

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 81

READT 046/15

UNDER THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF AN APPEAL UNDER SECTION 111 OF
THE ACT
BETWEEN MARY ANN KENNEDY
Appellant
AND THE REAL ESTATE AGENTS
AUTHORITY (CAC 403)
First respondent
AND CLIVE LONERGAN
Second respondent

Tribunal: Ms K Davenport QC – Chairperson
Mr J Gaukrodger – Member
Ms C Sandelin – Member

Appearances: The appellant in person
Ms N Copeland for first respondent
Ms K Kenealy, Kennedys Law, Solicitors for second respondent

Decision: 21 December 2016

DECISION ON THE PAPERS

[1] On 7 February 2014, the appellant complained to the Real Estate Agents Authority about the actions of the second respondent Clive Lonergan. Mr Lonergan had been engaged as an agent to sell Ms Kennedy's property at 168 Ocean View Road, Oneroa, Waiheke Island.

[2] On 25 June 2015, the Complaints Assessment Committee considered the 12 complaints by Ms Kennedy and made findings of unsatisfactory conduct against

Mr Lonergan. They found that five of Ms Kennedy's complaints were established. Ms Kennedy's other complaints were dismissed.

[3] On 27 August 2015, the Complaints Assessment Committee censured Mr Lonergan and ordered him to apologise, to pay a fine and to reimburse the complainant the sum of \$515.60 for some of the costs which Ms Kennedy had incurred.

[4] Ms Kennedy appeals these orders. The basis of her appeal is that the Complaints Assessment Committee should have laid charges of misconduct against Mr Lonergan under s 73(a) of the Real Estate Agents Act 2008 with respect to complaints 1 and 10 and under s 73(b) with respect to complaints 2 and 3. Ms Kennedy submits that for complaints 1 and 10 Mr Lonergan was guilty of disgraceful conduct. These complaints relate to the established allegation that Mr Lonergan gave a key to Ms Kennedy's property to a person unknown to Ms Kennedy (Mr and Mrs T) and that these persons moved furniture and personal possessions into the property which caused damage to Ms Kennedy's personal possessions and damage to the interior walls of the dwelling.

[5] Ms Kennedy submits that complaints 2 and 3 should have led to charge under s 73(b) i.e. that Mr Lonergan's conduct constitutes seriously incompetent or seriously negligent real estate agency work. Those complaints are that Mr Lonergan:

- (a) reduced the advertised purchase price to \$500,000 from the instructed asking price of \$600,000 (without consent); and
- (b) when instructed in January 2014 to reduce the asking price to the low \$500,000s Mr Lonergan did not do so.

[6] Ms Kennedy also seeks a finding of unsatisfactory conduct against Mr Lonergan with respect to complaints 4, 9 and 12. These complaints are:

(i) **Complaint 4:** That Ms Kennedy received virtually no correspondence or information about marketing of the property from the licensee between January 2013 and January 2014.

(ii) **Complaint 9:** That Mr Lonergan compromised Ms Kennedy's security and insurance cover by requesting the T's to leave the key inside a small fireplace on the property where it could be accessed by unauthorised persons.

(iii) **Complaint 12:** That licensee Lonergan made comments about the complainant which were defamatory and therefore amount to disgraceful conduct.

[7] This decision is made by the Tribunal on the papers and based on evidence before the Complaints Assessment Committee.

The facts

[8] Ms Kennedy listed her property ("the Bach") on Waiheke Island for sale with Curnow Real Estate trading as Bayleys Waiheke Island in 2013. The agency agreement was signed on 26 January 2013 and the property was listed at a price of \$600,000 (its CV). It is common ground that Mr Lonergan did not prepare a market assessment of the Bach before the agency agreement was signed.

[9] No marketing budget was agreed between Ms Kennedy and Bayleys but the property was advertised in the Waiheke Weekender between March 2013 and January 2014 on 12 occasions. It appears there was modest interest in the property. On or about August 2013 the licensee says he had a discussion with Ms Kennedy about reduction of the price. There is a dispute between the two of them as to whether a telephone conversation took place about reducing the price as Ms Kennedy denies this call. Further there was no instruction in writing to reduce the price. Nonetheless Mr Lonergan did reduce the price on Bayleys' website.

