

Decision No: [2011] NZREADT 18

Reference No: READT 083/10

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

BETWEEN **LINDA GALBRAITH**

Appellant

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

First Respondent

AND **GARY AND ANNA McNABB**

Second Respondents

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

HEARING at AUCKLAND on 18 July 2011

APPEARANCES

John Samuel for the appellant
Nicole Wilde for Complaints Assessment Committee
David Bigio for Second Respondent

Introduction

[1] This is an appeal by Linda Galbraith (“the appellant”) against the decision of Complaints Assessment Committee 10012 (“the Committee”) which found her guilty of unsatisfactory conduct by breaching rule 6.1 and 6.2 of the Real Estate Agents: Professional Conduct and Client Care Rules.

[2] The appellant was at all material times employed as a salesperson by Kellands Realty Limited, a firm which carried on business as real estate agents in Auckland.

Summary of the Complaints

[3] The complaint was made to the REAA by the second respondents who complained about the appellant’s handling of a sale of the second respondents property in Auckland in early 2010.

Committee Decision

[4] The Committee's decision dated 2 December 2010 is set out below.

Decision

[5] *The Complaints Assessment Committee met on 5 October 2010 to consider the complaint against Linda Galbraith. The Complaints Assessment Committee have determined under s 89(2) of the Act that it has been proven on the balance of probabilities that Ms Galbraith has engaged in unsatisfactory conduct by breaching rule 6.1 and 6.2. In a subsequent penalty decision a fine of \$3,500 was imposed on Ms Galbraith. The date of the penalty decision was 8 March 2011. A direction was also made to publish Mrs Galbraith's name.*

Relevant Legislation

[6] The relevant legislation that the Tribunal has to consider in this appeal is contained in s 72 and s 73.

"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."*

"73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
- (c) consists of a wilful or reckless contravention of—*
 - (i) this Act; or*
 - (ii) other Acts that apply to the conduct of licensees; or*

- (iii) *regulations or rules made under this Act; or*
- (d) *constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee".*

The Appellant's Case

[7] The appellant's case is that the Complaints Assessment Committee erred in finding her guilty of unsatisfactory conduct because:

- (i) There was no jurisdiction to make a finding of unsatisfactory conduct pursuant to s 72 of the Real Estate Agents Act.
- (ii) The CAC had no jurisdiction to find breaches in rule 6.1 and 6.2 of the Real Estate Agents Act Professional Conduct and Client Care Rules 2009.
- (iii) The CAC erred in fact and in law in making the determination of unsatisfactory conduct, having regard to all the circumstances including the vendor's conduct.

[8] The jurisdictional argument advanced was that the McNabbs were not able to bring this complaint as they did not fall within the definition of a "*client*" in the Act and Rules as they were two out of three trustees. Mr Samuel urged the Tribunal to find that did they not fall within the definition of "*any person who may complain about a licensee*" (s 74). He submitted that the words "*any person*" must still imply a causal nexus to the provision of real estate agency work. The Tribunal does not accept this argument. It finds that s 74 must be given its widest possible interpretation and that "*any person*" in that section does in fact mean "*any person*", a deliberately wide definition given that the purpose of the Act (see s.3) is to raise "*industry standards*" and to "*provide accountability through a disciplinary process that is independent, transparent and effective*". To achieve this any person must be able to complain.

[9] The appellant did not advance the jurisdiction issue and had she done so, we would have found the Client Care Rules did apply to this case.

[10] To determine the rest of the appellant's case requires an examination of the facts. Evidence was given only by Ms Galbraith and Mr Ross Buckley, the ultimate purchaser of the property which was being sold by the McNabbs in Shore Road, Remuera, Auckland.

[11] Mr and Mrs McNabb had two sites which formed the basis for one large home and tennis court at 75B & 79 Shore Road, Remuera. They wished to sell this property. Reference will also be made to another section they owned in Lucerne Road, Remuera which, after listing the Shore Road property with Kellands, they determined that they wanted to sell. The McNabbs had had a sole agency with Bayley's on the Lucerne Road property but this had expired. The chronology of events is as follows:-

- On 6 June 2009 Mr and Mrs McNabb executed a sole agency agreement authorising Kellands to sell Shore Road on their behalf. The vendors were the McNabb House Trustees. The trustees were Mr and Mrs McNabb and Joanna Pigeon (their solicitor).

