

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 41

READT 011/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	RUTH CUSHLA OGILVIE Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1901) First Respondent
AND	KEIGHLY (KIKI) ABEL Second Respondent
Hearing:	25 September 2019, at Hastings
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Appearances:	Ms Ogilvie Mr M Mortimer, on behalf of the Authority Mr F Holland, authorised agent for Ms Abel
Date of Decision:	8 October 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Ogilvie has appealed pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 1901 (“the Committee”), issued on 1 May 2019, in which it decided not to inquire into her complaint against Ms Abel.

Complaint

[2] Ms Abel is a licensed salesperson, engaged at New Zealand Sotheby’s International Realty, at Napier. Ms Ogilvie’s complaint was that Ms Abel counselled a prospective purchaser against buying her property, and made loud and disparaging comments about the property in front of attendees at an open home.

[3] In November 2018, Ms Ogilvie listed her property in Napier for sale with Ms Meo, a licensed salesperson with Ray White Napier. The property had been appraised at \$890,000 to \$920,000. Within three days of listing (and before any open homes were held), Ms Ogilvie received an offer from Ms W of \$900,000, conditional on a building report. Ms W later cancelled that offer, on the basis of an unsatisfactory building report. Ms Ogilvie attended to the issues identified in the building report.

[4] An open home was held at the property on 18 November 2018. After the open home, Ms Meo sent Ms Ogilvie the following text message:

7 groups through. [Ms W] who put an offer on your house came through wuth [sic] a friend and told me ‘I don’t believe there has been any remedial work here you need to disclose’ can you get written confirmation from your builders? Hi Ruth I’m working. Yes please Grant summary be great font wHt [Ms W] killing it! [sic]

[5] Ms Ogilvie said in her complaint that the “friend” with Ms W was Ms Abel (whom she has never met), and that even after she provided evidence of repairs to the property, the damage had been done, and Ms Abel continued to gossip about the property. She said that the marketing campaign for the property never picked up. A conditional offer of \$840,000 fell over because the prospective purchaser could not sell his own property.

[6] On 21 January 2019, Ms Ogilvie had a conversation with the manager of Ray White, Ms Domney. Ms Ogilvie recorded the conversation, and later provided the recording to the Authority. Ms Domney is recorded as having made the following statements:

Kiki bagged your house to [Ms W] right in front of us, ...

Kiki who works for Sotheby's

She came through your house with [Ms W] very early on and I wouldn't be surprised if she fuelled the fire on the other side.

[7] Ms Ogilvie also said in her complaint that in a telephone conversation with Ms Meo on 31 January 2019, Ms Meo said that Ms Abel "was instrumental in the demise" of the campaign to sell her property.

[8] In February 2019, Ms Ogilvie listed the property with Bayleys Real Estate, for sale by auction. Ms Ogilvie reluctantly accepted an auction offer for \$820,000. She said in her complaint that she believed she lost \$80,000 as a consequence of Ms Abel's actions, which had destroyed the campaign to sell her property. She also said that her health had suffered as a result. She sought compensation from Ms Abel and Sotheby's.

[9] Ms Ogilvie's complaint was referred to the Authority's Early Resolution Team. In a letter dated 16 April 2019, an Early Resolution Facilitator reported on the complaint as follows:

Based on the information you have provided the REA, and the discussions we have had with you, [Ms Domney], [Ms Meo], and [Ms Abel's] manager, [Ms Abel] does not appear to have breached the Act or Rules. The reasons are:

1. There is no information to show [Ms Abel] was at the Property during the listing period.
2. There is no information to show [Ms Abel] made disparaging remarks about the Property.

[10] The facilitator stated that the Ray White listing agents had "verbally confirmed that they had no record or knowledge of Ms Abel being at the property during any viewings they conducted", and that Ms Abel's manager had said that he had "asked [Ms Abel] directly whether she had ever visited the property, and she responded that she had not".

