

Decision No: [2011] NZREADT 12

Reference No: READT 066/10

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

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10040)**

**AND** **SOON (FIONA) LEE, REAL ESTATE SALESPERSON**

First Defendant

**AND** **HULAN (WENDY) FENG, REAL ESTATE SALESPERSON**

Second Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Judge M Hobbs - Chairperson  
Ms K Davenport - Member  
Mr J Gaukrodger - Member

Hearing: 13 June 2011

Appearances: Paul Mabey QC for Ms Feng  
Maurice Coughlan for Ms Lee  
Luke Clancy for the Complaints Assessment Committee

**DECISION**

***Introduction***

[1] The first and second defendants are both licensed salespersons employed in Auckland.

[2] They each face one charge under s 73(a) of the Real Estate Agents Act 2008 ("the Act").

### **Charge against First Defendant**

1. *Following a complaint made by the second defendant against the first defendant Complaints Assessment Committee 10040 ("CAC 10040") charges the first defendant with misconduct under s 73(a) of the Real Estate Agents Act 2008 in that her conduct would reasonably be regarded by agents of good standing, or reasonable members of the public as disgraceful.*

### **Particulars**

*On 26 April 2010 the first defendant engaged in a physical fight with the second defendant at a client's apartment in the presence of other persons.*

### **Charge against Second Defendant**

2. *Following a complaint made by the first defendant against the second defendant Complaints Assessment Committee 10040 ("CAC 10040") charges the second defendant with misconduct under s 73(a) of the Real Estate Agents Act 2008 in that her conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*

### **Particulars**

*On 26 April 2010 the second defendant engaged in a physical fight with the first defendant at a client's apartment in the presence of other persons.*

### **Background**

[3] The second defendant Ms Feng is employed by City Sales Limited and the first defendant Ms Lee is employed by L J Hooker Limited in Ponsonby.

[4] The charge against each defendant arises out of an incident that took place on 26 April 2010 at apartment 20F, 76 Albert Street, Auckland. It is common ground that, on 26 April 2010, Ms Lee was at 76 Albert Street showing a potential buyer around apartment 20F. Ms Feng subsequently arrived at the property and words were exchanged to the effect that Ms Feng considered the apartment to have been sold and that Ms Lee should therefore not be showing it. A physical confrontation between the defendants ensued. The incident was witnessed by a number of people, including the tenant of the apartment and Ms Lee's client.

### **Findings of Fact**

[5] Each of the defendants alleged she was assaulted by the other but it was not necessary for the Tribunal to make any findings about that because both defendants through Counsel admitted they were engaged as alleged in a physical fight.

[6] Counsel for both defendants however submitted that the conduct of the defendants amounted only to unsatisfactory conduct pursuant to s.72 of the Act rather than disgraceful conduct pursuant to s 73(a). Section 72 provides:

**72 Unsatisfactory conduct**

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

[7] Both Defence Counsel urged the Tribunal to apply s 110(4) of the Act which provides as follows:-

**110 Determination of charges and orders that may be made if charge proved**

- (4) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that the licensee, although not guilty of misconduct, has engaged in unsatisfactory conduct, the Tribunal may make any of the orders that a Complaints Assessment Committee may make under section 93.

[8] The Tribunal rejects that submission and has no hesitation in finding that the conduct of the two defendants as admitted by them amounts to disgraceful conduct. The Tribunal refers to the Tribunal's decision in *CAC v Downtown Apartments Ltd and Anor*<sup>1</sup> between paras 50 to 57:-

- 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.

**Penalty**

[9] The relevant parts of s 110 set out the penalties available to the Tribunal as follows:-

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<sup>1</sup> [2010] NZ READT 06

**110 Determination of charges and orders that may be made if charge proved**

- (1) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that it has been proved on the balance of probabilities that the licensee has been guilty of misconduct, it may, if it thinks fit, make 1 or more of the orders specified in subsection (2).
- (2) The orders are as follows:
  - (a) 1 or more of the orders that can be made by a Committee under section 93:
  - (b) an order cancelling the licence of the licensee and, in the case of a licensee that is a company, also cancelling the licence of any officer of the company:
  - (c) an order suspending the licence of the licensee for a period not exceeding 24 months and, in the case of a licensee that is a company, also suspending the licence of any officer of the company for a period not exceeding 24 months:
  - (f) an order that a licensee who is an individual pay a fine not exceeding \$15,000 and order a licensee that is a company pay a fine not exceeding \$30,000:
  - (g) where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct, an order that the licensee pay to that person a sum by way of compensation as is specified in the order, being a sum not exceeding \$100,000.

[10] Counsel for both defendants argue that this is not a case where the defendants' licenses should be either cancelled or suspended and both submit that pursuant to s 93(1)(a) an order censuring or reprimanding the defendants would be appropriate.

[11] The Tribunal was referred to the references supplied by both defendants and both Counsel suggested that this was conduct quite out of character and could have been dealt with by mediation between the parties.

[12] The defendant Lee has now left the apartment sale business to ensure she will no longer have contact with the defendant Feng. Mr Coughlan submitted that her precarious financial position made a fine inappropriate.

***Decision***

[13] The Tribunal having taken into account the submissions of Counsel does not draw any distinction between the conduct of the two defendants. It finds that while the conduct of both of them was disgraceful it was at the lower end of that kind of misconduct.

[14] The conduct of the defendants does not involve dishonesty or fraud or any breach of the Act and we accept it was a short lived loss of control which became more serious as it was in the presence of others.

[15] We are also satisfied that publication of this disciplinary matter pursuant to s 66 of the Act is in itself a penalty. Accordingly we accept that this is not a case that requires interference with the licenses of the two defendants.

[16] In lieu of that sanction we make an order that both defendants be censured pursuant to s 93(1)(a) of the Act. In addition the Tribunal imposes a fine. We take as a starting point a fine of \$1,000 but discount that for the admissions by the two defendants and fix \$600 as being the appropriate penalty.

[17] 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 24<sup>th</sup> day of June 2011

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Judge M Hobbs  
Chairman

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K Davenport  
Member

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J Gaukrodger  
Member