- On 13 July 2009 there was a discussion between the vendor and purchaser concerning the way in which the property was being advertised with the McNabbs expressing reservations about Kellands' decision to advertise to CV for the property fearing that it would "*lowball*" the property value. On 13 July 2009 this issue was addressed by Ms Galbraith. The McNabbs did not pursue their complaint in this respect.
- On 12 August 2009 Shore Road was scheduled for auction. It was passed in. Mr Buckley made a post-auction offer to purchase.
- In August 2009 Mr and Mrs McNabb made a counter-offer on the sale of Shore Road to Mr Buckley. This was not accepted.
- The McNabbs were then desirous of buying another property in St Georges Bay Road and they mentioned in passing to Kellands that they were also trying to sell their section in Lucerne Road which they had listed with another agent. They asked if Kellands had a buyer. Ms Galbraith obtained a key from the other agent. A Mr Yang was shown their section and subsequently the plans which had been developed by the McNabbs for the construction of a house. Thereafter the agents' involvement in the sale process of this property ended. No written agency agreement was entered into.
- Sometime in October 2009 the McNabbs entered into an Agreement for Sale and Purchase to sell Lucerne Road to Mr Wang. The agreement was negotiated between their solicitors and the purchaser's solicitors and on the Agreement for Sale and Purchase no agent details were mentioned.
- The appellant and Kellands were unhappy with the fact that they did not receive commission on the sale of Lucerne Road. The issue remained unresolved during late 2009 and early 2010. Discussions took place between Kellands and the McNabbs concerning whether or not any agreement could be reached over the payment of commission on Lucerne Road.
- In December 2009 Mr Buckley made a further offer to purchase Shore Road. Kellands were still keen to "*clear the air*" on the commission for the Lucerne Road property. A counter-offer was made by the McNabbs but no agreement results.
- On 25 December 2009 Kellands sole agency expired to Shore Road reverting to a general agency agreement.
- The McNabbs enter into a sole agency agreement with Bayleys for the sale of Shore Road in January 2010.
- Kellands are given to the end of January (the McNabbs' version) or the end of February (Kellands) to be able to complete the sale of Shore Road with the purchasers already introduced by them. Mr Buckley formerly withdraws his offer to purchase Shore Road (via Kellands) on 25 January 2010.
- On 1 March 2010 Bayleys present an offer from Mr Buckley to the McNabbs for the purchase of Shore Road.

- Mrs Galbraith meanwhile has already e-mailed Mr McNabb advising him that if the property is sold to Mr Buckley then Kellands will be solely entitled to the commission. This e-mail is dated 16 February 2010, it appears at pages 16 and 17 of the bundle. Mrs Galbraith says:

“As it stands we appreciate Gary you did give us an extension until the end of February. Notwithstanding this, this gentleman and Mr Buckley are covered under the Kellands’ agency and such if either of these two parties purchased the commission payable would be as specified on that agency and exclusive to Kellands”.

- This information was as a matter of law incorrect. Mrs Galbraith admitted under cross-examination that she was qualified to be a licensee under the 1976 Real Estate Agents. As such, she realised that once the sole agency had expired Kellands did not have the sole right to the agency fee, or the right to claim anything more than an introduction fee.
- Matters then became somewhat confused. Mr Buckley was drawn into the commission debate between Kellands and Bayleys. He asked the solicitor for the McNabbs on 2 March 2010 [with reference to a trail of e-mails sent to him by Mrs Galbraith on 2 March including the e-mail of 16 February referred to above, that *“if I withdrew my offer through Bayleys and issued through Kellands does this avoid duplication of commission?”* Later on 2 March Kellands wrote to Mr Buckley saying that the issue of commission will be resolved between Kellands and Bayleys and he does not need to concern himself with that issue. They assert that they were the best people to transact the purchase.
- On 12 March Mr Buckley tables an offer to the McNabbs through Kellands. There was some delay in the response by the McNabbs. It appears that Kellands were told that the McNabbs would not accept an offer on a Kellands Real Estate Agency form.
- On 29 March 2010 Mrs Galbraith e-mails Mr Buckley. This e-mail was found to be disparaging by the CAC. In this e-mail she says:

