

Decision No: [2011] NZREADT 22

Reference No: READT 005/11

IN THE MATTER OF s.111 of the Real Estate Agents Act
2008

BETWEEN **BRENT ADAIR MATHEWS**

Appellant

AND **COMPLAINTS ASSESSMENT
COMMITTEE (CAC 10062)**

First Respondent

AND **PETER STRATTON**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mr G Paine for the appellant
Mr M J Hodge for the first respondent
Mr A Isac for the second respondent

Introduction

[1] This is an appeal by Mr Mathews (“the appellant”) against the decision of Complaints Assessment Committee 10062 (“the Committee”) to take no further steps on a complaint made by Mr Mathews against Mr Stratton, a Licensed Real Estate Agent.

[2] The appeal relates to the conduct of Mr Stratton prior to the commencement of the Act. 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).

[3] 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.

[4] A complaint 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**).

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

[6] **Step 1 – Could Mr Mathews have complained about Mr Stratton or could he have been charged under 1976 Act?**

[7] 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).

[8] 94 Grounds on which licence may be cancelled by Board

- (1) The Institute, the Disciplinary Committee, or any other person with leave of the Board, may at any time apply in the prescribed form to the Board for an order cancelling a real estate agent's licence, and the Board may cancel the licence, on any of the following grounds:
- (a) That a licensee or, in the case of a licensee company, any officer of the company, has been convicted of a crime involving dishonesty:
 - (b) That a licensee or, in the case of a licensee company, any officer of the company, has been guilty of misconduct in the course of his [or her] or the company's business as a real estate agent, and that by reason of that misconduct it is in the interests of the public that the licence be cancelled:
 - (c) That a licensee or, in the case of a licensee company, any officer of the company, has been shown to the satisfaction of the Board to be of such a character that it is in the interests of the public that the licence be cancelled:

[9] 95 Board may suspend real estate agent

- (1) On any application under section 94(1) of this Act, or on any other application made to the Board in that behalf in the prescribed form by the Institute, the Disciplinary Committee, or other person with the leave of the Board, the Board may, if it is satisfied that a ground exists for ordering the cancellation of a real estate agent's licence, instead of ordering the cancellation of that licence, suspend the licensee or, where the licensee is a company, the company or any officer of the company, from carrying on the business of a real estate agent for any period not exceeding 3 years as the Board thinks fit.

[10] 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.

[11] Mr Isac argued for Mr Stratton that the Tribunal had no jurisdiction to consider the appeal as notwithstanding the words of s 172 there was no authority under the 1976 Act to consider any appeal from a decision to take no further steps under s 99 Real Estate Agents Act 1976.

[12] The Tribunal have considered this point and do not accept it. Plainly, the transitional provisions were designed to be enabling as set out above. What is required is the ability to bring a complaint under the 1976 Act and then it may be dealt with under the 2008 Act but with the imposition of no penalty it could not be imposed upon an agent under the 1976 Act. This means that once the first step under s 172 (of the 1976 Act) has been satisfied the Tribunal then turn to the provision of the Real Estate Agents Act 2008. Accordingly the Tribunal reject the submission that there is no jurisdiction to determine this appeal.

The Facts

[13] This case arises out of the claim for commission brought by Bayleys (C D Realty [PN] Limited against Mr Stratton (the second respondent) who was a director of this company, from Mr Mathews for the sale of Mr Mathews' farm in February 2008. The facts had been succinctly set out in the judgment of the District Court and then judgment of the High Court arising out of an application for summary judgment brought by C D Realty (PN) Limited against Mr Mathews. Mr Mathews and his then wife Ms Capenerhurst had separated and wished to sell a farm property they owned at Mangaweka. The farm property was in three titles, two of which were owned by the couple and the third by a company called Mathurst Limited which they controlled. Mr Mathews asked Mr Stratton to act as Land Agent on the sales and signed an Agency Agreement on 27 October 2007. It was not signed by Ms Capenerhurst. Clause 4 and 5 of the Agreement and the Agency Agreement provided (*inter alia*) that if the property was sold directly or indirectly by the agent or through the introduction of the agent then commission was payable.

