

[2011] NZREADT 10

Reference No: READT 057/10

IN THE MATTER OF an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN **JAMES ROBERT REID**

Appellant

AND **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10055)**

First Respondent

AND **SUZANNE COTTLE**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Judge Michael Hobbs – Chairman
Mr J Gaukrodger – Member
Mr G Denley – Member

Hearing: 23 May 2011

Appearances: The appellant in person
Luke Clancy for First Respondent
John Reardon for Second Respondent

Decision: 27 May 2011

DECISION

Introduction

[1] This is an appeal by James Robert Reid (“the appellant”) against the decision of Complaints Assessment Committee 10055 (“the Committee”) not to enquire into the appellant’s complaint against the second respondent pursuant to s 80(1)(a) of the Real Estate Agents Act 2008 (“the Act”). The appeal is by way of rehearing s 111(3) of the Act.

Background

[2] The appellant is a self styled community advocate who laid a complaint against

the second respondent with the Real Estate Agents Authority on behalf of Christine Barber which was then referred to the Committee.

[3] In laying this complaint the appellant relied on an Authority to Act he was given by Mrs Barber but of course s 74 of the Act provides as follows:-

“74 Complaints about licensees

- (1) **Any person may**, in accordance with regulations made under this Act, complain in writing to the Authority about the conduct of a licensee.
- (2) When the Authority receives a complaint under this section, the Authority must refer the complaint to a Committee and notify the person complained about of the reference” (emphasis added).

[4] The appellant’s complaint related to the sale of Mrs Barber’s farm in 1998 and the part played in it by the second respondent.

[5] Mrs Barber sold her farm in November 1998 to Papaitonga Springs Limited for \$700,000. The second respondent Mrs Cottle was a licensed salesperson acting on the sale. She was also a shareholder in Papaitonga Springs Limited, a fact which Mrs Barber well knew. Under sections 63 and 64 of the Real Estate Agents Act 1976 this fact required that Mrs Cottle provide Mrs Barber with an independent valuation within 14 days but this was not done by Mrs Cottle.

[6] Following settlement of the sale Mrs Barber alleged that Mrs Cottle as a shareholder in Papaitonga Springs Limited failed to advise Mrs Barber that the farm could be subdivided and then sold at a considerable profit with the result that Mrs Barber sold the property to Papaitonga Springs Limited at a significant undervalue.

[7] As a consequence of these facts Mrs Barber issued proceedings alleging breach of fiduciary duty, deceit, breach of trust, breach of statutory duty and negligence against Mrs Cottle. The matter went to hearing in the High Court and on 13 March 2008 Mallon J issued a comprehensive decision dismissing the claim. The Judge found that Mrs Cottle did owe a fiduciary obligation to Mrs Barber but that they were not breached. Mallon J found that in any event Mrs Barber had suffered no loss because the purchase price of \$700,000 was a fair market value. The Judge further found that Mrs Cottle had breached her obligation under s 63 and s 64 of the Real Estate Agents Act 1976 giving rise to the right to rescind the contract or affirm it subject to return of the Commission.

[8] Mrs Barber took the second option and affirmed the contract but the commission has not been returned by Mrs Cottle because Mrs Barber has never paid Mrs Cottle’s costs of \$54,385 ordered by Mallon J. On 22 March 2010 the Court of Appeal refused an application by Mrs Barber for an extension of time within which to appeal.

[9] In the end result Mrs Barber suffered no loss arising from Mrs Cottle’s failure to provide the independent valuation.

[10] On 22 October 2010 the Committee having considered the appellant’s complaint determined to take no action on it pursuant to s 80(1)(a) of the Act which provides as follows:

“80 Decision to take no action on complaint

- (1) A Committee may, in its discretion, decide to take no action or, as the case may require, no further action on any complaint if, in the opinion of the Committee,—
- (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
 - (b) the subject matter of the complaint is inconsequential.
- (2) Despite anything in subsection (1), the Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate”.

[11] The Committee determined that the lapse of time since 1998 made further investigation impractical and in any event the whole issue between Mrs Barber and Mrs Cottle had been finally dealt with by the Real Estate Institute of New Zealand and the High Court. The appellant now appeals that determination pursuant to s 111 of the Act.