[10] When it was drawn to his attention that Ms Kennedy did not want a reduction in price (approximately one month later), he corrected the Bayleys' website and other information. There was a later discussion between Ms Kennedy and Mr Lonergan where Ms Kennedy asked Mr Lonergan to reduce the price to approximately \$520,000 but Mr Lonergan did not do this. Ms Kennedy complained and Mr Lonergan responded that this was because he was awaiting instructions from her in writing. The Complaints Assessment Committee found that Mr Lonergan should have made this clear to Ms Kennedy but it was prudent for him to wait in these circumstances.

[11] The most significant complaint arises out of the unauthorised use of Ms Kennedy's Bach by Mr and Mrs T during October and November 2013. It appears that Mr T met Ms Kennedy's brother in a pub and on several occasions Mr Kennedy offered him the use of Ms Kennedy's bach which he claimed to partially own. He provided him with a key which he said would open the Bach. In October 2013 Mr and Mrs T went to the bach with their children to use it. Mr T found that the key given to him by Mr Kennedy did not open the Bach. After calling Mr Kennedy several times Mr T called Mr Lonergan (as he saw his name on the for sale sign on the property) and told him that he had been offered a right to stay in the Bach by someone that Mr Lonergan understood to be Ms Kennedy. Mr Lonergan did not contact Ms Kennedy to confirm but went to the office and provided a key to Mr and Mrs T. He told them how to drop the key into Bayleys' office on Sunday or where to leave the key on the property should they leave after Bayley's closed on Sunday. Mr Lonergan then retrieved the key from outside the property on the Monday morning.

[12] Mr Lonergan does not recall a second occasion where the T's obtained a key but it seems established by the evidence that Bayleys provided the key to Mr and Mrs T again in November 2013 after having arranged with Mr Lonergan to do so. Mr and Mrs T believed that they could use the Bach on a long-term basis, and put up blinds and removed some of Ms Kennedy's property from the Bach and took their own possessions to be stored at the Bach. Ms Kennedy was initially unaware of the fact that Mr and Mrs T had stayed in the property but when she went to visit the property in January 2014 with a builder she immediately noticed that the bach and her possessions had been moved and she became very concerned about this. Mr

Lonergan did not tell Ms Kennedy that he had given access to the property to Mr and Mrs T and it was not until Mr T made another phone call to Mr Lonergan in late January 2014 and asked for the key again that Mr Lonergan referred him to Ms Kennedy. Ms Kennedy then discovered that the property had been accessed by use of key that had been provided by Mr Lonergan to Mr and Mrs T.

[13] Ms Kennedy has complained about damage to her property and the losses that have been caused by the T's occupation. Shortly after she discovered that Mr Lonergan had allowed access to her property she cancelled the agency agreement.

[14] The Complaints Assessment Committee (the CAC) found licensee Lonergan should have checked with Ms Kennedy before he released the key. The CAC found that he was in breach of Rule 9.5 for this behaviour and found him guilty of unsatisfactory conduct. The CAC also found that Mr Lonergan's actions in reducing the price without Ms Kennedy's approval (complaint 2) were in breach of R 5.1. Finally, Mr Lonergan was found to have breached R 10.2 for his failure to provide adequate information to Ms Kennedy about the progress of the sale (Complaint 4), and to have breached R 10.6 for complaint 8. (Failure to advise how the commission would be calculated.) This decision is not appealed by Ms Kennedy.

The appeal

[15] Ms Kennedy's submissions on appeal are as follows:

- She wishes to withdraw her complaints 6, 11 and 12.

Complaints 1 and 10: unauthorised handing out of the key.