“Appreciate all that you have been trying to do is secure the property as we have been also. The frustration is that the vendors and their solicitor are not being completely transparent in what is transacted behind the scenes. As recent as this morning our sales manager conversed with Joanna (Pigeon) who told us that McCabe (McNabb) has still not made a decision. Now it seems the decision is stalled as they continue to negotiate with you directly. If you do as you have say and table an offer directly to the vendors I can be assured of not being paid (yet again)...”

- Mr Buckley was concerned about this e-mail and referred this correspondence to Joanna Pigeon the solicitor and trustee for the McNabbs and said:

“I’m sure the matter can be resolved by an acknowledgement that the commission due will be paid to the appropriate agents.”

- On 31 March 2010 the McNabbs entered into an Agreement for Sale and Purchase with Mr Buckley to purchase their Shore Road property for \$5,000,000 with no agent shown on the agreement. Subsequently Kellands were paid the sum of \$100,000 plus GST as agent by the McNabbs. The Tribunal has no knowledge of what portion of that was paid to Bayleys but correspondence in the bundle seems to suggest that the agreed commission split was 75% to Kellands, 25% to Bayleys.

[12] The complaints made by the McNabbs were whittled down in this appeal to three matters:

- (i) The appellant breached the McNabbs' privacy by forwarding an e-mail on 2 March to Mr Buckley.
- (ii) That the appellant made disparaging comments about the McNabbs in an e-mail dated 29 March 2010.
- (iii) The appellant failed to act in the McNabbs' best interest by interfering in negotiations between Mr Buckley and the McNabbs.

[13] Mrs Galbraith submitted that in the circumstances that were prevailing at the time, with the ongoing dispute about the Lucerne Road commission and her concerns about the delays in completing the agreement it was quite understandable that she would send the e-mail of 29 March. She said she intended no insult nor was she intending to in any way to disparage the McNabbs when she sent the e-mail. She submitted that it was simply a result of the continued and unacceptable delays in reaching agreement over the sale of Shore Road and other concerns over Lucerne Road that she expressed the views in the e-mail. Mr Samuel submitted that the e-mail was not in breach of her obligations to the McNabbs.

[14] Mr Bigio submitted that but for providence the e-mail of 29 March could have led to the withdrawal of all offers on the property. He submitted that viewed objectively the e-mail was a negative comment about the vendors, Ms Galbraith's clients. He further submitted that the e-mail of 16 February was legally incorrect and gave false information to the McNabbs and was then forwarded on to Mr Buckley in breach of her obligations to the vendors.

Discussion

[15] This case centres around both an understanding of the obligations of an agent and an appreciation that the Client Care Rules which came into effect 17 November 2009 clearly identify the standards expected of an agent. These rule provide (*inter alia*):-

- (i) Clause 6.1 provides that an agent must comply with their fiduciary obligations to his or her client arising as an agent.
- (ii) Clause 6.2 provides that an agent must act in good faith and deal fairly with all the parties engaged in the transaction.

- (iii) Clause 6.4 provides that a licensee must not mislead a customer or client nor provide false information nor withhold information that should by law or fairness be provided to a customer or client.
- (iv) Clause 9.1 provides that a licensee must act in the best interest of a client and act in accordance with a client's instructions unless to do so would be contrary to the law.