[12] The appellant filed written submissions in support of his appeal and at the hearing made further oral submissions.

[13] For the sake of completeness only the following points of appeal from the appellant are set out in full:

“CAC REFUSAL TO INVESTIGATE

9. The CAC has offered three reasons for refusing to investigate the matter:

- 9.1 “IMPRACTICAL”** : Were it not for the extensive evidential record of the Agent’s behaviour, it may well have been impractical to gather and hear witnesses given the effluxion of time. However, it appears that the parties do not dispute the findings of fact and law recorded by the Judges involved.
- 9.2 PRIOR COMPLAINT** : The REINZ received an anonymous letter which was not dealt with in accordance with prescribed complaint procedures. The letter refers to behaviour which predates the threatening behaviour of the Agent’s solicitors. The forced settlement of the contract by duress is a matter which the REINZ could have investigated under previous legislation.
- 9.3 RELITIGATION** : The Courts have not dealt with the issue of settlement under duress. The evidence before the Tribunal establishes that the vendors rescinded the contract but were forced to settle under threat of legal action. The Courts have not dealt with that issue, although the minority view of the Court of Appeal is that the vendors are still the equitable owners.

REMEDIES

10. The remedies available to the Tribunal are limited to those available at the time of offending (s 172 REA Act 2008). Those remedies are: cancel the agent’s licence, suspend or censure the agent or pay to the Institute a penalty up to \$2,000.
11. It is submitted that the limited scope of the remedies available should not limit the Tribunal from finding that the Agent is guilty of misconduct or is in breach of her fiduciary obligations. It is relevant that the High Court decision was issued before the Supreme Court’s decision in *Premium Real Estate Ltd v Stevens* cited in the Court of Appeal decision.

12. The aggravated nature of the Agent's offending warrants a closer look than carried out by the Courts. The evidence is that the vendors' consent to settle the contract was obtained under duress. The threats of legal action by the Agent's solicitors were not examined by the High Court. Even if the contract had been valid and the commission had been returned, the threats of legal action by an agent against a principal is gross misconduct".

The Law

[14] The determination of the Committee under s 80(1)(a) is a discretionary one as the section specifically provides.

[15] In *Austin, Nichols & Co v Stichting Lodestar*¹ the Supreme Court confirmed that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the Appellate Court even when that opinion involves an assessment of fact and degree and entails a value judgment.

[16] In *Kacem v Bashir*² the Supreme Court has clarified that the principles in *Austin, Nichols* apply to Courts exercising jurisdiction over general appeals from lower Courts, not appeals from decisions made in the exercise of a lower Court's discretion. The distinction between general appeals and appeals from discretionary decisions is set out at paragraph [32]:

"[32] But for present purposes, the important point arising from 'Austin, Nichols' is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. 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. (emphasis added)."

[17] The burden of proof rests with the appellant to establish that the Committee's determination should be overturned and the complaint sent back to the Committee to enquire into it.

[18] The appellant has no legal qualifications and his arguments both written and oral have been difficult to distil into some coherent form and we are reminded of the observations of Alexander Pope (1688 – 1744) who said:

"A little learning is a dangerous thing.
 Drink deep, or taste not the Pierian Spring
 There shallow draughts intoxicate the brain,
 And drinking largely sobers us again":

¹ [2008] 2 NZLR 14 1

² [2010] NZSC 112

[19] However doing the best we can with his arguments it is quite clear to us that they have no merit.

[20] There is nothing he has put before us which would persuade us to find that the Committee has:

- (1) Made an error of law or principle;
- (2) Taken account of irrelevant considerations;
- (3) Failed to take into account relevant considerations or
- (4) Reached a decision which is plainly wrong.

The Committee has relied on the provisions of s 80(1)(a) and exercised its discretion accordingly and we can find no fault with that.

[21] The appeal is accordingly dismissed.

[22] In accordance with s 113 of the Act the Tribunal advises the parties of the right to appeal this decision to the High Court pursuant to s 116 of the Act.

DATED at WELLINGTON this 27th day of May 2011

Judge Michael Hobbs
Chairman

Mr G Denley
Member

Mr J Gaukrodger
Member