[16] Ms Kennedy submits that Mr Lonergan providing the key to the T's on two occasions amounts to disgraceful conduct. She submits that a finding of unsatisfactory conduct only sends the wrong message to real estate agents. Ms Kennedy submits that the mitigating factors considered by the Complaints Assessment Committee were not mitigating because Mr Lonergan did not know of any of these matters at the time. These mitigating factors included:

- Mr T's belief that he had permission to stay at the Bach; and knew the name of the owner and the address had a key
- Mr Kennedy's behaviour in allowing Mr T to believe he had permission.
- The fact that the request for the key came relatively late at night

[17] Ms Kennedy submits that Mr Lonergan did not have the permission to hand out the key to the property to anyone and that the fact that a family member of Ms Kennedy's had facilitated this situation does not alter the fact that this conduct amounts to misconduct. Ms Kennedy also points to the significant nature of the damage inflicted by Mr and Mrs T in removing Ms Kennedy's property and her furniture. Ms Kennedy also submits that an important reason the charge should be laid is because the Complaints Assessment Committee does not have jurisdiction to grant compensation for property damage consequential upon a licensee's negligence. This can only be granted by the Tribunal under s 73(b) for serious negligence.

Complaint 2: the reduction in the price

[18] Ms Kennedy submits that the unilateral price reduction led to damage in terms of "contaminating the property" for the market and this was neither transitory nor insignificant. She submits that it was advertised widely on Trade Me and Bayleys' website. Once Ms Kennedy discovered the error she immediately instructed Mr Lonergan to increase the listed price to \$620,000.

[19] Ms Kennedy submits that the Tribunal could award compensation of up to \$80,000 for the diminution in the value of her property because of Mr Lonergan's actions in reducing the listing price if the conduct of Mr Lonergan was held to be misconduct.

Complaint 3:

[20] Ms Kennedy complains that she was unaware that she was required to put the instruction to reduce the listing price in writing as Mr Lonergan never told her this. Ms Kennedy seeks a charge of misconduct to be laid under s.73(b) of the Act.

Complaint 4:

[21] Ms Kennedy submits that she received no communication about the sale process from Mr Lonergan. She seeks a finding of unsatisfactory conduct.

[22] *Complaint 9:*

Ms Kennedy submits that allowing the key to be placed outside the property was a breach of security and that vendors on Waiheke Island should be entitled to expect the same standards of security as in Auckland and “the casual nature of Waiheke Island licensees is not appropriate”. Ms Kennedy seeks a finding of unsatisfactory conduct.

2nd respondent’s submissions

[22] Complaint 1. The second respondent submits that allowing the T’s to have a key is not misconduct but rather a case akin to the decision of *Ross v REAA and Nickless* [2013] READT 109. In that case an agent was “placed under intense pressure as a human being and sought to smooth the way for a settlement without realising that important issues can unexpectedly surface”. The second respondent submits that this case is similar in that Mr Lonergan was placed under pressure and sought to assist a person who needed a key to get into a property after hours. The respondent submits the appellant has put no cogent case before the Tribunal as to why this conduct should lead to a charge being laid and submitted that the complainant’s desire to seek compensation is not an appropriate reason for allowing the appeal. They submit that the “READT cannot consider what an appropriate penalty might be and work backwards”.

[23] With respect to complaint 2, the respondent makes a similar submission i.e. that conduct of the agent in breaching Rule 5.1 is conduct which must be assessed

without reference to whether the complainant can claim compensation if a charge is laid.

[24] The second respondent submits with respect to complaint 3, that having been in breach of Rule 5.1 by not having written authority to reduce the listing price the agent cannot also be found to have acted in breach of the Rules by failing to reduce the price without the same written authority. They submit that this complaint ought to be dismissed.

[25] With regard to complaint 4, the second respondent submits it is not a rehearing of the evidence but is an appeal on issues of law. Further the respondent submits that the Tribunal is bound by the factual determination of the CAC that Mr Lonergan provided email updates and telephone calls on an irregular basis and that this casual approach did not reach the level of breach of Rule 9.3, but his failure to provide a current market appraisal was a breach of rule 10. 2.. The second respondent submits there is nothing further to be said with respect to this complaint.

[26] With respect to complaint 9, the second respondent submits that the finding that keys are often left hidden on the property on Waiheke Island because of the need for tradespeople to access property is a finding of fact which cannot be challenged on an appeal on the papers and this appeal ought to be dismissed.

