

Decision No: [2011] NZREADT 11

Reference No: READT 060/10

IN THE MATTER OF of a charge laid under s.91 of the Real Estate Agents Act 2008

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10012)**

AND **SOFIA KHAN**

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairman
Ms J Robson - Member
Mr G Denley - Member

Hearing: 31 May 2011

Appearances: Mr Clancy for the Committee
No appearance for or on behalf of the defendant

DECISION

Introduction

[1] Ms Khan is a licensed salesperson practising in West Auckland. She is facing two interlinked charges relating to Agreements for Sale and Purchase entered into in February 2008.

The Charges

Charge 1

Following a complaint made by Azib Hussein (“the complainant”) Complaints Assessment Committee 10012 (“the Committee”) charges Sofia Khan (“the agent”) (subsequently amended to “salesperson”) with misconduct under s 73(a) of the Real Estate Agents Act 2008 (“the Act”) in that her conduct could reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.

Particulars

On 13 February 2008 Sofia Khan, with knowledge that Lise-Marie Aoese did not have sufficient funds to pay a deposit on 71 Glendene Avenue, Glendene, Auckland (“the property”) gave Ms Aoese \$27,000 in cash to deposit into Ms Aoese’s bank account for the purpose of creating false evidence of funds to pay a deposit following which Sofia Khan instructed Ms Aoese to withdrawal (sic) the \$27,000 and give it back to Sofia Khan.

Charge 2

[3] Following a complaint made by Azib Hussein (“the complainant”) Complaints Assessment Committee 10012 charges Sofia Khan, agent (subsequently amended to Sofia Khan, salesperson) with misconduct under s 73(a) of the Real Estate Agents Act 2008 in that her conduct could reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars

Using her position as a real estate agent for personal gain and/or gain for her family in the on-sale of the property to Ms Aoese.

Background

[2] Ms Khan did not attend the hearing. A telephone call was made to her. She advised the Tribunal that she was not attending. The Committee called seven witnesses in person and handed up a further three statements of evidence.

Evidence for the Committee

[3] The complaint to the REINZ was made by Mr Azib Hussein on 9 October 2009. Following the introduction of the Real Estate Agents Act 2008 this complaint (which was not completed) was referred to the REAA for investigation. Mr Hussein, gave evidence that he was, with his wife and brother, the owner of a property at 71 Glendene Avenue, Glendene, West Auckland. Through a family association he knew Sofia Khan and listed the property for sale with her agency Ray White – Goodwin Realty Limited. The listing agreement showed a purchase price of \$489,000 and was dated 8 January 2008. Mr Hussein’s evidence was that Ms Khan presented him with an Agreement for Sale and Purchase dated 31 January 2008 with the purchaser shown as Shazreen Nisher or nominee. The initial offer was for \$469,000. Mr Hussein countersigned this at \$480,000. This price was agreed. The settlement of the contract was set for 11 February 2008.

[4] Mr Hussein said that on 12 February he was told by Ms Khan that the sale had fallen through and that the agreement needed to be varied. A variation to the signed Sale and Purchase Agreement was executed by Mr Hussein showing that the purchaser would now be Taufiq Khan (see Exhibit 1, Tab 3). Settlement of this contract was due to take place on 15 February 2008. Mr Hussein waited until 17 February but it did not appear that settlement had taken place. He told Ms Khan that he was thinking of renting the property.

[5] Shortly thereafter he became aware of a woman called Lise-Marie Aoese and her family moving into the property. He rang Ms Khan. Ms Khan told him not to worry, that Ms Aoese was just renting the property and the property had been sold. The property settled on 21 February 2008. In March 2008 Lise-Marie rang him to complain about a leak and he asked why she wasn't calling the landlord. Ms Aoese told him that she had bought the property from him. Ms Khan told him to ignore her and that she was *"crazy and did not know what she was talking about"*.

[6] In May 2008 he was told by a valuer that his property had been on-sold for \$625,000. He confronted Ms Khan. She denied this but said the property had been on-sold for \$480,000 (i.e. what he had paid for it) but she had put a figure of \$525,000 on the agreement because the buyers did not have a full deposit.