[11] The facilitator further said that there was no information to show that Ms Abel had “disparaged” Ms Ogilvie’s property. The facilitator referred to the recording of Ms Domney’s comments, but said that they appeared “to be speculative and based on rumour”.

[12] Ms Ogilvie then asked for her complaint to be referred to a Complaints Assessment Committee.

The Committee’s decision

[13] The Committee’s decision not to inquire into Ms Ogilvie’s complaint was made pursuant to s 79(2)(c) of the Act. The Committee said:

3 Our reasons for the decision

3.1. The Committee’s reason for not inquiring into the complaint is that the complaint is frivolous, based as it is on gossip, and ought therefore not to be pursued.

3.2. The Committee acknowledges that, where a complaint discloses some potential conduct that requires investigation, it has the option under section 79 to inquire into the complaint, which will if necessary entail the investigator obtaining information from relevant third parties to substantiate or otherwise corroborate the complaint (or not, as the case may be).

3.3. However, in the Committee’s view, this option to inquire does not enable the Committee to initiate investigations into agents, with all the necessary stress and angst such investigations create, on the basis of what are nothing more than rumours and gossip. There is nothing in the complaint that suggests [Ms Abel] was even at the property during the relevant listing period ([Ms Abel] denies that she was), nor any real information to suggest she may have made disparaging comments about the property. The information provided by [Ms Ogilvie] in the form of a tape recording about a meeting with [Ms Domney] is nothing more than speculative hearsay.

3.4. The Committee therefore considers this complaint to be frivolous and declines to inquire into it.

[14] Mr Mortimer (counsel for the Authority) advised the Tribunal that while the facilitator was provided with the the recording of Ms Ogilvie’s conversation with Ms Domney, it was not provided to the Committee until 8 May 2019, one week after it issued its decision on 1 May. Having listened to the recording, all members of the Committee agreed that nothing in it caused them to change their decision as to the complaint.

[15] Mr Mortimer also advised the Tribunal that file notes were made of the facilitator's communications with Ms Domney, Ms Meo, and Ms Abel's manager (Mr Holland). However, these were not provided to the Committee.

Approach to appeals against decisions not to inquire under s 79(2) of the Act

[16] Section 79 of the Act sets out the procedure to be followed by a Complaints Assessment Committee when it receives a complaint:

79 Procedure on receipt of a complaint

- (1) As soon as practicable after receiving a complaint concerning a licensee, a Committee must consider the complaint and determine whether to inquire into it.
- (2) The Committee may—
 - (a) determine that the Complaint alleges neither neither unsatisfactory conduct nor misconduct and dismiss it accordingly:
 - (b) determine that the complaint discloses only an inconsequential matter, and for this reason need not be pursued:
 - (c) determine that the complaint is frivolous or vexatious or not made in good faith, and for this reason need not be pursued:
 - (d) determine that the complaint should be referred to another agency, and refer it accordingly:
 - (e) determine to inquire into the complaint.

[17] As the Tribunal said in its decision in *Dyall v Real Estate Agents Authority (CAC 403)*, a determination under s 79(2)(c) involves the Committee exercising a discretion. Section 79 of the Act performs a filtering function, enabling a Complaints Assessment Committee to decide whether a complaint should be investigated. The Committee must “consider” a complaint, but it has a discretion as to whether the complaint should become the subject of an inquiry.

[18] Accordingly, an appellant against a Committee's decision made under s 79 must satisfy the Tribunal that the Committee made an error of law or principle, took into account irrelevant considerations, failed to take relevant considerations into account, or that the Committee's decision was plainly wrong.¹ A Committee's decision is

¹ *Dyall v Real Estate Agents Authority (CAC 403)* [2016] NZREADT 41, at [28] (see also *Fielding v Real Estate Agents Authority (CAC 10068)* [2012] NZREADT 10, at [7]; *Sherburn v Real Estate Agents Authority (CAC 10017)* [2012] NZREADT 33, at [16]; and *Kacem v Bashir* [2011] 2 NZLR 1 (SC), at [32].

