

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2016] NZREADT 54**

**READT 003/16**

IN THE MATTER OF an appeal under s111 of the Real Estate Agents Act  
2008

BETWEEN HELEN WIN

Appellant

AND THE REAL ESTATE AGENTS AUTHORITY  
(CAC 407)

First respondent

AND MICHAEL BRODIE

Second respondent

Hearing: By consent on the papers

Tribunal: Ms K Davenport QC, Chairperson  
Mr G Denley, Member  
Ms N Dangen, Member

Appearances: The appellant, on her own behalf  
Ms K Lawson-Bradshaw and Mr J Simpson, counsel for the first  
respondent  
Mr C Matsis, counsel for the Second Respondent

Decision: 17 August 2016

---

**DECISION OF THE TRIBUNAL**

---

[1] Helen Win (the Appellant) appeals the decision of the Complaints Assessment Committee (the Committee) which found Michael Brodie (the Licensee and Second Respondent) guilty of unsatisfactory conduct. The Appellant submits that the Licensee's conduct went beyond unsatisfactory conduct and amounted to dishonesty and misconduct under the Real Estate Agents Act 2008 (the Act).

### **Decision of the Complaints Assessment Committee**

[2] The Committee found the Licensee guilty of unsatisfactory conduct under the Act. Following this finding, the Committee ordered that the licensee:

- a. Apologise to the Appellant;
- b. Undergo further education;
- c. Reimburse the Appellant for her legal fees in the amount of \$3000; and
- d. Pay a fine of \$2,000.

[3] The Licensee accepts the Committee decision but denies any dishonesty or misconduct. He accepts that he was guilty of unsatisfactory conduct, and that he breached rr 6.4 and 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

### **Facts on which the Complaints Assessment Committee based its finding**

[4] The Licensee is a licensed Salesperson under the Act and at the time of the relevant conduct was engaged by Leaders Real Estate Agency (1987) Limited (the Agency). On 16 April 2015 the Real Estate Agents Authority (the Authority) received a complaint against the Licensee from the Appellant.

[5] The complaint relates to a property situated at 61a Mortimer Terrace, Brooklyn, Wellington (the Property) and alleged, (among other things), that the Licensee made no disclosures about defects to the property. A sale and purchase agreement was signed by the Appellant and the vendor on 22 August 2014. The Licensee acted as the salesperson on this transaction. The vendor was the girlfriend of his brother.

[6] The bathroom in the Property was not code compliant. The Property had undergone extensive changes where the second bedroom was removed and renovations to the bathroom occurred. The Licensee phoned the Appellant on 8 September 2014 when he says that the defect was disclosed to him by the vendor and advised her of the defect. This call was made prior to the complainant paying the deposit and the agreement becoming unconditional. The Licensee advised the Appellant that the granting of a Code Compliance Certificate (CCC) was imminent. She asked him to also inform her lawyer of this issue but he did not do so prior to the contract becoming unconditional.

[7] The Appellant's solicitor emailed her on 8 September 2014 at 4.29pm advising that the contract was unconditional. She paid the deposit on 9 September 2014. However, no CCC subsequently issued. The parties agreed to a \$20,000 retention on settlement in relation to the unresolved bathroom consent issue.

[8] Settlement occurred on 22 September 2014 (according to the CAC) but according to correspondence before the Tribunal and the Certificate of Title settlement occurred on 22 October 2014.

[9] The vendor's application for the CCC was not submitted to the Wellington City Council (the Council) until a month after the deposit was paid. The property had undergone extensive changes where the second bedroom had been removed by the vendor and renovations to the bathroom had occurred. This fact was not disclosed to the Appellant until after settlement had occurred. It was then disclosed by the vendor. As at 14 April 2015 the bathroom remained non-compliant, and a Notice to Fix had been issued by the Council making the Property a defective property.

[10] The Committee considered that upon receiving the disclosure from the vendor, it was the Licensee's duty to not only disclose this information to the Appellant but also to have immediately disclosed this information to both parties' solicitors and verify if an extension to the unconditional date was needed to consider this new information. The Committee found that it was inappropriate that he did not make certain the Appellant's solicitor was fully aware of this new information prior to the contract becoming unconditional.

[11] The Committee also found that the Licensee misled the Appellant when he passed on the comment from the Vendor that the CCC was imminent, without verifying or qualifying that statement. The Committee considered that a licensee would know that it is difficult to arrange a CCC for un-consented works and therefore the Licensee should not just have relied on the word of the Vendor.

