

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2022] NZREADT 5

Reference No: READT 020/2020

IN THE MATTER OF

An appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

MIKE JASON MACDONALD
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 1906)**
First Respondent

AND

OW
Second Respondent

Hearing on the papers

Tribunal:

D J Plunkett (Chair)
G Denley (Member)
N O'Connor (Member)

Appearances:

The appellant:	Self-represented
Counsel for the first respondent:	C Paterson, A-R Davies
Counsel for the second respondent:	No appearance

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 6 April 2022

INTRODUCTION

[1] Mike Jason MacDonald, a licensed real estate salesperson, is the appellant. A complaint was made against him. The complainant was OW, the second respondent, who was a prospective purchaser of a property. Mr MacDonald was found guilty of unsatisfactory conduct by Complaints Assessment Committee 1906 (the Committee), the first respondent. He was found to have contravened the Real Estate Agents Act 2008 (the Act) and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules). Certain penalty orders were later made by the Committee.

[2] Mr MacDonald appealed to the Tribunal against the Committee's liability and penalty decisions, but he has chosen not to engage in any meaningful way with the Tribunal. He claims his health precludes him from doing so, but he has not produced adequate medical evidence, despite being requested to do so.

[3] It now falls to the Tribunal to determine the appeal, bearing in mind that Mr MacDonald bears the onus of proof whether or not he chooses to prosecute his appeal.

BACKGROUND

[4] The complaint concerns a property in rural Waikato. It was listed by Mr MacDonald who was then at Prime Country Real Estate Ltd (the agency).

[5] On 18 February 2019, the complainant viewed the property with Mr MacDonald. She advised him of her intention to make an offer, but she needed more information. The Committee found that Mr MacDonald provided the information though not in a timely way.

[6] A few days after viewing the property, the complainant asked Mr MacDonald if she would be in a multi-offer situation (where multiple offerors all know of the existence of other offers). He said 'no', which the Committee found was correct at the time.

[7] On 21 February 2019, the ultimately successful purchasers (the purchasers) made a written offer which was presented to the vendors by Mr MacDonald and his supervising agent. The vendors were told another person was interested (the complainant), but they were not told that she was intending to put in an offer. There were variations and counter-offers, with the purchasers' final offer being given to the vendors on Saturday 23 February 2019.

[8] There was an email exchange on the Saturday evening between Mr MacDonald and the complainant. At 4.52 pm, Mr MacDonald advised the complainant she might have a chance if she put in an offer. He said that the current offer could be fully signed within a few hours. At 6:09 pm, she told him she was happy to put in an offer that day and asked for any paperwork needed. At 7:35 pm, Mr MacDonald requested certain information from her and he said he would then put the offer together. She sent him the information at 7:39 pm.

[9] At about 8 pm, Mr MacDonald sent an email to his supervisor requesting him to draw up the offer. According to Mr MacDonald, he did this when he was busy. He said that he phoned the supervisor, but this is denied by the supervisor (a conflict in the evidence which the Committee did not resolve). Then at 8:11 pm, Mr MacDonald encouraged the complainant to make her best offer. At 8:52 pm, the complainant gave him her starting price and asked him to prepare the offer as soon as possible.

[10] The vendors signed the purchasers' final offer at about 10 pm on the Saturday. They were not aware the complainant wanted to put in an offer.

[11] The supervisor did not become aware of Mr MacDonald's email concerning the complainant's prospective offer until the morning of Sunday 24 February 2019. An offer document was drawn up by the supervisor and sent to the complainant on the Sunday morning by Mr MacDonald.

[12] On the Sunday morning, the complainant herself went to see the vendors and presented an offer directly to them.

THE COMPLAINT

[13] On about 4 July 2019, the complainant made a complaint against Mr MacDonald to the Real Estate Agents Authority (the Authority).

Decision of the Committee on liability

[14] Following an investigation, the Committee issued a decision on 16 April 2020 finding that Mr MacDonald had engaged in unsatisfactory conduct, as defined in s 72(a) of the Act (conduct falling short of the standard expected from a reasonably competent licensee) and s 72(b) (contravened the Act or the relevant rules). He had contravened rr 6.1, 6.2, 6.4 and 9.3 of the Rules.

[15] The Committee found that Mr MacDonald had an obligation to advise all the parties that there was a possibility of a multi-offer situation on the property. Prior to the

purchasers' offer being presented to the vendors, he should have advised the purchasers they would be in a multi-offer situation. The Committee was of the view he did not do so, as he feared they would withdraw their offer.

