

Decision No: [2011] NZREADT 23

Reference No: READT 061/10

IN THE MATTER OF charges laid under s 91 of the Real Estate Agents Act 2008

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10031)**

AND **MICHAEL TANGVEL MARAN**
Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Judge Michael Hobbs – Chairman
Ms J Robson – Member
Mr J Gaukrodger – Member

Date of Hearing: 22 and 23 August 2011

Appearances: Mr Michael Hodge for the Committee
Ms Margaret Mathews for the Defendant

DECISION

Introduction and Charges against Defendant

1.1 Following a complaint made by Sukhjot Singh (“the complainant”) the Complaints Assessment Committee (CAC 10031) charges Michael Tangvel Maran, licensed salesperson, with misconduct under s 73(a) of the Real Estate Agents Act 2008 in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars: Making a false representation as to the nature and quality of the title of a property at 118A Oakdale Road, Hillsborough, Auckland (“the property”) which he was selling in his private capacity through agent, Gurinder Singh:

- (a) Before 20 June 2009, Mr Maran, through Gurinder Singh, represented to the complainant that the issue of title to the property was a formality by telling the complainants that title to the property had not yet been issued but that the owners of the adjoining property at 120 Oakdale Road, Hillsborough, Auckland (“the neighbouring property”) were ready with their share of the subdivision fee (about \$27,000) and once there was a contract for sale of the

property, it was just a matter of depositing the fees and arranging the title, with the process to take no more than 4 to 8 weeks (“the representation”);

- (b) At the time Mr Maran made the representation, he was locked in a dispute with the owners of the neighbouring property which meant that the issue of the title to the property was not just a formality;
- (c) In reliance on Mr Maran’s representation, the complainant entered into an agreement to purchase the property from Mr Maran (“the agreement”).

1.2 CAC 10031 further charges Michael Tangvel Maran with misconduct under s 73(a) of the Real Estate Agents Act 2008 in that its conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars: Making a false representation as to the reasons why release of the complainant’s deposit under the agreement was required.

- (a) Between 20 June 2009 and 8 July 2009, in seeking release of the deposit under the agreement, Mr Maran, through Gurinder Singh, represented to the complainant that the issue of title to the property was a formality by telling the complainant that he required the deposit to finish the work required on the property necessary to have the title to the property issued and that issue of the title would be delayed if the complainants did not release the deposit to him (“the second representation”).
- (b) At the time Mr Maran made the second representation, he was locked in a dispute with the owners of the neighbouring property which meant that the issue of the title to the property was not just a formality.

Background

[1] The defendant is a licensed salesperson under the Real Estate Agents Act 2008 (“the Act”) who in October 2006 was the owner of a property at 118 Oakdale Road in Auckland which had a house on the road frontage with a large area at the rear.

[2] In April 2006 Weiguo Ding and his wife met the defendant and his partner and they discussed the possibility of the property next door to 118 Oakdale Road number 120 being amalgamated with number 118 and the two properties then subdivided into four lots. The suggestion was that if the Dings bought 120 Oakdale Road and the two properties subdivided the Dings would retain the front section with a house on it while the defendant would retain the rear section of 118 Oakdale Road.

[3] It was proposed that the defendant using his property experience would coordinate the subdivision work on the two properties to the effect that four separate titles would issue together with a jointly owned access lot 5 giving access to the two rear sections.

[4] Mr and Mrs Ding agreed to this proposal and on 20 April 2006 they signed an agreement to purchase 120 Oakdale Road for \$435,000 with the defendant acting as agent for the vendors, the transaction being settled on 4 August 2006.

[5] The defendant began work on the proposed subdivision and a Deposit Plan was prepared and approved by the Auckland City Council on 9 August 2007, with the rear section at 118 Oakdale Road being shown as Lot 2 and described as 118A Oakdale Road.

[6] On 20 June 2009 the complainant Sukhjit Singh and his wife signed an agreement with the defendant to purchase the section at 118A Oakdale Road, Lot 2 on the deposit plan, for \$277,500 with a deposit of \$25,000 payable once the contract became unconditional, with the possession date being five days after issue of the title.

[7] In the event title to Lot 2, 118A Oakdale Road was never issued to the complainant who had paid the deposit to Barfoot and Thompson which he lost and has never recovered. The failure to provide him with a clear title to the section ultimately gave rise to the present charges being laid against the defendant by the Committee.

Evidence for the Committee

[8] The complainant Sukhjit Singh said he had been told by his agent Gurinder Singh that obtaining title to the section was just a matter of depositing fees and finalising the payment of the defendant's share of costs of subdivision. He said the defendant had told Gurinder Singh the process would not take more than four to eight weeks. It was on this assurance they agreed to purchase 118A Oakdale Road.

[9] By letter dated 7 July 2009 the complainant's solicitor wrote to the defendant's solicitor confirming satisfaction of the finance condition in the agreement and that the contract was now unconditional.