[14] Clause 5 provided that in signing the Agreement "*we warrant that if not the sole owners of the property we have the authority of all the vendors/lessors to enter into this contract*".

[15] The property was eventually sold to Mr Mathews himself. Mr Stratton was found by the District Court and High Court to have been instrumental in organising and brokering this sale and was entitled to commission. Both the High Court and the District Court had found that C D Realty (PN) Limited was entitled to seek the entire commission from Mr Mathews (rather than just a ½ share).

[16] The sale was effected by means of a s 21 Property Relationship Agreement between Mr Mathews and Ms Capenerhurst. This agreement contained a clause which said that any debt which was outstanding was to be paid by the person in whose name the debt was. The Tribunal was told that Mrs Mathews' legal advice was that having executed this agreement it was not possible for Mr Mathews to claim half of the commission from his former wife. The Tribunal can offer no view on that but it would have seemed at least arguable that a debt payable by both of them would survive the s 21 Agreement. However that is not a decision for the Tribunal. Mr Mathews complained to the Complaints Assessment Committee about the conduct of Mr Stratton, arguing that, in this appeal that Mr Stratton should have ensured that Ms Capenerhurst's signature was on the Agency Agreement and/or he explained to Mr Mathews the impact of not having her signature.

[17] Mr Paine for Mr Mathews argued that an agent is a fiduciary of the vendor. He also submitted that there was an industry standard set out in the 2008 Act that an Agreement should be signed by both parties. He argued that a real estate agent is deemed to know and understand the Agency Agreement and has an obligation to explain this to his/her clients. In particular he should have explained the agreement to Mr Mathews as he knew this was a sale of property by a divorcing couple. Mr Mathews he argued should have been made aware of the situation that he was getting himself into. Mr Paine argued that Bayleys, or Mr Stratton, had breached their fiduciary obligations by putting their own interests ahead of their client and rewarding themselves for their own negligence. He submitted that *Elders Pastoral*

Limited v BNZ [1989] 2 NZLR 180 show that there is a fiduciary obligation between agent and principal. By extension Mr Paine argued that Bayleys owed a special obligation to Mr Mathews to act in his interests and had a duty to act in good faith and should not allow their interests and their duty to conflict. He urged the Tribunal to find that Mr Stratton had been guilty of professional misconduct of the “*worse possible kind*” because of his failure to advise Mr Mathews that he would be liable for the entire commission and what could happen potentially if he did not obtain the signature of Ms Capenerhurst to the listing agreement.

[18] In reply Mr Isac argued that Mr Stratton believed that he had Ms Capenerhurst’s authority to sell the property. He argued there was no general fiduciary obligation on Bayleys to operate in the best interests of a client but rather the scope of the fiduciary obligation varied depending upon the contract of agency. He provided the Tribunal with a copy of a decision of the Privy Council in *Kelly v Cooper* [1992] 3 WL 936 at page 6. He submitted that this decision showed that the scope of the fiduciary duty was determined by the terms of the contract between the parties. He submitted that there was nothing in the Agency Agreement between Mr Mathews and Mr Stratton which required Mr Stratton to take the steps that Mr Mathews suggested. Indeed he submitted it was directly at odds with the express terms of the listing. He argued that there was nothing in the appeal, so that could be said that the Complaints Assessment Committee had plainly got their decision wrong. He submitted that Clause 5 gave a warranty to Bayleys that Mr Mathews was authorised to sell the property on behalf of himself and his wife. Mr Isac argued that the High Court (and District Court) had determined that the warranty in Clause 5 did make Mr Mathews liable to pay commission to C D Realty for the sale. He submitted that for the Tribunal to find otherwise would be a matter of *issue estoppel* as the Tribunal could not make findings of fact contrary to those made by the High Court.