[12] The Committee accepted that there was insufficient evidence to establish that the Licensee was aware of the other renovations that had taken place at the property. That part of the complaint was dismissed. The Committee also found that the Licensee did disclose his relationship with the vendor to the Appellant but that the relationship did not make them

‘related persons’ under the Act. The CAC found that no further disclosures with respect to the relationship were needed.

[13] The Appellant’s solicitor has retained \$20,000 in his trust account to be paid once all the Council consents have been granted. This has not occurred. The dispute remains unresolved.

### **Challenges to the facts**

[14] The Appellant has challenged some of these facts and submitted that the Licensee was dishonest for a number of reasons as follows:

- a. The Licensee initially misrepresented to the Authority investigator when he started speaking to his brother again;
- b. The Licensee did not disclose to the investigator that he tried to sell the Property when he worked at Tommy’s Real Estate in 2012;
- c. The Licensee set out to deceive the appellant by offering her “up to \$20,000 on the phone when he rang [her] on the 8 of September 2014 to ensure [she] completed the sale”;
- d. The Licensee’s brother was living at the Property and renovating it up until it was put on the market in 2012;
- e. In an email to the Authority the Licensee claimed that agreement was due to be unconditional on 12 September 2014 and that it was made unconditional early without his prior knowledge. The Appellant claims the 12 September date is incorrect;
- f. The Licensee only contacted her about the bathroom after the agreement went unconditional;
- g. The Licensee inferred to the Authority that he could have been in contact with the Appellant on another phone number but the Appellant claims she did not provide him with another phone number;

- h. The Licensee continues to lie about when he informed her of the lack of code compliance with the bathroom; and
- i. That the Licensee's brother became involved before settlement contrary to the Licensee's claim.

### **Issue on appeal**

[15] The issue on appeal is whether Mr Brodie's conduct was sufficiently serious for misconduct charges to have been laid.

[16] The Committee does not have the power under the Act to determine that a person has engaged in misconduct under s 73. If the Committee considers that misconduct charges are appropriate, then it must lay and prosecute them in the Tribunal.

[17] The Authority has submitted that the scope of the right to appeal in the circumstances of this appeal is outlined in *Dunn v Real Estate Agents Authority*.<sup>1</sup> In that case the Tribunal considered that the Tribunal's role on an appeal from the exercise of a discretion not to prosecute will be treated as an appeal from a decision in exercise of a discretion. The Tribunal outlined that the role of the Tribunal on such an appeal will be limited as set out by the Supreme Court in *Kacem v Bashir*.<sup>2</sup>

[32] ...In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

[18] The Authority therefore submitted that this appeal should be treated in the same way, as an appeal from the discretion not to prosecute for misconduct, and if the Tribunal considered that misconduct charges should have been laid, the appropriate response is to refer the matter back to the Committee with a direction that the Committee lay and prosecute a misconduct charge in separate proceedings in the Tribunal. The Tribunal accepts that this is the appropriate approach.

### **Relevant Sections in the Act and Rules**

---

<sup>1</sup> *Dunn v Real Estate Agents Authority* [2012] NZREADT 56 at [14]-[19].

<sup>2</sup> *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

[19] The Act provides a two-tier approach to disciplinary conduct. Lower level conduct issues fall within unsatisfactory conduct, as defined in s 72:

### **72 Unsatisfactory conduct**

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

[20] More serious conduct may amount to misconduct under s 73:

### **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
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
- (c) consists of a wilful or reckless contravention of—
  - (i) this Act; or
  - (ii) other Acts that apply to the conduct of licensees; or
  - (iii) regulations or rules made under this Act; or
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

[21] The Committee found that the Licensee's conduct also contravened rr 6.4 and 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. These rules provide the following:

6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

...

10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either—

(a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or

(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

### Relevant case law

[22] In *Complaints Assessment Committee v Downtown Apartments (in liq)* the Tribunal considered the difference between unsatisfactory conduct and misconduct:<sup>3</sup>

[49]... Leaving s 73(d) (criminal convictions) to one side, there is a clear progression from unsatisfactory conduct under s 72 to misconduct under s 73 of the 2008 Act:

(a) Unacceptable conduct (as regarded by agents of good standing) s 72(d) → disgraceful conduct (as regarded by agents of good standing or reasonable members of the public) (s 73(a));

(b) Negligence/incompetence (s 72(a) and (c)) → serious negligence/incompetence (s 73(b));

(c) Contravention of the Act/Regulations/Rules (s 72(b)) → wilful or reckless contravention of the Act/Regulations/Rules/other Acts (s 73(c)).

