, including the Dominion Post, Mr Chambers’ current landlord and his previous landlord. This indicates a lack of appreciation of Mr Chambers’ right to privacy and for the appeal to be conducted by the Tribunal fairly. This behaviour also shows a lack of judgement on behalf of Mr Gustafson which may be able to be addressed by the ethics paper.

[10] Mr Gustafson also wanted the Tribunal to make it clear that when REAA investigators were calling potential witnesses that they should inform the witness that “in answering the questions the agent might be potentially liable to be fined or removed from the register and that the witness did not have to answer”. The Tribunal will make no finding on this point except to say there is no such obligation on the investigator.

[11] Accordingly the Tribunal makes the following findings:

- (i) It upholds the decision of Complaints Assessment Committee to find Mr Gustafson guilty of unsatisfactory conduct, but modifies the Rule(s) that he has breached to R 6.2.

(ii) It upholds the penalty decision of the Complaints Assessment Committee.

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

Ms K Davenport QC
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member