[19] For the Complaints Assessment Committee Mr Hodge argued that it was a litigation choice of Mr Mathews not to pursue his former wife for her part of the commission. He argued that it was clear that the Complaints Assessment Committee had a discretion not to enquire any further into the complaint. He said that while it was possible that an agent had a duty to explain an Agreement and the implications of that Agreement to a vendor, he submitted that the facts of this case did not make it the case with which to grapple with these issues. Rather he submitted the factual features were such that it was appropriate that the Complaints Assessment Committee reached the decision that it had. He submitted that this was so because of the way the facts unfolded, i.e. the liability to pay commission only became an issue when the property was sold to Mr Mathews himself and the sale was effected by way of a s 21 Agreement. He submitted that if the Tribunal found that the Complaints Assessment Committee had erred in not enquiring further, it could deal with the case by way of modifying or varying the decision of the CAC. Mr Paine also urged upon the Tribunal this point. Mr Isac said however if the Tribunal wished to reach a decision too that the Complaints Assessment Committee should have enquired or to modify or vary its decision then Mr Stratton wanted to call further evidence and the matter should be sent back to the Complaints Assessment Committee for a further examination of the evidence.

Decision

[20] The Tribunal have considered this matter very carefully and read and listened to all of the submissions of counsel and read the decisions of the District Court and the High Court.

[21] For the reasons which we set out below we have decided not to modify or change the decision of the Complaints Assessment Committee not to enquire into this matter.

Reasons

[22] We consider that it is possible that in the right case an agent might have a duty (fiduciary or tortious) to a vendor to explain to him or her the terms of the Agency Agreement and to explain to them clearly the implications of signing an agreement. However we do not find that that obligation arises in this case. When Mr Mathews listed the property for sale Mr Stratton contacted Ms Capenerhurst and discussed the listing with her. She seemed to be content with the fact that he was selling the property and indeed agreed to sell a property to a third party (the Cripps) who made an offer prior to Mr Mathews himself making an offer. Thus, until the decision by Mr Mathews to offer to purchase the property himself the agency proceeded, like any normal transaction, with Mr Mathews and Ms Capenerhurst both seemingly content for Mr Stratton to act as agent. If there was an obligation to explain the implications of the contract to Mr Mathews then it would have to arise in terms of the facts known at that time; that is at the time that the Agency Agreement was executed. At that time it appears both parties agreed that Mr Stratton should sell the property. Mr Mathews signed the contract agreeing that he would pay a fee on the sale and Ms Capenerhurst agreed that the property should be sold. At that time there was nothing unusual in the transaction which might give rise to more concern. The question for the Tribunal is whether Mr Stratton should have contemplated that Mr Mathews might purchase a property himself by means of a s 21 Agreement and agreed to be responsible for all the debts that Ms Capenerhurst might otherwise also be obliged to pay? This cannot have been in any of the parties' contemplation at that time. Thus we do not find on the facts of this case that any duty can be implied to obliging Mr Stratton to undertake to explain the consequences of this possibility to Mr Mathews. We understand that Mr Mathews feels aggrieved that he has had to pay a full commission on the purchase of his own property from his wife and that he was unaware that this legal obligation might flow from the Agency Agreement that he signed. However the High Court has found on the facts of this case that Mr Stratton was entitled to commission on the 'sale' under s 21 agreement. We cannot go behind this conclusion. Mr Mathews has chosen not to pursue Ms Capenerhurst but that is not a matter for this Tribunal. On the narrow issue before us we do not find that the decision of the Complaints Assessment Committee not to enquire into the matter was wrong. It is clear that the legal issues at stake may well have been refined between the complaint by Mr Mathews and its presentation to us, but nonetheless we do not consider that the conclusion by the Complaints Assessment Committee was wrong.

[23] We therefore dismiss the appeal.

[24] 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 AUCKLAND this 26th day of August 2011

Ms K Davenport
Chairperson

Mr G Denley
Member

Ms J Robson
Member