BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 70

READT 015/15

IN THE MATTER OF	a charge laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	THE REAL ESTATE AGENTS AUTHORITY (CAC 302) MARIE THERESE KAHUKURA Defendant
Hearing:	1 and 2 September 2016 (at Queenstown)
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Ms C Sandelin, Member
Appearances:	Ms C Paterson, on behalf of the Committee Mr J Waymouth, on behalf of the Defendant
Date of Decision:	7 October 2016

DECISION OF THE TRIBUNAL

Introduction

[1] Following a complaint having been made by Mr Anthony Clark, Complaints Assessment Committee 302 ("the Committee") has charged Ms Kahukura with misconduct under s 73(a) of the Real Estate Agents Act 2008 ("the Act"). The Committee alleges that Ms Kahukura's conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[2] Ms Kahukura was charged with disgraceful conduct in the course of managing a rental property at Cromwell ("the property"). The Committee alleges that she misled the owners of the property, Mr and Mrs Fraser ("the Frasers"), that she was acting on behalf of Central Realty 2010 Ltd (trading as L J Hooker) ("the Agency"), and managed the property in a manner that put the reputation of the Agency at risk.

[3] A charge relating to a licensee's management of a property can only be brought under s 73(a) of the Act. This is because property management work is not "real estate agency work" as defined in s 4 of the Act.[1] All other disciplinary provisions in the Act relate to a licensee's performance of real estate agency work.

[4] The charge was heard on 1 and 2 September 2016, at Queenstown. Evidence was called on behalf of the Committee, and on behalf of Ms Kahukura. Counsel for the Committee and Ms Kahukura made submissions at the conclusion of the hearing.

Background facts

[5] In large part, there is no dispute as to the factual background. At the relevant time, Mr Clark was a senior salesperson at the Agency. Ms Kahukura was employed by the Agency as a licensed salesperson from July 2011 until June 2013.

[6] On 5 May 2012, Ms Kahukura sold the property to the Frasers. The Frasers live in Queensland and intended to use the property for family holidays, and to rent it out as a holiday home (referred to in this decision as "holiday lets"). Ms Kahukura

---

1 See *Real Estate Agents Authority (CAC 303) v Kerr* [2015] NZREADT 33.

rented the property herself until November 2012. She paid rent directly to the Frasers until August 2012, then in September and October, she paid rent into the Frasers' bank account.

[7] Between December 2012 and May 2013, Ms Kahukura (together with a colleague; Ms Riordan) arranged holiday lets of the property, and received rents on behalf of the Frasers. There was no written agreement between Ms Kahukura and the Frasers regarding holiday lets. Such oral agreement as there was between them was informal, and in uncertain terms.

[8] There is a conflict in the evidence as to when the Frasers and Ms Kahukura discussed the possibility of Ms Kahukura managing the property. For the purposes of this decision we are not required to determine whether the discussion was at the time the Frasers purchased the property (as Mr Fraser contended), or at the time Ms Kahukura vacated it (as Ms Kahukura contended).

[9] There is also a conflict in the evidence regarding commission to be paid to Ms Kahukura. She and the Frasers agreed that commission would be taken out of rental payments, but they did not agree as to the amount of commission to be taken. Mr Fraser said there was no discussion about commission, but it never bothered him as he expected to pay commission at the "going rate" (which he said was about 9 per cent in Australia). Ms Kahukura's evidence was that she told the Frasers that the going rate for commission from holiday lets would be 30 per cent. She actually charged 20 or 30 per cent. Again, we are not required to reach a decision on the point.

[10] The property was let to three different tenants between December 2012 and June 2013. Rental payments were deposited into a business bank account in Ms Kahukura's name. It is evident from bank statements that the account was used for personal as well as business purposes. Some of the deposits of rental payments were identified as such, and some were identified incorrectly. The account was overdrawn on several occasions while rentals were being deposited

[11] Ms Kahukura did not pay rental from holiday lets over to the Frasers immediately, or regularly. She acknowledged that she could not have made payments when the bank account was overdrawn. She did not keep accurate records of payments made to the Frasers, or commissions deducted, although she made some diary notes.

