BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 35

READT 050/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	ALISON FLETCHER Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 412) First respondent
AND	HAMISH NOPS Second Respondent

On the papers:

Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Ms N O'Connor, Member
Appearances:	Appellant no appearance Mr R W Belcher, on behalf of the Authority No appearance for second respondent
Date of Decision:	21 August 2019

DECISION OF THE TRIBUNAL

Background

[1] The appellant made a complaint against the second respondent which was referred to Complaints Assessment Committee 412 (the Committee) for decision, which they duly made on 19 September 2018. In their decision, the Committee resolved that it was not necessary for them to enquire further into the complaint. Further details about the complaint will be discussed subsequently in this decision.

[2] The appellant was not prepared to accept that outcome and filed this appeal.

[3] The approach to an appeal of this kind is summarised in *McGechan on Procedure* in the following terms:[1]

> **HR20.18.02 Appeals from exercise of discretion**
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> Where the appeal is against a finding which is within the discretion of the decision-maker, the Court will not interfere with the exercise of that discretion unless it is shown that the discretion has been exercised on a wrong principle, or not at all, or that there has been a miscarriage of justice ... It will not interfere if it is simply a matter of giving different weight to the factors considered ...
>
> (citations omitted)

[4] We accept that the submissions of counsel for the Authority correctly, and, more expansively, stated the position as to the nature of the appeal against a decision made under s 79 of the Real Estate Agents Act 2008 (the Act):[2]

> 4.3 … appellate courts will adopt a different approach on appeals from discretionary decisions to that taken on general appeals:
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> > [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. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary.
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> 4.4 The Tribunal has previously held that it will adopt the narrower approach contemplated by the Supreme Court in *Kacem v Bashir* when considering appeals from discretionary decisions of Complaints Assessment Committees under s 79(2) of the Act. A decision under s 79(2) is a discretionary decision. A narrower appellate approach in terms of an appeal from a discretion is therefore appropriate.
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> (footnote omitted)

[5] In summary, the Committee determined that the complaint, namely that the appellant had been put under undue pressure by the second respondent, as the vendor's agent in regard to the purchase of real estate, was not one that ought to be enquired into further.

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[1] Robert Osborne and others *McGechan on Procedure* (loose-leaf ed, Thomson Reuters).
[2] Quoting a passage from *Kacem v Bashir* [2010] NZFLR 884 (SC).

[6] In order to understand the Committee's decision, it is necessary to make an additional reference to the background.

[7] The appellant had intended to make an offer for the purchase of a property at 40 Grant Road, Waipu, which was the transaction in which the second respondent represented the vendor. She made contact with the second respondent. The second respondent showed her the property. Shortly afterwards, the second respondent became aware that an offer was being made by a third party for the property.

[8] For that reason, the second respondent concluded that because it was now a case where there were multiple offers, he was required to obtain from the appellant a multiple offer form which she would be required to sign before he could proceed to submit any offer by her to the vendor. The second respondent duly prepared the form and he emailed it to appellant. Unfortunately, this form referred not to 40 Grant Road, Waipu but, incorrectly, to another property at 6B Moki Place, Ruakaka. The appellant told the Real Estate Authority facilitator on 17 August 2018 that she "corrected, signed and returned" the offer. She also told the facilitator that:[3]

> … she 'whited out' the incorrect address, signed it and sent the scanned-multi offer form back to [the second respondent].

[9] The facilitator also recorded that the appellant said to her that the second respondent had told her it was not acceptable to send the form back in this way and that he would email her a new multiple offer form with the correct address on it. However, instead of sending such a form, the appellant alleges the second respondent sent her an email, to which there were no attachments.

[10] The second respondent disputes that there were no attachments to the email. The Committee concluded that the appellant was wrong in this matter and that there were attachments to the email.

[11] We interpolate that the correct position is that the second respondent did in fact send an amended correct multiple offer form to the appellant because the email to which that document

[3] Bundle of documents at 11.

was purportedly attached, which he sent on 23 March 2018 at 1.26 pm, records that there was such an attachment.

[12] Further, by the time when the second respondent sent the amended form, the appellant knew that any offer that she was going to submit would need to be put before the vendor by 5.30 pm on Saturday, 24 March 2018. There was still, therefore, over 24 hours in which the appellant could complete execution of the multiple listing form in its corrected state and send it back to the second respondent.

[13] However, rather than sending the form back to the appellant at approximately 2.00 pm on Friday, 23 March 2018, the second respondent sent an email saying:

> Can you use the form I've signed as I'm not able to sign a new form at this time.

[14] The second respondent made it clear that he could not use the earlier multiple offer form that the appellant requested him to use. He emailed the appellant:

> In regards to the multiple offer form, the one you return (sic) appears to be blank. The address has not change (sic) etc. If you could sign the new one I sent you would be great (sic).

[15] This message made it clear that he was still waiting for the correct multiple offer form to be sent back.

[16] When he sent to the appellant this last email at 2.34 pm that day, there was still over 24 hours until the offer from the appellant was due, and, therefore, adequate time for her to complete the correct multiple offer form which the second respondent had sent back to her. She did not, however, complete the form.

