

Decision No: [2011] NZREADT 13

Reference No: READT 079/10

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

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10014)**

AND **RITA CHARLES**

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Judge M F Hobbs - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

Date of Hearing: 27 June 2011

Appearances: Luke Clancy for the Committee
Defendant in person

DECISION

Introduction

[1] At the material time the defendant held a Certificate of Approval as a salesperson under the Real Estate Agents Act 1976 (the 1976 Act).

[2] The defendant faces one charge under s 73A of the Real Estate Agents Act 2008 (the 2008 Act).

Charges against the Defendant

[3] Following a complaint made by Ronika Devi Chand ("the complainant") Complaints Assessment Committee 10014 ("*CAC 10014*") charges the defendant, Rita Maria Charles, 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

- (a) On 2 March 2009, the complainant signed a private agreement to sell her property at 6 Constance Place, Clover Park, Manukau to Petelo and Lesina Tue (*“the purchasers”*) for \$295,000 (*“the agreement”*).
- (b) When the complainant and the purchasers signed the agreement, none of the following details were on the agreement:
 - (i) Stamp on middle front page ‘Payable to Haron & Co Ltd, Real Estate Trust Account on acceptance’.
 - (ii) Sticker on the bottom front page ‘Nationwide Haron & Co Ltd’.
 - (iii) Stamp on bottom last page ‘Nationwide Real Estate Haron & Co Ltd MREINZ, 49 George Street, Old Papatoetoe Ph: (09) 278 6333’.

(“the real estate agent details”)
- (c) After the complainant and purchasers signed the agreement, the defendant inserted the real estate agent details into the agreement without the knowledge of the complainant for the purpose of obtaining a commission on the sale.

Case for the Committee

[4] In outline, the allegation against the defendant is that she induced Ronika Chand to sign a sale and purchase agreement for the sale of her property, when the agreement included no information to suggest that the defendant was a licensee or that the sale was being conducted through the defendant’s employer real estate agent (Haron & Co Limited); and in circumstances in which Ronika Chand believed the transaction to be a private sale.

[5] Subsequent to the signing of the agreement it is alleged the defendant added her employer’s details and sought payment of a commission from Ronika Chand subject to a contract of agency, relying on the signed Sale and Purchase Agreement as evidence of the agency. Proceedings to recover the commission were then issued against the complainant in the Manukau District Court which were heard on 24 February 2010. On 3 March 2010 Judge Peter Spiller delivered a judgment dismissing the defendant’s claim for commission.

[6] On 18 December 2010 the defendant was served with the charge and acknowledged receipt of it.

[7] The defendant did not file a response to the charge pursuant to reg 7 of the Real Estate Agents (Complaints and Discipline) Regulations 2009 and the charge was set down for hearing by way of formal proof on 5 April 2011 and the defendant advised accordingly.

[8] On 5 April the defendant appeared before the Tribunal and sought an adjournment to obtain legal advice.

[9] The hearing was accordingly adjourned on two further occasions at the defendant's request and was finally heard in the presence of the defendant on 27 June when the defendant was not represented by counsel.

Evidence for the Committee

[10] The complainant Ronika Chand gave evidence before the Tribunal in which she said that in February 2009 her property at 6 Constance Place, Clover Park, Manukau was advertised for sale on Trade Me. Her partner Paul Martin was the listed contact on Trade Me for the property because they wanted to sell the property privately and not involve a real estate agent.

[11] Ms Chand was informed that a woman named Rita wanted to view the property and on 28 February 2009 the defendant Rita Charles visited the property with a couple who introduced themselves as Anna and Lua.

[12] These people looked at the property and after some discussion indicated their interest in buying the house and there was some discussions about the price that the complainant and her partner wanted for the property.

[13] The evidence of the complainant Ms Chand was that on that same day the defendant Rita Charles arrived with a blank Sale and Purchase Agreement which did not have any of the following details on it:-

- (iv) A stamp on the middle front page indicating "*payable to Haron & Company Limited, Real Estate Trust account on acceptance*".
- (v) A sticker on the bottom front page stating "*Nationwide Haron & Company Limited*".
- (vi) A stamp on the bottom to the last page of the document stating "*Nationwide Real Estate Haron & Company Limited MREINZ, 49 George Street, Old Papatoetoe Ph: (09) 278 6333*" which were the real estate agent's details, as it subsequently appeared, by whom the defendant was employed.

[14] After a number of various negotiations between the prospective purchasers and the complainant a new agreement was produced by the defendant, again absent of any reference to any real estate agent. Eventually this Agreement for Sale and Purchase was signed and initialled by Ms Chand. Her evidence was that the first time she saw the details relating to a real estate agent was when she saw the document with her solicitor. The Agreement was produced as an exhibit.

[15] Some days after the Sale and Purchase Agreement had been signed Ms Chand told us the defendant contacted her and asked her to sign a Real Estate

Agent's Listing Authority. Her evidence was that she declined to do so on the basis that the defendant was not her agent and had no authority to act on her behalf. The evidence of Ms Chand was that she told the defendant they had advertised their property on Trade Me and they understood the defendant had seen the property on Trade Me and was simply helping the prospective purchasers as friends and should have known the property was being sold privately.