[12] By 13 March 2013, Ms Kahukura had paid the Frasers $3,000. In June 2013, the Frasers contacted the Agency, and spoke with Mr Clark. They expressed their concern as to the Agency's management of the property. They had not been receiving rental statements setting out the details of the holiday lets that were being arranged, and the bank account into which the rental income was to be paid had gone into overdraft. This would not have occurred if rental income had been paid into the account.

[13] Mr Clark told them that the property had never been managed by the Agency. Following that discussion, Ms Kahukura paid the Frasers $4,200 on 17 June 2013, and a further $400 in early 2014. It was accepted that the Frasers have now received all payments due to them.

Issues for determination

[14] It was common ground that Ms Kahukura was managing the property. In order to decide whether the charge against Ms Kahukura is proved, the Tribunal must consider:

[a] Did Ms Kahukura mislead the Frasers into believing she was managing the property as a licensed salesperson on behalf of the Agency?

[b] Did Ms Kahukura fail to account to the Frasers deliberately, negligently or in an incompetent manner?

[c] If the answers to [a] and [b] are "yes", was Ms Kahukura's conduct such as would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful?

First issue: did Ms Kahukura mislead the Frasers into believing that she was managing the property as a licensed salesperson on behalf of the Agency?

[15] We note, first, that one of the Agency's employees undertook property management for the Agency. The Agency had a policy that salespersons did not undertake property management. However, the Agency's property management did not extend to holiday lets.

Evidence

[16] Mr Fraser's evidence was that when they discussed renting the property, Ms Kahukura told them that the Agency was "starting to get into rentals" and asked "could we do it". In his words, Ms Kahukura's offer was to "look after the property" for them, on behalf of the Agency. This understanding arose from Ms Kahukura having been the agent who sold them the property; she had told them that the Agency managed rentals, and they had no reason to think she was doing it on her own, in her personal capacity.

[17] Mr Fraser also said that because Ms Kahukura was part of a well-known firm which undertook property management, they felt they could trust her with the management. They would not have agreed to her managing the property if they had known she was acting on her own behalf. Mr Fraser's evidence was that Ms Kahukura never told them this.

[18] Ms Kahukura said she made the offer to look after the property in her personal capacity, not as a salesperson for, or on behalf of, the Agency. Her evidence was that when she made this offer, she pointed out to the Frasers that the Agency did not "do holiday lets". While she accepted that there was some confusion, Ms Kahukura was confident that the Frasers knew she was dealing with them directly, not on behalf of the Agency. Ms Kahukura said she honestly believed that she did not mislead the Frasers as to the capacity in which she managed the property, and that the Frasers knew she was managing the property in her individual capacity.

Submissions

[19] Ms Paterson submitted for the Committee that Mr Fraser's evidence should be preferred over that of Ms Kahukura. She submitted that Mr Fraser was credible, and was doing his best to give truthful evidence as to what happened at the time. She further submitted that the reasons Mr Fraser gave for believing Ms Kahukura was managing the property on behalf of the Agency were logical and reasonable.

[20] Mr Waymouth submitted for Ms Kahukura that the Tribunal should accept that she honestly and reasonably believed that there was no misapprehension or misunderstanding by the Frasers as to the fact that she was managing the property for holiday lets on her own behalf. He went on to submit that if the Frasers understood that Ms Kahukura was acting on behalf of the Agency, that was not as a result of her having set out to mislead them, or that she failed to make the position clear as a result of incompetence or negligence. He submitted it would have arisen out of confusion on both sides, and any "misleading" by Ms Kahukura was innocent.