[16] Mr MacDonald also had a duty to give the complainant an opportunity to present her offer along with the other offer. He knew time was of the essence and the vendors were on the point of signing the first offer. By delaying the writing of the complainant's offer, he was playing for time and was not dealing fairly and in good faith with the complainant.

[17] Furthermore, the Committee found that Mr MacDonald had not acted in good faith or dealt fairly with the complainant in relation to the information she had requested.

[18] According to the Committee, it was not acceptable for Mr MacDonald not to advise the vendors of the complainant's offer, but instead to encourage them to accept the purchasers' offer as the only one they would get and warning that it could be withdrawn. The vendors were denied an informed decision. Mr MacDonald did not comply with his fiduciary obligations to his clients, nor did he act in good faith or fairly. He did not keep the vendors well informed of matters relevant to their interests.

Decision of the Committee on orders

[19] The Committee issued its decision on the orders on 15 July 2020. It noted that Mr MacDonald had stalled the complainant from preparing her offer in the hope the purchasers' offer would be accepted. The Committee ordered that Mr MacDonald:

1. Be censured.
2. Undergo training or education within three months by completing unit standard 23135 (knowledge of contract and agency law).
3. Pay a fine of \$1,000 within 21 days.

APPEAL

[20] On about 11 August 2020, Mr MacDonald appealed to the Tribunal against the decisions of the Committee. He set out his version of the events in an email to the Tribunal on 12 August 2020.

[21] Mr MacDonald confirmed on 18 August 2020 that he was appealing both decisions of the Committee.

[22] A telephone conference was held on 28 August 2020. Mr MacDonald attended, as did counsel for the Authority. The complainant did not attend. A Minute was then issued on 1 September 2020. An oral hearing in November 2020 was directed, together with a timetable for filing evidence and submissions. The hearing was subsequently scheduled for 20 November 2020.

[23] On 3 September 2020, Mr MacDonald sent an email to the Tribunal requesting that the appeal be put on hold until December or longer as his health was seriously challenged. He would need an operation within the next few months. In a further email on 4 September, Mr MacDonald said he had a disc removed in his back, that he had reinjured his back and that he needed to have his [deleted] removed. He was not working as an agent as his health was a priority. He could provide all these facts in writing.

[24] On 7 September 2020, the Tribunal advised the parties that the matter was stayed until December 2020 at Mr MacDonald's request. The hearing on 20 November 2020 was adjourned.

[25] On 8 December 2020, Mr MacDonald sent an email to the Tribunal advising that he was in a very serious and potentially life-threatening health situation. He had been hospitalised several times with severe, chronic pain from past accidents. He was waiting for a [deleted] operation. He would not be able to address the situation until the following year.

[26] The Tribunal issued Minute 2 on 17 December 2020 adjourning the matter, for review in March 2021. Mr MacDonald was to advise the Tribunal whether he intended to pursue the appeal. If he sought a further adjournment, he was to file a medical certificate as to his condition and ability to participate in a hearing.

[27] Mr MacDonald was informed by the Tribunal on 5 May 2021 that a telephone conference would be set down for 21 May 2021.

[28] In an email to the Tribunal on 12 May 2021, Mr MacDonald advised that he was recovering from a serious operation and other health challenges. He asked that the appeal be put on hold until July. In a further email on 28 May 2021, Mr MacDonald requested that the matter be adjourned until August. In support, he filed a certificate from his general practitioner (27 May 2021) as follows (in its entirety):

This is to certify, that this patient has completed a [deleted] removal surgery on the 10th February 2021. He may expect a full recovery to take a duration of three to six months after the surgery.

[29] The telephone conference scheduled for 21 May 2021 was vacated.

[30] The Tribunal advised the parties on 28 October 2021 that it was reviewing whether an oral hearing was required and invited submissions. Furthermore, if Mr MacDonald desired another adjournment for medical reasons, a full medical certificate was required from a family doctor or specialist stating his condition, diagnosis, symptoms, certifying his unfitness to participate in a hearing or present written submissions and stating when he would be fit to do so.

[31] Mr MacDonald did not respond, so the Tribunal's case manager rang him, but he declined to substantively respond.

[32] On 19 November 2021, Mr MacDonald provided an additional medical certificate to the Authority, but not to the Tribunal.

[33] In an email on 19 November 2021 to Mr MacDonald, the Tribunal noted he had produced no medical certificate. He was again requested to provide submissions or a medical certificate. He declined to do so.

[34] On 24 November 2021, the Tribunal issued Minute 3. It noted that Mr MacDonald had produced no medical evidence which could justify the appeal being further postponed. On the basis of the brief certificate filed earlier, he could be expected to be fit enough to fully participate in the appeal. The Tribunal directed that the appeal be heard on the papers and it set a timetable for evidence and submissions.