[17] The second respondent gave her a further reminder at 6.12 pm that day — that is Friday 23 March 2018 — when he asked her not to forget that he would "need the acknowledgement form as well".

[18] At 7.23 pm that night the appellant responded in an email that it had taken her three hours to sign the incorrect form on Thursday evening (22 March 2018) and that she:

> Cannot do it again until Monday if I'd known this last night that you might not except (sic) the wrong form you sent, it could all have been dealt with today! I had no idea I'd be signing anything today, hence my ability to do so. We can sort this out Monday if you let the owner know what has happened with the wrong form.

[19] The response from the second respondent was that he agreed that he could have used the "wrong form" but he had "not received any signed form back from [the appellant] as an attachment to emails". He told her this at 7.33 pm on the Friday night, 23 March 2018. At that point, we again observe, there was still adequate time for the appellant to complete the form.

[20] Again, later that night the second respondent told the appellant that he required a signed acknowledgement form for the multiple offer and that without that acknowledgement he could not present the offer. He also said that if she was having trouble printing or scanning documents:

> I can meet you somewhere tomorrow and pick it up from you or I can bring a hard copy for you to sign.

[21] The importance of getting the multiple offer form signed was underlined by the second respondent saying in the same email:

> I would hate for you to miss out due to a small technicality so better to get it sorted sooner rather than later. As I said you have not emailed me a signed acknowledgement of any kind as of yet, only the blank form came back.

[22] Still, the appellant took no steps to sign a multiple offer document or indeed a signed offer in the form of a sale and purchase agreement. At 1.56 pm on Saturday, 24 March 2018, the second respondent again asked when the appellant would be sending the document through and repeated his offer to make a hard copy and meet somewhere "if this helps". He then said the time is 2.00 pm and the deadline was 5.00 pm that day. There were still approximately three hours to run in order to get the documents completed.

[23] The second respondent, shortly after sending that email, took the step of reproducing the multiple offer acknowledgement in an email. In that email, he suggested that the appellant could reply, in which case the vendor's agents would accept the acknowledgement set out in the email. There was no reply.

[24] As well as the emails that the second respondent sent to the appellant, he also sent her texts telling her that he was waiting for her to produce the documents, but no response was received.

Discussion

[25] The Committee elected not to enquire further into the complaints by the appellant pursuant to s 79(2)(b) of the Act. It considered that the matter was "inconsequential" in the wording of s 79(2)(b) and for that reason did not need to be pursued.

[26] Before the question can be answered whether the Committee correctly exercised its discretion, it is necessary to properly understand what the discretion involved.

[27] The discretion has been described as one that is intended to filter out meritless cases. The objective of the legislation is that the Committee ought not to become involved in investigating meritless complaints. Where the Committee determines that the complaint should be considered by the Tribunal, it has the responsibility to refer the matter to the Tribunal by way of a charge under s 91 of the Act.

[28] However, the discretion that is being exercised differs from one where the Committee, having enquired into a complaint, has to make a decision whether or not the complaint is proved or, in appropriate cases, whether charges ought to be brought before the Tribunal. A decision not to enquire under s 79 of the Act will be restricted to cases where it is clear from the evidence that there is no substance to the complaint.

[29] The question is whether, in this case, the complaint by the appellant is of insufficient substance to warrant a determination that the complaint comes within one of the categories in s 79(2) of Act.

[30] The second respondent took steps to remedy the position — or at least that is his explanation. According to his account of his dealings with the appellant, the difficulties with getting the making of the written offer by the appellant back on track could have been resolved but for her failure to cooperate with him. He says that she declined his reasonable offers to arrange for the documents to be executed.

[31] The Committee concluded that the subsequent correspondence exchanged between the parties supported his position. There does not appear to be any substantial question that their conclusion was correct. The result is that the Committee has not attempted to resolve a serious difference on the evidence as part of making a determination under s 79 not to enquire further. It is unlikely that a Committee, which is proceeding under s 79, would ever be justified in resolving substantial factual issues. To do so would generally amount to making a determination about the substance of the dispute and thereafter determining that it would not be necessary to hold an inquiry into the complaint.

[32] However, there does not seem to be any substantial dispute that the contemporaneous documents the second respondent relies upon actually came into existence or that those documents are consistent with the account of the second respondent that the initial error on his part was capable of being remedied, had the appellant cooperated.

[33] That being so, the Committee cannot be said to have come to a wrong conclusion when they decided that, in effect, the problems with getting the documents executed arose from the appellant and not the second respondent. There was only one relatively minor instance of fault on the part of the second respondent which he took steps to remedy, but was unable to do so because of the lack of cooperation on the part of the appellant. All that being so, we do not consider that the Committee was plainly wrong in its decision when deciding that the complaint concerned an inconsequential matter that did not need to be pursued.

[34] For these reasons, our decision is that the appeal should be dismissed and there will be an order accordingly.

[35] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in pt 20 of the High Court Rules 2016.

Mr J Doogue
Deputy Chairperson

G Denley
Member

N O'Connor
Member