[16] There is no doubt that Mrs Galbraith felt that her commission was possibly at risk given what she felt was an unfair but which she agreed in cross examination was a legally justified position taken by the McNabbs over the Lucerne Road property. It was clear that in respect of Lucerne Road no written agency agreement had ever been signed and Kellands were not in a position to claim commission. Moreover the sole agency held by Kellands had ended for Shore Road and Mrs Galbraith had not been able to conclude a satisfactory sale between Mr Buckley and the McNabbs Trust. It was Bayleys who managed to bring about an agreement between Mr Buckley and the McNabbs. Mrs Galbraith therefore cannot have believed that she had the sole entitlement to all of the commission in respect of the sale or that it was appropriate for her to claim that no commission was payable to Bayleys for Shore Road.

[17] Reading the trail of e-mails sent in February and March 2009 leaves the Tribunal with a view that Mrs Galbraith had lost sight of the fact that she was there to act as agent (even if it was only under an expired agency agreement) for the McNabbs. Her obligation to the McNabbs was paramount. She was acting for them. Thus she should not have disclosed any e-mails sent to them outlining their position to Mr Buckley (the 16th of February e-mail sent in early March) nor told Mr Buckley her view that the vendors were not being "*completely transparent*" and her view that she would not be "*paid for her agency work (again)*". As Mr Bigio submitted it was simply lucky that Mr Buckley did not walk away from this agreement following these disclosures. Mrs Galbraith did in fact receive her commission for the sale of Shore Road. She received \$23,886.56 (including GST). The Tribunal were concerned that she did not appear to appreciate that there were real reasons for the McNabbs to be concerned over the way in which she had acted in sending these e-mails to Mr Buckley. The e-mails were completely inappropriate for Mrs Galbraith to send. They gave incorrect information (16/2/10) and suggested to Mr Buckley that her clients were hiding something from Mr Buckley and were trying (again) to avoid paying a justly earned commission. They painted a very negative picture of the vendors.

[18] We have no hesitation in finding therefore that the CAC reached the correct decision in respect of the complaint made by Mr and Mrs McNabb. Mrs Galbraith clearly breached her fiduciary obligations to her clients the McNabbs in sending these e-mail exchanges to them.

[19] We consider that the actions of Mrs Galbraith were in breach of Clause 6.1, 6.2, 6.4 and 9.1 of the Client Care Rules s 72(b). We also consider that s 72 has been made out under s 72(a), s 72(b) and s 72(d). We consider that in sending these e-mails Mrs Galbraith's behaviour/conduct fell short of standard expected of a reasonably competent licensee and would be regarded as unacceptable by other agents of good standing.

[20] We have to consider therefore whether the penalty imposed by the CAC of a fine of \$3,500 is a fair penalty. Mrs Galbraith has been required to pay this fine and

received only \$23,886 for her work. We consider that in the circumstances it is a fair penalty. We reiterate that an agent, no matter what the provocation cannot disparage their client or suggest that they are “*less than transparent*” or in any way act against their interests unless this is contrary to the law. We have no hesitation therefore in upholding the decision of the Complaints Assessment Committee dated 2 December 2010 and the penalty decision of 1 March 2011.

Relevant Law

[21] The principles applying to the exercise of appellate jurisdiction have been considered by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. According to the judgment, a Court considering an appeal from a lower Court is not obliged to defer to the reasons of the decision appealed from. Rather, the appellate Court has the responsibility of arriving at its own assessment of the merits of the case at paragraph [16]:

“[16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court’s opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court’s assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion”.

[22] In *Kacem v Bashir* [2010] NZSC 112 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)”.*

[23] Section 89 of the Act confers on the Committee the power to make a determination on a complaint after it has inquired into it and conducted a hearing. Determinations pursuant to s 89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s 89 would generally be regarded as ‘general appeals’ and the Tribunal in considering the appeal by way of rehearing, should apply the principles set out in *Austin, Nichols* and *Kacem v Bashir*.

The Tribunal has done this for the reasons set out above and upholds the CAC decision.

Conclusion

[24] For the reasons set out above the Tribunal confirms the determination of the Committee.

[25] It confirms the penalty decision of a fine of \$3,500 and publication of Mrs Galbraith's name and details.

[26] Pursuant to s 113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s 116 of the Act.

DATED at AUCKLAND this 5th day of August 2011

Ms K Davenport
Chairperson

Ms J Robson
Member

Mr G Denley
Member