[35] Mr MacDonald was directed to provide submissions by 28 January 2022. As he did not do so, the case manager sent him a reminder by email on 8 February 2022. This led to an email from Mr MacDonald on 9 February 2022 stating that his doctor said he could not go through with the proceedings. He was waiting for an appointment with a specialist and hospital scans. He was not in a position to provide submissions or attend a hearing due to the doctor's "strong advice". He added that he had lost faith in the case manager and asked for her to be replaced.

[36] On 16 February 2022, the case manager sent a letter to Mr MacDonald advising that he had provided no evidence supporting his claimed medical condition. In the absence of medical evidence, the timetable set out in Minute 3 would proceed. He had one more opportunity, in accordance with the timetable, to provide submissions. Whether or not he filed submissions, a decision would be issued by the Tribunal on the basis of the material before it.

[37] The complainant advised the Tribunal on 16 February 2022 she had no submissions.

[38] The Authority filed a memorandum on 17 February 2022. It set out at length the history of the appeal. It noted Mr MacDonald had failed to file submissions, as directed. Nor had he filed any up-to-date cogent medical evidence which could justify further extensions of the timetable. It requested that Mr MacDonald be directed to file submissions or a full medical certificate. If he did not comply with the updated direction, the Authority would make an application to dismiss the appeal for want of prosecution.

[39] The Authority provided to the Tribunal with its memorandum of 17 February 2022, the earlier general practitioner's medical certificate (17 November 2021) not sent to the Tribunal, which states (in its entirety):

I understand that the above is due to attend a Hearing in Auckland shortly.

Currently he is being investigated by the [deleted] Department at Waikato for back pain and nerve damage. He is also awaiting a surgical appointment for abdominal pain following [deleted] removal.

As such he does not feel fit for traveling for the following 3 to 6 months.

[40] On 21 February 2022, the Tribunal advised the parties that it declined to issue the direction sought by the Authority as it regarded the direction as unnecessary. The Tribunal expressed the view that it did not favour a summary dismissal application. It was noted that Minute 3 had set out a process leading to a determination, that Mr MacDonald bore the onus of proof and the absence of any submissions from him would be taken into account.

[41] The Tribunal's registry manager wrote on 21 February 2022 to Mr MacDonald declining to replace the case manager. The Tribunal notes that an earlier case manager had been replaced at his request.

[42] The Authority made an application to dismiss the appeal for want of prosecution on 3 March 2022.¹

[43] The Tribunal received the Authority's substantive submissions on 11 March 2022.

[44] There were no substantive submissions from Mr MacDonald (deadline for reply submissions was 25 March 2022). In an email to the Tribunal on 22 March 2022, he said he was still not in a position to attend a hearing due to ongoing health concerns. His wellbeing had been seriously affected and it was unfair to put undue pressure on him. He would not be able to attend to any hearing or further correspondence.

Bundle of documents

¹ In light of the outcome of the appeal, it is not necessary to determine this application.

[45] The Tribunal received from the Authority a paginated bundle of documents provided to the Committee.

JURISDICTION AND PRINCIPLES

[46] These are appeals pursuant to s 111 of the Act.

[47] An appeal is by way of a rehearing.² It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.³ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.⁴ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.⁵

[48] A hearing may be in person or on the papers.⁶ A hearing in person may be conducted by telephone or audiovisual link.

[49] There is an appeal against the liability determination of the Committee under s 89(2)(b) that Mr MacDonald engaged in unsatisfactory conduct. It is a general appeal. The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee's determination is wrong.⁷ An appellant has the responsibility of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.

[50] There is also an appeal by Mr MacDonald against the Committee's penalty orders. There is some controversy as to whether such appeals are general appeals or appeals against the exercise of a discretion.⁸ Mr MacDonald does not contest the submission of Ms Davies on behalf of the Authority that this is an appeal against the exercise of a discretion, in which case he must show that there is an error of law or principle, or the Committee took into account irrelevant considerations, or it failed to take into account relevant considerations, or the decision is plainly wrong.⁹

DISCUSSION

² Real Estate Agents Act 2008, s 111(3).

³ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

⁴ At s 111(4).

⁵ At s 111(5).

⁶ At ss 107, 107A.

⁷ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] & [16] and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

⁸ *Walker v Real Estate Agents Authority (CAC 1907)* [2021] NZREADT 12 at [17]–[18].

⁹ Ms Davies relies on *Century 21 Wellington Ltd v Real Estate Agents Authority* [2017] NZREADT 47 at [18]–[19].

