

Decision No: [2011] NZREADT 4

Reference No: READT 068/10

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

BETWEEN **COMPLAINTS ASSESSMENT
COMMITTEE 10037**

AND **PATRICK WILLIAM WALKER**

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Judge Michael Hobbs – Chairman
Ms J Robson – Member
Mr G Denley – Member

Hearing: 5 April 2011

Appearances: Michael Hodge and Luke Clancy for the Committee
No appearance of Defendant

Decision: 21 April 2011

DECISION

Introduction

[1] Following a complaint made by Edith South (“the Complainant”), Complaints Assessment Committee 10037 charges the Defendant, 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

On or about 31 December 2007, the Defendant obtained a cheque from the Complainant in the amount of \$70,000 under the false pretence that the Defendant would use the money to purchase a property, namely 31 Dick Street, Reefton, for the Complainant.

The Defendant used the Complainant’s \$70,000 for his own benefit, without the Complainant’s consent.

[2] Complaints Assessment Committee 10037 further charges the Defendant 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

Between 12 April 2007 and 11 November 2008 the Defendant, in circumstances where he held power of attorney in respect of the Complainant's financial affairs and/or knew that the Complainant was vulnerable and relied on him to act in her best interests, obtained money from the Complainant in the amount of \$92,438.22 (excluding the amount referred to in charge 1).

[3] Pursuant to regulation 6 of the Real Estate Agents (Complaints and Discipline) Regulations 2009 (Regulations), the Defendant was sent notice of the Committee's determination to lay charges and a copy of the charges to be laid.

[4] The Defendant failed to submit a response to this charge as required by Regulation 7.

[5] Regulation 15 provides:

[15] If a party fails to appear at the hearing of the Disciplinary Tribunal, the Tribunal may, having regard to all the circumstances,—

- (a) adjourn the hearing; or*
- (b) on proof of service on the party of the notice of hearing, hear and determine the proceeding in the party's absence; or*
- (c) dismiss the proceedings.*

[6] The Defendant was served with a notice of the hearing in accordance with the regulation and the Tribunal has received no response. Accordingly the Tribunal heard and determined the charge in the Defendant's absence.

[7] The Tribunal had before it sworn affidavits from the Complainant dated 6 December 2010 and Christopher Delaney, a Real Estate Agents Authority investigator dated 2 December 2010 and 24 March 2011.

[8] The Complainant deposes that she came to know the Defendant in Wellington around 1998 when he acted for her in a professional capacity on the sale of her house. The two became close after the death of the Complainant's partner in 2000 and, in 2001, following a stroke, the Complainant granted the Defendant power of attorney over her affairs. She was then aged 72.

[9] In 2006 the Defendant informed the Complainant that he was moving to Reefton. He later suggested that the Complainant may also wish to move to Reefton and that he could arrange for her to purchase a property. The Complainant subsequently moved to Reefton and into a property in which the Defendant was also living.

[10] On 31 December 2007, the Complainant wrote out a cheque for \$70,000 to the Defendant. The Defendant led the Complainant to believe that the money was for the purpose of purchasing the house in which the two were living.

[11] The Defendant took further funds from the Complainant, by way of cheques and an ATM card, over the period they were living together while the Defendant held a power of attorney and was trusted by the Complainant to act in her best interests. The amounts taken were much greater than those the Complainant believed she had agreed to provide, to assist the Complainant in his business.

[12] The Complainant discovered that she did not own the property in which she lived in early 2010 and complaints as to the Defendant's actions were lodged on her behalf with the Police and the Real Estate Agents Authority.

[13] The affidavit of Mr Delaney confirms that information received in the course of their investigation shows that the Defendant obtained a total of \$92,438.22 from the Complainant between April 2007 and November 2008 exclusive of the \$70,000 cheque.

[14] Mr Delaney states that he had a number of conversations with, and received correspondence from, the Defendant during the investigation, in which the Defendant admitted that he had taken a substantial amount of money from the Complainant that he had then used to pay debts and otherwise for his own purposes.

[15] In his further affidavit, Mr Delaney deposes that he has received information that the Complainant is facing civil proceedings in respect of her continued occupation of the house she believed she had purchased through the Defendant.

[16] Having considered these affidavits none of which is challenged the Tribunal has no hesitation in finding the charges against the Defendant proved beyond any possible doubt.

Penalty

[17] Section 3(1) of the Act sets out the purpose of the legislation. The principal purpose of the Act is "*to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.*" One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (s 3(2)).

[18] This function has been recognised in professional disciplinary proceedings involving other professions for example, in medical disciplinary proceedings: *Taylor v The General Medical Council*¹ and in disciplinary proceedings involving valuers: *Dentice v The Valuers Registration Board*². This is reinforced by the reference in the purpose provision to the Act (s 3) to raising industry standards and the promotion of public confidence in the performance of real estate agency work.

¹ [1990] 2 All ER 263

² [1992] 1 NZLR 720

[19] In *Patel v Dentists Disciplinary Tribunal*³ Lang J held that disciplinary proceedings inevitably involve issues of deterrence and penalties and are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[20] This case does not strictly involve real estate agency work as that term is defined under the Act, and for that reason the charges have been laid under s 73(a). However, the Defendant has acted dishonestly and abused a position of trust in the course of acting for the Complainant in the course of a purported purchase of a property.

[21] In *Smith v CAC* and *Brankin*⁴ this Tribunal held, at paragraph 19:

“... the conduct of a licensee can be properly described as ‘disgraceful’ under s 73(a) of the Act so long as there is a sufficient nexus between the alleged conduct and the fitness or propriety of the licensee to carry out real estate work”.

[22] There is clearly such a nexus in this case because the Defendant in the first instance was purportedly acting as an agent to help the Complainant buy a house, although his subsequent dishonesty was unconnected to that end.

[23] As in the case of *CAC v Dodd*⁵ the Defendant’s dishonesty is clear evidence of his bad character and any public interest test is well and truly met.

[24] In *CAC v Downtown Apartments Limited and Anor*⁶ this Tribunal said at paras 50, 51, 55 & 56:

[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.

[51] The requirement to prove something more than a departure from acceptable standards does not mean it is necessary to prove a wrongful intention in order to prove misconduct. That would be inconsistent with the express language of s 73.

In the present case intention is not an issue anyway because the First Defendant took no part in the proceedings.

[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’.

*[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*).*

Conclusion

[25] Having found the charges against the Defendant proved the Tribunal is satisfied that a condign penalty should be imposed.

³ High Court, Auckland, CIV 2007-404-1818, 13 August 2007

⁴ [2010] NZREAD13

⁵ [2011] NZ READT 01

⁶ [2010] NZ READT 06

[26] The Tribunal is satisfied that the Defendant's conduct was a flagrant and dishonest breach of his obligations to the Complainant with no indication of remorse or regret intimated to the Complainant or this Tribunal.

[27] Accordingly the Tribunal makes an order pursuant to s 110(2)(b) of the Real Estate Agents Act 2008 cancelling the licence of the Defendant effective from the date of issue of this decision.

[28] Had it been possible the Tribunal would have made an order for compensation to the Complainant but as the Defendant's conduct was prior to the commencement of the 2008 Act on 17 November 2009 s 172 of the 2008 Act applies and we cannot make such an order, see *CAC v Dodd* (above) at para 65.

[29] 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 21st day of April 2011

Judge Michael Hobbs
Chairman

J Robson
Member

G Denley
Member