“plainly wrong” if it was not open to the Committee to make it, on the material that was before the Committee.²

Appeal submissions

[19] Ms Ogilvie submitted that the Committee was plainly wrong to determine that there was “nothing more than rumours and gossip” to substantiate her complaint and in particular, was plainly wrong in finding that there was nothing to suggest that Ms Abel was at the property while it was listed with Ray White, and was plainly wrong in its its assessment of the recording of her conversation with Ms Domney as being “nothing more than speculative hearsay”.

[20] She submitted that she became concerned that there had been very little foot traffic and enquiries about her property after Ms W’s offer was cancelled, so sought a meeting with Ms Domney. She submitted that it was clear that something had happened since the first offer, and this was confirmed by Ms Domney’s recorded statements to her. She further submitted that Ms Abel was seen at the property by the Ray White agents, as stated by Ms Domney. She also referred to Ms Meo’s text message to her, that Ms W and “a friend” had come to an open home, and that Ms W was “killing it”.

[21] Ms Ogilvie submitted that the Committee was wrong to describe her complaint as “frivolous, based as it is on gossip”, and ought therefore not to be pursued. She said that Ms Domney told her categorically that Ms Abel had “bagged” her property, in front of the Ray White salespeople, and she took her at her word. She said that she had bought and sold several properties and had never had something like this said to her, and she had no reason to think that Ms Domney was misleading her.

[22] Mr Holland made brief submissions on behalf of Ms Abel. He submitted that the complaint arose as a result of speculative comments by Ms Domney to Ms Ogilvie, with no substance, evidence or fact, and that there was no evidence that Ms Abel had ever been to the property. He submitted that the Committee had made a sensible decision based on fact.

² See *Holmqvist v Real Estate Agents Authority (CAC 403)* [2017] NZREADT 15, at [14].

[23] Mr Mortimer submitted that Committees should not hesitate to exercise the power given to them to dispose of complaints early, in appropriate cases. He submitted that Committees have expertise in dealing with complaints, and are well-placed to know whether a complaint relates to the real estate disciplinary jurisdiction (s 79(2)(a)), discloses matters of substance (s 79(2)(b)), or is vexatious or frivolous in substance (s 79(2)(c)). He submitted that s 79 provides an important protective function for licensees who are the subject of frivolous or vexatious complaints, or complaints that do not relate to their professional duties.

[24] Mr Mortimer also submitted that those complaints that do proceed to an inquiry use more of the Authority's resources as the complaint is investigated. He submitted that principled use of the s 79 power will mean that fewer resources are expended by the Authority on inappropriate cases, and are preserved for genuine complaints.

[25] With respect to the recorded conversation with Ms Domney, while acknowledging that the Committee did not have the recording until after they had issued the decision (at which time the Committee members confirmed that having listened to the recording, there was nothing in it that caused them to change their decision), Mr Mortimer submitted that it was open to the Committee to find on the basis of the facilitator's report that Ms Domney's comments were hearsay and plainly based on gossip. With respect to the text message from Ms Meo, Mr Mortimer submitted that Ms Meo did not refer to Ms Abel, and the text message does not provide any evidence to support Ms Ogilvie's complaint.

[26] Mr Mortimer further submitted that notwithstanding that the Committee did not have file notes of the facilitator's communications with Ms Domney, Ms Meo, and Mr Holland, the Committee was entitled to conclude on the material before it (that is, the facilitators report to Ms Ogilvie) that Ms Ogilvie's complaint ought not to be pursued, under s 79(2)(c) of the Act.

[27] Mr Mortimer further submitted that while the Committee made its decision under s 79(2)(c), a decision not to inquire could have been made under s 79(2)(a), on the grounds that the complaint did not allege either unsatisfactory conduct or misconduct.

[28] Mr Mortimer submitted that it is exceedingly unlikely that unsatisfactory conduct could have been made out from Ms Abel attending at the property with Ms W. He submitted that if Ms Abel attended as a friend of Ms W's, it is unlikely that she was performing real estate agency work. He acknowledged that a charge of disgraceful conduct does not require a licensee's conduct to be within the definition of "real estate agency work", but submitted that it is unlikely that making comments about a property at an open home would reach the threshold of disgraceful conduct.