[51] The Committee found Mr MacDonald to have breached the following rules:

6 Standards of professional conduct

- 6.1 A licensee must comply with fiduciary obligations to the licensee's client.
- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
- ...
- 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.

9 Client and customer care

General

- ...
- 9.3 A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest, unless otherwise instructed by the client.
- ...

[52] Mr MacDonald sets out his version of some of the events in his email to the Tribunal on 12 August 2020. His main points are:

1. The complainant was encouraged to put in her offer immediately.
2. If she had done so, there would have been a multi-offer situation.
3. He answered all her queries about the property.
4. The complainant did not provide the information for an offer until late Saturday evening, but by then it was too late.
5. He did everything possible to accommodate the complainant but time dragged on at her insistence.
6. The vendors said they were not interested in the complainant's offer because she took too long, it was going to be too low and she had too many demands.
7. He was updating the vendors daily.
8. He has completed multi-offers in the past.

9. He phoned the vendors on Friday and Saturday morning and was told they were happy to sign the first offer, because if the complainant was serious, she would have put an offer in several days previously.
10. The vendors changed their tune when the complainant turned up to their property on Sunday. She asked them about the other offer and then tried to offer more. She had earlier said that her offer was \$30,000 less than the first offer.
11. He had supplied many texts, emails and phone records to the Authority clearly proving that he made every effort to communicate with the complainant. He had a solid communication plan with her, the vendors and the purchasers. The Committee did not believe he called the vendors on Saturday, but he did. He could not get the phone record, as he had replaced his phone.
12. He sent the details of the complainant's offer to his supervisor on Saturday evening to be put together as a back-up offer, as it was his understanding that the first offer had been accepted on Friday afternoon or Saturday morning.
13. He can provide references from very satisfied clients over five years proving he has a very high level of professional communication and listening skills.
14. He made a 100% effort to help the complainant throughout the process.

[53] In the course of the Authority's investigation, Mr MacDonald had provided his version of the events to the Committee and it had the opportunity to weigh his evidence with that of the complainant, the vendors and Mr MacDonald's supervisor. The Committee made clear findings and gave reasons for its findings and outcome. While Mr MacDonald sets out his version of certain events in his submissions to the Tribunal, he has not explained why the Committee's reasoning was wrong. He makes no reference to any contemporary documents. He does not answer the conflicts between his evidence and that of the complainant, the vendors and his supervisor.

[54] In her submissions of 11 March 2022, Ms Davies thoroughly cross-references the Committee's findings against the contemporary documents and other evidence from witnesses, which was before the Committee. Mr MacDonald has not replied to those submissions, nor to counsel's contention that the Committee was correct for the reasons given by the Committee in its decisions.

[55] Indeed, Mr MacDonald has chosen not to participate in the Tribunal's process. Nor has he provided any medical evidence which could justify extending time for him to substantively participate and/or excusing his failure to participate. The medical evidence does not establish any inability to provide written submissions.

[56] As noted above, Mr MacDonald bears the onus of proof. Merely asserting his version of some facts and making certain factual contentions at the outset of the Tribunal's process, but otherwise refusing to engage, is not a discharge of the onus.

[57] We accept that the Committee's findings of fact and conclusions are correct. Mr MacDonald had an obligation to advise the vendors, the complainant and the purchasers of what was clearly a multi-offer situation. He had a duty to give the complainant an opportunity to present her offer, but he delayed writing it up in case the purchasers withdrew theirs. He did not advise the vendors of the complainant's intention to make an offer or later of her offer, but instead encouraged them to accept the purchasers' offer in case it was withdrawn. He did not comply with his fiduciary obligations to the vendors and did not deal with them or the complainant in good faith or fairly.

[58] As the Committee found, Mr MacDonald breached rr 6.1, 6.2, 6.4 and 9.3 of the Rules. This amounts to unsatisfactory conduct. He was censured, ordered to undergo specified training and fined \$1,000. We agree with Ms Davies that the orders are appropriate. Indeed, the fine is lenient, as counsel observes. Mr MacDonald has not established that there was any legal error in setting the penalty orders or that they are plainly wrong.

OUTCOME

[59] The appeal is dismissed. The Committee's decisions are confirmed.

[60] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 setting out the right of appeal to the High Court.

PUBLICATION

[61] The Committee directed publication of its decisions with the name of the licensee and the agency.

[62] In light of the outcome of this appeal and having regard to the interests of the parties and the public, it is appropriate to order publication without identifying the complainant, but naming the licensee, his agency and the Authority.

D J Plunkett
Chair

G Denley
Member

N O'Connor
Member