

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 79

READT 073/15

IN THE MATTER OF

A charge laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY

COMPLAINTS ASSESSMENT
COMMITTEE 405

AGAINST

LYNLEY LOCKWOOD
Defendant

Hearing:

5 December 2016, at Auckland

Tribunal:

Hon P J Andrews, Chairperson
Mr J Gaukrodger, Member
Ms C Sandelin, Member

Appearances:

Ms N Copeland, on behalf of the
Committee
Ms S Telford, on behalf of the defendant

Date of Decision:

5 December 2016
(Issued 9 December 2016)

(ORAL) DECISION OF THE TRIBUNAL

[1] Ms Lockwood has been charged by Complaints Assessment Committee 405 (“the Committee”) with misconduct under s 73(a) of the Real Estate Agents Act 2008 (“the Act”). The charge was set down for hearing today.

[2] The relevant facts are that Ms Lockwood listed a business for sale. The owner of the business was her partner (now husband) Mr Rogers. The complainants bought the business. The terms of sale (negotiated in large part by Ms Lockwood) included a restraint of trade, pursuant to which Mr Rogers was prevented from setting up a similar business within 5 kilometres, for a period of 12 months. The purchasers subsequently alleged that Mr Rogers had breached the restraint of trade, and complained to the Real Estate Agents Authority that Ms Lockwood had facilitated the breach.

[3] The relevant particulars in the charge are as follows:

17 Knowing of the restraint of trade clause, and having acted as agent in the negotiations between Mr Rogers and [the complainants] that ultimately resulted in the agreement, which had the restraint of trade clause in it, Ms Lockwood has then allowed Mr Rogers to set up business at her home address and address for the Agency and allowed her cell phone to be listed for appointments, in breach of the restraint of trade clause.

18 This conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. It is also a reckless or wilful contravention of the prohibition contained in r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 that licensees must not engage in any conduct likely to bring the industry into disrepute.

[4] At the beginning of the hearing the Tribunal raised with the parties a question as to whether the Committee’s charge could proceed. The point that was made to counsel was that the essence of the Committee’s charge was that Ms Lockwood had assisted Mr Rogers in the breach of a restraint of trade. To find that charge proved would require the Tribunal to make a finding that Mr Rogers did in fact breach the restraint of trade.

[5] That, as was acknowledged by counsel, is a determination to be made by a Court of law in its civil jurisdiction. Accordingly, the question raised with counsel was whether the Tribunal could deal with this disciplinary charge before a determination was made by a Court.

[6] Having considered the matter Ms Copeland sought to amend the charge, to allege that Ms Lockwood had provided facilities or taken steps to enable Mr Rogers to provide various services, knowingly or reckless as to the *risk* that Mr Rogers was in breach of the restraint of trade. Ms Copeland further referred to a letter from the complainant's solicitors dated 14 November 2014 which she submitted put Mr Rogers and Ms Lockwood on notice of the complainant's view that the terms of the restraint of trade were not being honoured.

[7] Ms Telford opposed the amendment. She submitted that there must still be a finding of a breach of the restraint of trade. She submitted that if what Mr Rogers was doing was lawful (that is, not in breach of the restraint of trade), then it could not be said that Ms Lockwood had done anything where there was a risk of it being in breach of the restraint of trade.

[8] We have taken some time to consider the application and we have concluded that an amended charge of "taking various steps knowingly or reckless as to the risk that what Mr Rogers was doing was in breach of the restraint of trade" requires a finding that there was such a breach.

[9] Ms Copeland's submission requires us to proceed on the hypothesis that Mr Rogers was in breach, or at the least that it was likely that he was in breach. We cannot proceed on the hypothetical basis we have set out above. It is our view that the Committee, the Tribunal and the licensee would be in some difficulty if it were subsequently held by a Court that there was no breach; that is, that what Mr Rogers was doing was lawful and did not involve a breach of the restraint of trade. If that were to occur the matter would, in fairness, need to be reconsidered. Essentially what we have set out above is the counterfactual of Ms Copeland's submission and in our view demonstrates the difficulty of proceeding on that basis.

[10] For that reason we do not allow the amendment. We note Ms Copeland's subsequent submission that the charge would be withdrawn and we allow that.

[11] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, 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 part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member