[29] Alternatively, he submitted, Ms Abel could have been performing real estate agency work in the capacity as a buyer's agent (for Ms W). If that were the case, he submitted, it would be entirely appropriate that a licensee could attend a property viewing with the client, and assist in assessing the property (including making comments about the state of the property). In that case, he submitted, Ms Abel's conduct would not constitute unsatisfactory conduct.

Discussion

[30] Pursuant to s 111(4) of the Act, after considering an appeal against a decision of a Complaints Assessment Committee, the Tribunal may "confirm, reverse, or modify the decision of the Committee. Pursuant to s 111(5), if the Tribunal "reverses or modifies" a decision of the Committee, it may exercise any of the powers the Committee may have exercised. However, in the case of an appeal against a Committee's decision not to inquire into a complaint, the Tribunal's power is necessarily limited. In the present case, if Ms Ogilvie's appeal is successful, the only possible outcome would be that her complaint would be referred back to the Committee, with a direction that the Committee give further consideration to it.

[31] We must express our concern that the Committee was not provided with the recording of conversation between Ms Domney and Ms Ogilvie until after it had issued its decision.

[32] The reference to the conversation in the facilitator's report to Ms Ogilvie was not accurate. The facilitator reported that "while [Ms Domney] indicated [Ms Abel] may have made comments about the property, [Ms Domney's] comments appear to be

speculative and based on rumour”. In fact, Ms Domney said “[Ms Abel] bagged your house to [Ms W] right in front of us”, and “[Ms Abel] came through your house with [Ms W] very early on and I wouldn’t be surprised if she fuelled the fire on the other side”. The only “speculation” was Ms Domney’s statement that she would not have been surprised if Ms Abel had “fuelled the fire on the other side”. There was nothing to indicate that Ms Domney was speculating, or repeating gossip, in her statements to Ms Ogilvie that Ms Abel “bagged your house ... right in front of us”, or that Ms Abel “came through your house with [Ms W] very early on”.

[33] We must also express our concern that the Committee was not provided with any file notes of the facilitator’s communications with Ms Domney, Ms Meo, and Mr Holland. The facilitator reported that “the Ray White listing agents for the property” (that is, Ms Domney and Ms Meo) “verbally confirmed that had no record or knowledge of [Ms Abel] being at the property during any viewing they conducted”. The contradiction between Ms Domney’s statements in the recorded conversation and those of Ms Domney, Ms Meo, and Mr Holland, as reported by the facilitator, is clear.

[34] As both the recording of the conversation and the communications with Ms Domney and Ms Meo were referred to in the facilitator’s report, we would have expected that in the face of the contradictory statements, the Committee would have been alerted to the need to have the original material before it. It did not have that material before it, and it did not request it.

[35] In the circumstances, by virtue of if not having been given the recording of the conversation between Ms Domney and Ms Ogilvie, and file notes of the facilitator’s communications with Ms Domney, Ms Meo, and Mr Holland, the Committee failed to consider all relevant information before deciding that Ms Ogilvie’s complaint was “frivolous”, and “based on gossip”, and therefore should not be pursued. The Committee should have considered that material. Ms Ogilvie’s appeal must therefore be allowed, and her complaint referred back to the Committee for further consideration.

Outcome

[36] Ms Ogilvie's appeal against the Committee's decision under s 79(2)(c) of the Act to take no further action on her complaint against Ms Abel is allowed. The Committee's decision is quashed.

[37] The Committee is directed to give further consideration to the complaint, and in particular to consider the recording of the conversation between Ms Domney and Ms Ogilvie, and the facilitator's notes or memoranda of communications with Ms Domney, Ms Meo, and Mr Holland.

[38] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Ms C Sandelin
Member

Mr N O'Connor
Member