[7] Mr Hussein said that he subsequently learnt that Taufiq Khan was the nephew of Sofia Khan and Shazreen Nisher was his wife. Ms Khan denied to Mr Hussein that she was related to Taufiq Khan or even knowing Ms Aoese. Mr Hussein complained that Ms Khan made a commission from the sale and then made a second commission and/or profit on the on-sale without his knowledge. He produced details of the commission paid (Tab 4, Exhibit 1) showing that he paid commission of \$20,362.50 to Ray White. Ms Khan received approximately \$8,880 of this. He complained to Ray White in September 2008 and then complained to the REINZ. In February 2009 he said he was advised that Ms Khan no longer had a Real Estate Licence. He reinstated his complaint again in October 2009 when he saw a REMAX sign outside his neighbour's property advertising the property for sale with Ms Khan as agent.

[8] Lise-Marie Aoese then gave evidence. She told the Tribunal that in 2008 she was 23 years of age working as a salesperson and living in rented accommodation. Her mother had seen an advertisement for 71 Glendene Avenue and contacted Sofia Khan. Sofia Khan offered to help Ms Aoese and her mother obtain the property. She was invited to see Ms Khan at her home. Ms Khan said that she was a real estate agent and that she had friends with Oriental Mortgage and Insurance Limited who were finance brokers. They could help Ms Aoese and her mother buy the home in Glendene Avenue. Ms Aoese said that she was concerned because she did not have enough money to pay a deposit on the house. She said that Ms Khan told her not to worry because she knew a way that they could get the house in Glendene Avenue. Ms Khan then took her to meet the Oriental Mortgage brokers at a house in Hillsborough and Ms Aoese filled in a lot of paperwork. Ms Aoese complained that she did not get the chance to read it in detail. She said Ms Khan told her that she was approved for a loan of about \$500,000 with a condition that she have a certain amount of money in her bank account. She said she became concerned and suspicious and asked Ms Khan why the process could not slow down so she could have a look at the paperwork. Ms Khan said *"no that this is what was going to happen"* and she was *"saving Ms Aoese from having to shop for a house and this property in Glendene is hot. It's got a sleepout and we have actually approved it now if you want to go ahead with it. It's valued at \$525,000 but I could approve it for \$499,000."* She produced to the Tribunal a copy of the loan proposal from Tasman Mortgages Limited dated 12 February 2008. She said she never saw any valuation for the property. Ms Khan also told her that there was a way that, even though she did not have enough money for the deposit, she could show the finance company or

bank that she did have enough money. When Ms Aoese asked whether this was legal Ms Khan said *"we do it all the time"*.

[9] On 13 February Ms Khan and Ms Aoese went to the ASB Bank in Onehunga and Ms Khan withdrew \$27,000 in cash from a bank account. They then went to the Westpac bank in Onehunga and deposited the \$27,000 in cash into Ms Aoese's Westpac account. A statement was then obtained from Westpac to show that the money was sitting in the bank account. They then drove to another Westpac at Mount Roskill and that cash was withdrawn by Ms Aoese and returned to Ms Khan. She produced a copy of the Westpac statement showing the deposit and the withdrawals. (Exhibit 1, Tab18). They then drove to an ASB bank in Dominion Road where Ms Aoese opened a new ASB bank account. She said that Ms Khan had prearranged for this account to be opened as she asked for a bank employee by name. This person then came to open the account. A further sum of \$27,000 was paid into this account and withdrawn. Both these transactions were done electronically. The evidence from the ASB Fraud Manager Raenor Woolf (Exhibit 10) shows that the transfer into Ms Aoese's new ASB bank account on 13 February 2008 was from the account of Sofia Khan. The money was transferred into Ms Aoese's account at 2.57 pm and at 3.18 pm \$26,980 was transferred back out of the account into Ms Khan's bank account.

[10] Ms Aoese then entered into an Agreement for Sale and Purchase to purchase Glendene Avenue in February 2008. The purchase price shown on this agreement was \$525,000. Ms Aoese's evidence was that she thought the purchase price was \$499,000 and she believes this is what she paid for the property. The loan agreement was signed on 19 February 2008 with a total loan amount of \$510,221. \$11,471 of this was for a mortgage insurance premium. The purchase settled in February 2008 but Ms Aoese was unable to keep up with the mortgage payments and the property was sold at mortgagee sale in late 2009.

[11] The Committee then called Maseli Aoese to give evidence. She corroborated her daughter's story and explained that because Ms Khan was from a Samoan family and that her own family had known Ms Khan's family in Samoa she trusted her. She said that once the property went up for mortgagee sale Mrs Khan had come to the house and was in tears wanting to speak to her daughter. She said that Ms Khan apologised to her.