[10] By letter dated 8 July 2009 the complainant's solicitor requested Barfoot and Thompson to release the deposit of \$25,000 to the defendant's solicitor which they accordingly did.

[11] Notwithstanding this the evidence of Gurinder Singh was that the defendant had put pressure on the complainant for him to release the deposit prior to 7 July 2009, and even threatened to cancel the agreement if the deposit was not released promptly.

[12] The evidence of both the complainant and Gurinder Singh was to the effect that about this time enquiries were made to the Auckland City Council about the subdivision where it was discovered there had been no progress towards the issue of a title, and it was about this time that the complainant became aware that the

defendant and his neighbour Weiguo Ding had been in dispute over the subdivision for a long time and this could be seen from records at the Council. In fact the evidence showed that by letter dated 12 September 2008 Mr Ding requested the Subdivision Officer at the Auckland City Council to put the joint subdivision at 118 and 120 Oakdale Road on hold because of issues between he and the defendant which were set out in the letter.

[13] There is no dispute that the issues between the defendant and Weiguo Ding were never resolved with the end result being that the defendant ran into financial difficulties and Weiguo Ding buying 118 Oakdale Road at a mortgagee sale on 9 July 2010 so that he owned both 118 and 120 Oakland Road. Resource consent to the subdivision in his name alone was finally obtained in October 2010.

[14] It was as a result of the events briefly summarised above that the present charges were laid against the defendant which allege that he made false representations to the complainant as set out in the particulars to the two charges and so breached s 73(a) of the Act.

“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”.

[15] The charges were laid pursuant to s 73(a) rather than s 73(b) because although the defendant is a licensee he was the vendor in person and was not carrying out real estate agency work as defined in s 4 of the Act.

Evidence for the Defendant

[16] The defendant’s evidence was extensive but we do not find it necessary to traverse it in any detail, suffice it to say that in summary he denies the allegations set out in the two charges.

[17] The defendant admitted he told Gurinder Singh the subdivision work was nearly over and it was just a matter of depositing the reserve contribution and assigning the title. He did tell Gurinder Singh that Waiguo Ding was ready with the money for the contributions and that when he paid his own share the title would issue in four to eight weeks’ time. He said that was his genuinely held belief at the time.

[18] The defendant denied that he put any pressure on the complainant to have the deposit released or that he threatened to cancel the agreement. He said the contract became unconditional anyway so why would he “*make such a fuss*” as he described it. He said he did not need the money and used the deposit less commission to do work on the subdivision. He said it was not until a year later that he fell into financial difficulty and was unable to meet his mortgage commitments.

Findings of Fact

[19] The Tribunal has only briefly summarised the evidence before us because of the clear view we have taken as to the critical issues in the case.

[20] The Committee elected to frame the charges against the defendant on the basis of his making the false representations set out in the particulars on each of the two charges, which required the Committee to prove on the balance of probabilities that the defendant in telling the complainant what he did knew what he said was false in a material particular and intended to deceive the complainant.

[21] Having seen and heard the witnesses together with the extensive material contained in the joint Bundle of Documents we are in no doubt that there was an acrimonious ongoing dispute between Weiguo Ding and the defendant in relation to the proposed subdivision and apportionment of blame for that must be shared between the defendant and Weiguo Ding.

[22] That their on and off dispute over several years was bitter and divisive can be seen from the fact that the defendant and Weiguo Ding claimed and counterclaimed against each other before the Disputes Tribunal as late as November 2009 and the dispute between them was never resolved with the end result being the mortgagee sale of 118 Oakdale Road in 2010.

[23] As far as the defendant’s evidence is concerned we have no difficulty in finding that his self proclaimed skill and experience in matters involving property subdivisions was largely illusory.

[24] We were not impressed by his evidence in that regard and find that most of his difficulties with Weiguo Ding arose from his incompetence rather than any deliberate obstruction. Arising from self belief in his own ability came his confidence to assure the complainant that all was well and a title would be issued without undue delay. This was shown to be incorrect but we are not satisfied on the balance of probabilities that he was acting dishonestly or recklessly.

Conclusion

[25] The objective test to be applied to the issue of disgraceful conduct under s 73(a) was set out by this Tribunal in *CAC v Downtown Apartments Limited*¹ at paras 55 to 59 as follows:

“[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)

¹ [2010] NZ READT 06

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”.

Quite plainly any deliberate dishonesty or deception would meet the test, but in the absence of real estate agency work mere incompetence or misplaced honest belief would not, and in this case the evidence does not justify reaching the conclusion that the defendant’s assurances to the complainant were both false and intended to deceive him in relation to both charges.

[26] Accordingly both charges against the defendant are dismissed.

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

DATED at WELLINGTON this 29th day of August 2011

Judge M Hobbs
Chairman

Ms J Robson
Member

Mr J Gaukrodger
Member