Assessment

[21] It is clear from the evidence of both Mr Fraser and Ms Kahukura that there was, at least, confusion as to Ms Kahukura's role. However, in taking on management of the property Ms Kahukura was stepping out of her role as a salesperson for the Agency, in which role she had been introduced to the Frasers. In the circumstances, she was required to make it absolutely clear that she was acting on her own behalf, not on behalf of the Agency. This was particularly important because, if she was not acting as a licensed salesperson, the Frasers would not be protected by a licensee's duties and obligations under the Act and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

[22] Having considered the evidence, and counsels' submissions, we find that Ms Kahukura did not make it clear to the Frasers that she was acting on her own behalf rather than on behalf of the Agency. It follows that the Frasers' belief that she was acting on behalf of the Agency resulted from their having been misled by Ms

Kahukura. We accept that Ms Kahukura did not mislead the Frasers deliberately, but her failure to make her role clear must be regarded as negligent.

Second issue: Did Ms Kahukura fail to account to the Frasers deliberately, negligently or in an incompetent manner?

Submissions

[23] Ms Paterson submitted that Ms Kahukura's management was "absolutely hopeless". She submitted that Ms Kahukura had "no idea" what she was getting into, she did not pass on rental payments immediately to the Frasers, she did not separate rental payments from other transactions in her bank account, and she allowed the bank account to go into overdraft. Ms Paterson further submitted that Ms Kahukura's conduct was either deliberate (in that it allowed there to be funds available for other purposes), seriously incompetent, or seriously negligent.

[24] Mr Waymouth accepted that Ms Kahukura's management of the property (in particular her handling of rental payments) was "slack". He also accepted that she had been "tardy" in getting information through to her accountant, on whom she relied for identifying and processing payments. However, he submitted that Ms Kahukura was naïve, unsophisticated, and muddled as to what was expected of her. He submitted that although she had banked rental payments into her personal bank account, she had made an attempt to code them as such.

Assessment

[25] When she was managing the property, Ms Kahukura deposited rental payments into her own account rather than keep them separate, and she did not keep proper records of what was received and paid out. She appears not to have noticed what her bank statements clearly showed – that the rental payments were being mismanaged. Further, she did not provide regular reports to the Frasers, and she did not make regular payments to them. She used the funds which she should have accounted for to the Frasers as if they were her own, and she allowed the bank account to go into overdraft. The effect of this was that until such time as the account was back in funds, the Frasers had lost the rent owed to them.

[26] We acknowledge that Ms Kahukura eventually paid the Frasers the rent they were due, but we conclude that her management of the property fell well below the standard expected of her.

Third issue: was Ms Kahukura's conduct such that it would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful?

The issue

[27] We have found that Ms Kahukura did not make it clear to the Frasers that she was acting on her own behalf rather than on behalf of the Agency, and her failure to make her role clear must be regarded as negligent. We have also found that her management of the property fell well below the standard expected of her. The final issue is whether she is guilty of misconduct under s 73(a) of the Act. This requires us to decide whether her conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[28] Section 73(a) of the Act provides that conduct must "reasonably be regarded" as disgraceful by "agents of good standing" or "reasonable members of the public". In the present case, Ms Kahukura's conduct can be considered against both "agents of good standing" and "reasonable members of the public".

[29] In his judgment in *Morton-Jones v Real Estate Agents Authority*, delivered on 8 August 2016, Woodhouse J said, in relation to a charge under s 73(a):[2]

> [29] … If the charge is under s 73(a) the critical enquiry is whether the conduct is "disgraceful". Conduct which involves a marked and serious departure from the requisite standards must be assessed as "disgraceful", rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to "seriously incompetent or negligent real estate agency work". Work of that nature would also involve a marked and serious departure from particular standards; the standards to to which s 73(b) is directed are those relating to competence and care in conducting real estate work.

---

2 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [29].