[12] As part of the loan offer Ms Aoese also had to show the origin of the \$26,000 in cash. Evidence as to this aspect was called from John Aoese the brother of Lise-Marie. He produced to the Tribunal a letter allegedly written by him confirming that he had gifted to Lise-Marie the sum of \$26,000 as a gift towards buying her first house. This letter is dated 18 February 2008 (Tab 26, Exhibit 1). Mr Aoese said that the signature on the letter was not his signature, he had not written the letter, he had not gifted his sister \$26,000 and he had not sent this letter to the Finance company. The letter was discovered on the file of the lender. However the letter did appear to be faxed from Busby Carriers which was the business owned by his girlfriend Abby Lee Busby's family. Mr Aoese was also then employed by Busby Carriers.

[13] Ms Busby gave evidence. She said that Lise-Marie had asked her to fax the letter to fax number 6240016 (the fax number for Oriental Mortgages) in late February 2008. She said that she had done this and it was her handwriting on the letter showing the fax number. She confirmed that her partner John did not have \$26,000 to lend to his sister.

[14] The Tribunal then heard from Simon Head. Mr Head (Exhibit 7) is a valuer practicing in West Auckland. He said that in 2007/2008 he had carried out a number of valuations for Ms Khan (about 7 to 10). He had addressed the invoice for this valuation to Ms Khan. He said that this was not uncommon as sometimes real estate agents paid the bill for valuations. The valuation report supported a valuation of \$535,000 for the property (Tab 23, Exhibit 1). The instruction sheet prepared by him to send to David Chester, his employee who carried out the valuation appeared at Tab 24, Exhibit 2 who carried out the valuation. He told the Tribunal that this was an information sheet showing the owner, the access, the indicative target valuation (suggested by Ms Khan) the name of the purchaser (Lise-Marie Aoese) and some other information about the property. The broker for the finance was Oriental Mortgage Insurance Limited. He said he had no difficulty with the valuation at this figure as it was a rising market and he felt comfortable with that request for this particular property. However he later (in 2008 or 2009) became concerned about Ms Khan over requests that she was making for valuations for properties which he felt were not appropriate. He then declined to prepare the valuations.

[15] Finally the Committee called Christopher Delaney who is an Investigating Officer for the REAA. He told the Tribunal that Ms Khan currently holds a salesperson's licence under the Real Estate Agents Act 2008 and was licensed as an agent under the Real Estate Agents Act 1976. Ms Khan responded to Mr Hussein's complaint by e-mail on 30 March 2010 (Tab 7, Exhibit 1) where she denied any wrongdoing. She said that once the contract for sale of the property to Shazreen Nisher was completed her part in the contract ended. She said that she felt that the vendor had received substantial money on-selling the property to his buyer and *"should be grateful for the mandate. I have fulfilled and successfully thereby (sic) given him a sizeable profit"*.

[16] Mr Delaney also referred to the response from Ray White dated 22 October 2009 (Tab 8, Exhibit 1). In that letter Ray White denied that Ms Khan had ever met or known Mr Taufiq Khan or Lise-Marie Aoese.

[17] Subsequently Mr Delaney obtained documents from various sources and met with Ms Khan on 2 June 2010. At this meeting she agreed that Mr Khan was her nephew but could not remember claiming that she did not know him. She continued to deny that she knew Ms Aoese or that she had assisted Ms Aoese to obtain finance to purchase Glendene Avenue. She was asked to provide a copy of her bank statements but she has not done so.

[18] The handed up evidence included a statement from a Mr Pitt, a Financial Investigations Manager for Westpac. He provided details of a joint account owned by Ms and Mrs Aoese receiving a deposit of \$27,000 on 13 February. This cash was paid in by Ms Stowers. The identifying information provided by the person paying the money in however show a passport and driver's licence in the name of S Khan.

\$27,000 from the same account was withdrawn on the same day in two separate amounts.

[19] The Tribunal have referred to the evidence of Ms Woolf. They also received evidence from Mr Pearce, the Risk Manager for GE Capital who provided the finance. He advised that the original loan file contained a letter dated 18 February from Mr Aoese referring to the gifting of money to Ms Aoese, a fax from the solicitor for Mr Khan confirming there was no relationship between the vendor and the purchaser of the property and an ASB interim statement showing an account balance for Ms Aoese of \$27,000.