[16] The evidence of Ms Chand was that she had no idea at any stage that Rita Charles was a real estate agent and she was insistent that the defendant had never told her that at any stage. Ms Chand said had she been aware that Rita Charles was a real estate agent and that commission would be payable she would not have accepted the reduced price that she did.

Evidence for the Defendant

[17] The defendant gave evidence and told us that while she had been searching Trade Me for properties for sale she came across the property in question, namely 6 Constance Place, Clover Park. She thought this property would be of interest to clients she had and so she drove past the property and viewed it from the outside.

[18] She then made arrangements to visit the property and she said that on 27 February she made arrangements with Ms Chand's partner to view the property.

[19] Her evidence was that her clients, as she described them, were pleased with the Constance Place property and wanted to put in an offer. The property she said had been listed on Trade Me at a price of \$300,000 negotiable and her clients, as she continued to describe them, at first wanted to make an offer of \$280,000.

[20] The defendant then said that before presenting Ms Chand and her partner with any offer from her clients she requested that she sign a listing form for the property. Her evidence was that Ms Chand refused but made enquiry as to her commission rates, which were 4% on the first \$300,000 and then 2% thereafter.

[21] The defendant's evidence was that the complainant Ms Chand then had a discussion about commission and said she could only pay \$10,000. She went on to say that she formed the view that the complainant was attempting to negotiate a commission which showed that she knew exactly what she was doing, and more importantly that she knew a commission would be due for the services provided by her and the introduction of the purchasers.

[22] While the negotiations between the parties continued the defendant said that she again approached the complainant about signing a Listing Agreement which the complainant still refused to do. She alleged the complainant said she had worked in a real estate firm and the defendant needn't worry about being paid commission.

[23] The evidence of the defendant was that on 2 March 2009, the date of the contract produced in evidence, the details of her employer the real estate agent firm were in the agreement, which of course is in complete conflict with the evidence of the complainant Ms Chand.

[24] The defendant confirmed that there was no Listing Agreement ever signed by the complainant Ms Chand and she conceded that she did no advertising of the property and that there were no open homes conducted by her. She also conceded that she did not take anyone other than the ultimate purchasers to view the property and acknowledged she had seen the advertisement in Trade Me as a private sale.

Decision

[25] The Tribunal has considered the evidence of the complainant and the defendant and have had the advantage of hearing them both give evidence from the witness box. We find it somewhat difficult to understand how the complainant came to sign the Agreement for Sale and Purchase in question without apparently making some enquiry as to the *bone fides* of the defendant.

[26] The document itself is stated to be a form approved by the Real Estate Institute of New Zealand and one might have thought it prudent of the complainant to make some more direct enquiry of the defendant as to her possession of a document of that kind. However notwithstanding that apparent naivety on the part of the complainant we are satisfied that at no stage did she sign a Listing Agreement with the defendant, as the defendant herself concedes, and at no time was she ever told by the defendant that she was a real estate agent.

[27] Having seen and heard from the complainant and the defendant we are left in no doubt whatever that the evidence of the complainant Ms Chand is to be preferred to that of the defendant.

[28] It was put to the defendant in cross examination that in the course of her evidence before Judge Spiller she stated on more than occasion that the details in relation to the real estate agency were inserted after the document had been signed, although she apparently went on to correct herself. She said that what she had said in her evidence before Judge Spiller about the details being inserted after the document had been signed was incorrect.

[29] The onus of proof on the Committee is of course on the balance of probabilities and we are clearly of the view that it is more likely than not that the details in relation to the real estate agency were only inserted into the Sale and Purchase Agreement after it had been signed by the complainant. We conclude therefore that the charge against the defendant has been proved to the required standard.

Penalty

[30] The Tribunal made some enquiry of the defendant in regard to the issue of penalty should that arise and she said she had no submissions to make. She told us that she was not married but supported by her partner who was present in Court and had two children aged 24 and 22 years. She told us that she no longer held a salesperson's licence as it had expired and that she was now employed in the

insurance industry with a firm she declined to name. She at first told us that her financial position was not good but after further questioning she told us that in the last financial year she had earned \$80,000.

[31] Because this offence occurred prior to the coming into effect of the 2008 Act the penalties available to this Tribunal were limited to those under s 99(1) and (4) of the 1976 Act which were:

- (a) Cancelling the defendant's Certificate of Approval.
- (b) Suspending the defendant's Certificate of Approval.
- (c) Imposing a fine not exceeding \$750.

It is plain therefore that the only penalty open to the Tribunal is to impose a fine but we record that had the defendant still been the holder of a salesperson's licence we would have given serious consideration to interfering with her licence.

[32] We say this because the Tribunal is satisfied that the defendant's behaviour was directly contrary to the purposes of the Act and would obviously be regarded by both agents of good standing and members of the public as disgraceful and in this regard we note the comment we made in *CAC v Downtown Apartments Limited*¹ at 55, 56, 57, 58 and 59:-

- "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."

¹ [2010] NZ READT 06

[33] In the end result therefore the Tribunal imposes the only penalty open to it which is that of a fine and we impose the maximum available to us of \$750.

In accordance with s 113 of the 2008 Act the Tribunal advises the parties of the right to appeal this decision to the High Court pursuant to s.116 of the 2008 Act.

DATED at WELLINGTON this 7th day of July 2011

Judge M Hobbs
Chairman

J Robson
Member

J Gaukrodger
Member