[50] At a high level of generality, therefore, it may be said that s 72 requires proof of a departure from acceptable standards and s 73 requires something more – a marked or serious departure from acceptable standards.

### Discussion

[23] Thus the Tribunal would need to be convinced that Mr Brodie's conduct was serious incompetence or serious negligence or disgraceful conduct amount to find him guilty of misconduct. For this appeal the Tribunal must consider whether the Committee (1) made an

---

<sup>3</sup> *Complaints Assessment Committee v Downtown Apartments Ltd (in liq)* [2010] NZREADT 6 at [50].

error of law or principle; (2) took into account irrelevant considerations; (3) failed to take into account relevant considerations; or (4) was plainly wrong. The Appellant alleges that the Committee was plainly wrong. This is a high threshold to meet.

[24] The Appellant has alleged that the Licensee was dishonest but the Committee found that there was not sufficient evidence to establish dishonesty. The burden of establishing that the CAC were wrong rests with the appellant. It is also a significant burden for the appellant who must show that there is sufficient evidence for the Tribunal to consider requiring the CAC to lay a charge alleging disgraceful conduct.

[25] The Licensee has denied any dishonesty. He accepts he began to speak to his brother prior to the date first given. Even if the Licensee and his brother were in contact in 2012, this does not establish that the Licensee knew anything about the renovations. Further, the presence of an inconsistency in his evidence does not show that he was deliberately misleading the Appellant. Finally, even if true this alleged dishonesty occurred only after the complaint was made by the Appellant.

[26] The licensee did not advise the Authority investigator that he had listed the Property while working for Tommy's Real Estate in 2012. However, he was not specifically asked about this and the omission does not tend to establish the Appellant's claims. The listing at the time described the apartment as having one bedroom which indicate that the renovations had already been conducted and concluded.

[27] The Appellant has not established that the Licensee set out to deceive her by offering her the \$20,000 retention as she claims. The Licensee's timeline of events states that he negotiated a \$20,000 retention with the intention that it would cover any potential issues with the bathroom. The fact of the retention indicates that the licensee knew an error had been made but is not supportive of dishonesty. There is no evidence to suggest that the Licensee set out to deceive the Appellant with the retention.

[28] The Appellant has not provided evidence to establish that the Licensee knew about the renovations at an earlier date. In the vendor's evidence, she states that she did not pass on the information about the renovations to the licensee because she did not think it was necessary. Further, the agency agreement indicates that the vendor did not make any disclosures about any renovations at the time when she entered into the agency agreement. The Appellant has



not provided sufficient evidence to establish that the Licensee nevertheless had knowledge of the renovations.

[29] The allegations of dishonesty from the Appellant mainly rely on inferences to be drawn from the evidence available to the Tribunal. The Appellant seeks to have the Tribunal infer that the Licensee was deliberately misleading her or that he was deliberately withholding information from her. However, the Tribunal cannot conclude that the CAC was plainly wrong in not laying a charge under s.73. The evidence we have read supports the conclusion reached by the CAC. The Appellant has not demonstrated that the inferences she contends for are correct on the balance of probabilities.

*New documents before the Tribunal*

[30] The Authority has submitted that nearly all of the additional documentation submitted by the Appellant in this appeal was before the Committee during its deliberations. The only new documents would not have been provided to the Committee are:

- a. A Letter from Susannah Muirhead dated 5 January 2016, detailing Ms Muirhead's recollections of the Licensee's brother and the vendor's involvement with the Property in 2011 and 2012;
- b. A Certificate of Compliance issued on 28 September 2014 for electrical work in the Property undertaken from 26 September 2011 to 23 January 2012; and
- c. An application for building consent, received by the local council on 9 October 2014.

[31] None of the new documents prove that the Licensee had such prior knowledge or acted dishonestly, or establish a prima facie case of dishonesty even when read with the other documents.

[32] The decision to not to prosecute the Licensee for misconduct was clearly open to the Committee based on the information before it. The appeal does not establish on the evidence a prima facie case that there has been a marked or serious departure from acceptable standards by the Licensee. The Appellant has therefore not showed that the Committee committed an error in exercising their discretion.

**Conclusion**

[33] The Tribunal therefore conclude the Appellant has not established that the CAC made an error of law or principle or took into account irrelevant considerations or failed to take into account relevant information or was plainly wrong.

[34] The Tribunal therefore dismiss the appeal and draw the parties' attention to the appeal provisions of s.116 Real Estate Agents Act.

---

Ms K Davenport QC  
Chairperson

---

Mr G Denley  
Member

---

Ms N Dangen  
Member