[20] The documentary evidence also contained an email from Mr Taufiq Khan to Mr Delaney. He confirmed that he was Ms Khan's nephew. He agreed he had never lived in the property. We find that she or Mr Khan then on-sold the property to Ms Aoese for a profit. This on-sale and profit were not disclosed to Mr Hussein.

Evidence for the Defendant

[21] There was no evidence from the defendant save for her responses to the investigator and the letter from Ray White.

Findings of Fact

[22] From the evidence (corroborated by documentary evidence) the Tribunal find that Ms Khan sold Mr Hussein's property to her nephew Tauriq Khan without disclosing this to Mr Hussein.

[23] We find that Ms Khan deliberately created evidence of deposits and money in bank accounts to deceive the lender into believing that Ms Aoese had sufficient money for a deposit on the property.

Relevant Law

[24] The burden of proof rests with the Committee on the balance of probabilities. A serious allegation such as in this charge calls for the Tribunal to be certain that there is sufficient evidence to establish the charge. We are satisfied that the Committee have discharged this burden.

[25] The charge relates to the defendant's conduct prior to the commencement of the 2008 Act on 17 November 2009. Section 172 of the 2008 Act therefore applies and provides as follows:

172 Allegations about conduct before commencement of this section

- (1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—
 - (a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and

- (b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.
- (2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the **[Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred]**. (emphasis added).

[26] In cases where the licensee who has been charged was licensed or approved under the 1976 Act at the time of the conduct (which the defendant was), and has not been dealt with under the 1976 Act in respect of the conduct (which the defendant has not), s 172 creates a three step process:

Step 1: Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

Step 3: If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made by this Tribunal.

[27] Looked at in the round, a charge relating to pre-17 November 2009 conduct falls to be determined in accordance with the disciplinary standards set out in ss 72 and 73 of the 2008 Act in the same way as a charge about post-17 November 2009 conduct (**Step 2**). However, there are two requirements under s 172 which limit its retrospective effect:

- (a) complaints outside the jurisdiction of the 1976 Act are also outside the jurisdiction of s 172 (**Step 1**);
- (b) only orders which could be made under the 1976 Act may be made under s 172 (**Step 3**).

[28] Each of the three steps, as they apply to this case, will be addressed in turn.

[29] **Step 1 – Could have been complained about or charged under 1976 Act**

[30] Under rule 16.2 of the Rules of the Real Estate Institute of New Zealand Incorporated (“REINZ Rules”), made under s 70 of the 1976 Act, any person could complain to REINZ. Following investigation of a complaint, REINZ could take one of a number of steps, including referring a matter to the Real Estate Agents Licensing Board (rule 16.13.5). The section relevant to this case is s.99. Section 99 requires that a certificate of approval may be cancelled or suspended, if the person was of such character that it was in the public interest that the certificate be cancelled. Clearly allegations such as made against Ms Khan could have been complained about under s 99.

[31] **99 Board may cancel certificate of approval or suspend salesman**

- (1) On application made to the Board in that behalf by the Institute, the Disciplinary Committee or by any other person with leave of the Board, the Board may cancel the certificate of approval issued in respect of any person or may suspend that person for such period not exceeding 3 years as the Board thinks fit on the ground—
- (a) That since the issue of the certificate of approval the person has been convicted of any crime involving dishonesty; or
 - (b) That the person has been, or has been shown to the satisfaction of the Board to be, of such a character that it is, in the opinion of the Board, in the public interest that the certificate of approval be cancelled or that person be suspended.

[32] **Step 1** under s 172 of the 2008 Act is satisfied.

[33] **Step 2 – Misconduct (Section 73 of the 2008 Act)**

[34] The question under **Step 2** is whether misconduct (or failing that, unsatisfactory conduct) is proved under the 2008 Act.

[35] In the present case the conduct for which the defendant was charged was both real estate and non real estate work. Section 73(a) is not limited to a defendant's conduct in carrying out real estate agency work, and provides as follows:

“... a licensee is guilty of misconduct if the licensee's conduct –

- (a) would reasonably be regarded by agents of a good standing, or reasonable members of the public, as disgraceful”.

[36] In *CAC v Downtown Apartments Limited and Anor* [2010] NZ READT 06 this Tribunal held as follows in relation to s 73 of the Act, and s 73(a) in particular:

“49 There are now two disciplinary levels under the 2008 Act:

- a. Unsatisfactory conduct – Complaints Assessment Committees and the Disciplinary Tribunal;
- b. Misconduct – Disciplinary Tribunal only.