[30] Particularly apposite to the present case are His Honour's further comments (in relation to a licensee's conduct which is not real estate agency work):[3]

> [30] This is not to say that s 73(a) could not apply to work carried out by a licensee so incompetently or negligently so as to amount to disgraceful conduct according to the s 73(a) tests. If the work was not real estate agency work, but the person doing the work was a licensee, the appropriate provision for a charge would be s 73(a). …

[31] In the case before him (and clearly analogous to the present case), his Honour said:[4]

> [31] For the reasons noted, … disgraceful conduct could be established in one of two ways:
>
> (a) If it was established that the appellant used the rent money for his own purposes and intentionally failed to account for it to the clients of the agency.
>
> (b) If the evidence established the appellant ran his business with such negligence or incompetence as to amount to a disgraceful abuse of his responsibilities in the handling of other peoples' money.

[32] The standard of proof required before the Tribunal can find a charge under s 73(a) proved is the balance of probabilities.[5] Thus, the Tribunal must find that the Committee has proved that it is more likely than not that the licensee has engaged in conduct that would reasonably be regarded by reasonable members of the public, or agents of good standing, as disgraceful.

[33] In this enquiry we focus on Ms Kahukura's management of the property. However, the enquiry is into her conduct as a whole, and her failure to make it clear to the Frasers that she was not acting on behalf of the Agency is a relevant factor.

Submissions

[34] Ms Paterson submitted that agencies and licensees routinely deal with clients' funds and must be beyond reproach. She submitted that Ms Kahukura fell well short of being beyond reproach. In particular, she used clients' funds for herself, which

---

3 At [30]. See also his Honour's discussion at [36]–[40].
4 At [31].
5 Section 110(1) of the Act.

amounts to an abuse of privilege. Ms Paterson submitted that this reflects badly on the Agency, and on the industry as a whole. She submitted that agents of good standing (in particular) would reasonably regard Ms Kahukura's conduct as disgraceful.

[35] Mr Waymouth submitted, first, that an innocent misrepresentation (as to the capacity in which she was managing the property) would not be regarded as disgraceful conduct. He further submitted that while she accepted that her management had not been satisfactory, Ms Kahukura had not been cavalier in her handling of the Frasers' property, and there had been no "financial inappropriateness".

[36] Mr Waymouth submitted that the Tribunal should take into account Ms Kahukura's evidence of personal matters which had a severe impact on her ability to focus on business matters. We note that submission, but while it may be relevant at a later stage, it is not relevant to our consideration of the conduct itself. He further submitted that Ms Kahukura was naïve, unsophisticated, and a "muddler". Again, that submission would more appropriately be considered at a later stage.

Assessment

[37] We accept Mr Waymouth's submission that Ms Kahukura had no intention of depriving the Frasers permanently, and intended to make payments to them when she had funds to do so. She may also have been, as Mr Waymouth submitted, naïve, unsophisticated, and a "muddler" (although, as noted above, those factors would more appropriately be considered at a later stage). However, we accept Ms Paterson's submission as to the importance of licensees and agencies being above reproach when dealing with clients' funds. We also accept Ms Paterson's submission that Ms Kahukura's use of clients' funds for herself was an abuse of privilege. We conclude that for the reasons set out at paragraph [25], above, Ms Kahukura fell well short of being beyond reproach.

[38] Ms Kahukura's failure to make it clear to the Frasers that she was not acting on behalf of the Agency means that we must take into account the impact of her conduct

on the Agency. We accept Ms Paterson's submission that Ms Kahukura's conduct reflects badly on the Agency, and on the industry as a whole.

[39] As we said at [3], above, property management is not real estate agency work, as defined in s 4 of the Act, and we can only consider Ms Kahukura's conduct under s 73(a) of the Act. Having considered the evidence before us, and counsels' submissions, we find that Ms Kahukura's conduct does not reach the threshold of disgraceful conduct under s 73 (a). We are not able to consider Ms Kahukura's conduct under any other disciplinary provision of the Act.

Outcome

[40] The charge of misconduct under s 73(a) of the Act is dismissed.

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

_____
Hon P J Andrews
Chairperson

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member