Leaving s 73(d) (criminal convictions) to one side, there is a clear progression from unsatisfactory conduct under s 72 to misconduct under s 73 of the 2008 Act:

- (a) Unacceptable conduct (as regarded by agents of good standing) s 72(d) → disgraceful conduct (as regarded by agents of good standing or reasonable members of the public) (s 73(a));
- (b) Negligence/incompetence (s 72(a) and (c)) → serious negligence/ Incompetence (s 73(b));
- (c) Contravention of the Act/Regulations/Rules (s 72(b)) → wilful or reckless contravention of the Act/Regulations/Rules/other Acts (s 73(c)).

50 At a high level of generality, therefore, it may be said that s 72 requires proof of a departure from acceptable standards and s 73 requires something more – a marked or serious departure from acceptable standards.

- 55 The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word. But s 73(a) qualifies the ordinary meaning by reference to the reasonable regard of “agents of good standing” or “reasonable members of the public” (emphasis added).
- 56 The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess (see *Blake v Preliminary Proceedings Committee of the Medical Council of New Zealand*, 1997, 1 NZLR 71).
- 57 The “reasonable person” is a legal fiction of the common law representing an objective standard against which individual conduct can be measured but in s 73(a) that reasonable person is qualified to mean an agent of good standing or a member of the public.
- 58 So while the reasonable person is a mythical ideal person the Tribunal can consider *inter alia* the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the first defendant.
- 59 So in summary the Tribunal must find on a balance of probabilities that the conduct of the first defendant represented a marked and serious departure from the standards of an agent of good standing or a reasonable member of the public.”

[37] In *Smith v CAC and Brankin* [2010] NZREAD13 the Tribunal held, at paragraph [19]:

“... the conduct of a licensee can be properly described as ‘disgraceful’ under s 73(a) of the Act so long as there is a sufficient nexus between the alleged conduct and the fitness or propriety of the licensee to carry out real estate work”.

[38] We have no difficulty in this case in finding that the actions of Ms Khan were disgraceful under s 73(a). She deliberately deceived Mr Hussein as to the purchaser. In the on-sale she acted in a way that can only be described as fraudulent in her conduct in providing a trail of evidence of a false deposit. We have a great deal of sympathy for Ms Aoese who as a naive and unsophisticated young woman was led into circumstances where she was landed with a mortgage which she had no ability (at any time) to realistically pay. Her dream of owning a home ended in tragedy. It is a sad indictment on Ms Khan that a vulnerable family was preyed upon by her to expedite the sale to make a profit.

[39] We conclude that s 73(a) has been established for both Charge 1 and Charge 2.

[40] **Step 3 – Orders under the 1976 Act**

[41] The Licensing Board had the power to make three types of orders in the event it found that the ground under s 99 of the 1976 Act had been proved:

- (a) An order cancelling the salesperson’s certificate of approval license;
- (b) An order imposing a monetary penalty not exceeding \$750 (s 99(4)).

Penalty

[42] Pursuant to the provisions of the 1976 Act (see Step 3) above the Tribunal can make three orders against the defendant:

- (a) Cancellation of her salesperson licence (s 99).
- (b) Impose a fine not exceeding \$750 (s 99(4)).

[43] In considering the penalty to be imposed the Tribunal adopts the observations of Allan J in *Niall v REINZ* (supra):

“The Board’s powers are extensive. It has jurisdiction to deprive those involved in the industry of their livelihood. It must exercise its jurisdiction in accordance with the principles of natural justice, among which is a requirement that a sanction imposed in a given case must bear some proper relationship to penalties imposed in past similar cases: *Aitken v Real Estate Agents Licensing Board* HC CHCH AP130/96 6 September 1996 at 12.

[44] Having considered all the circumstances we consider that the only appropriate penalty is to cancel Ms Khan’s salesperson’s licence and impose the maximum fine of \$750. This decision and penalty were given orally by the Tribunal at the conclusion of the hearing. Our reasons for this decision are set out above.

[45] The Tribunal draws the parties’ attention to the appeal provisions in s.116 Real Estate Agents Act 2008.

DATED at Auckland this 15th day of June 2011

Ms K G Davenport
Chairman

J Robson
Member

G Denley
Member