[27] The Real Estate Agents Authority submitted that this case was an appeal from the exercise of the discretion (not to lay charge) and as such the general appeal provisions did not apply. They referred the Tribunal to the decision of the Supreme Court in *K v B* (2010) 28 FRNZ 483 at [32]. This case held where an appeal is against the discretion then the appellant must show an error of law or principle or that the CAC considered of irrelevant considerations or failed to take account of relevant considerations or that the decision is plainly wrong. The Tribunal has followed this in the decision of *Dunn v REAA & Murray* [2012] NZREADT at [56]. Thus, the decision not to lay a charge on complaint one was a decision in the exercise of the discretion and there was no evidence to suggest that the CAC erred in any of the ways set out in the decision of *K v B*.

Claim for compensation: Complaint 2

[28] The Real Estate Agents Authority submits that relying on the decision of a High Court in *Quin v Real Estate Agents Authority* [2012] NZ HC 355 licensees can only be ordered to do something or take actions to rectify or put right an error or omission and that compensation generally is not available. The Authority submits that there was no evidence that there was any diminution in value of the Bach caused by the three to four weeks that the property was mistakenly advertised at \$520,000. It submits if there had been such a loss it would appear to be “compensation for diminution of a value” of a kind precluded by the *Quin* decision.

Complaint 4A: is this unsatisfactory conduct?

[29] Rule 9.3 of the Rules provides that a licensee must communicate regularly and in a timely manner with the client and keep the client well informed of matters relevant to the client’s interests unless otherwise instructed by the client.

[30] The factual finding made by the Committee was that there were some email updates and telephone calls provided on an irregular basis to Ms Kennedy but that Mr Lonergan had a casual approach to communication with the complainant. The Committee found that these facts did not amount to a breach of Rule 9.3. The Authority submits that this is a decision for the Tribunal as to whether the updates were sufficient to comply with these obligations under Rule 9.3.

Complaint 9: the failure to leave the key in a lock box

[31] The Real Estate Agents Authority submit that it is a matter for the Tribunal to determine whether it considers the steps taken by the second respondent to leave the key hidden on the property overnight is a breach of Rule 9.55 – that a licensee must take due care to ensure the security of the house and avoid the risks of damage to customers.

Discussion

Principles on which this appeal must proceed

[32] Appeals from a refusal of the Complaints Assessment Committee to prosecute a respondent are appeals from the exercise of a discretion as are decisions to take no action on a complaint. Thus, the appellant must satisfy the Tribunal that there has been an error of law or principle, or the CAC considered irrelevant considerations, or failed to take account of relevant considerations or the decision is plainly wrong. While the submissions of the appellant are not structured in this way the Tribunal will consider each of the complaints based on an analysis under the *K v B and May v May*¹ principles set out above.

Complaints 1 and 10: unauthorised handing out of the key

[33] In the Tribunal's view this is undoubtedly the most serious of Ms Kennedy's complaints. There is no doubt that the Complaints Assessment Committee were right in law to find that Mr Lonergan should not have at any time handed out the keys to the property without checking with Ms Kennedy that she had authorised Mr and Mrs T to have access to the property. Mr Lonergan's failure to do so amounts to a breach of Rule 9.5. The Tribunal must now determine whether the Committee erred in not finding this conduct was disgraceful or seriously negligent or reckless behaviour.

[34] In *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 the Court said at [29]:

[29] ... If the charge is under s 73(a) the critical enquiry is whether the conduct is "disgraceful". Conduct which involves a marked and serious departure from the requisite standards must be assessed as "disgraceful", rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to "seriously incompetent or negligent real estate agency work". Work of that nature would also involve a marked and serious departure from particular standards; the standards to which s 73(b) is directed are those relating to competence and care in conducting real estate work.

[35] Misconduct is meant for serious breaches of the Act, seriously negligent work or conduct that would by most persons be described as disgraceful.

¹ (1982) 1 NZFLR 165.

[36] We do not find that the Complaints Assessment Committee has erred in any of the ways set out in *May v May* in reaching this decision. Every case must be assessed on its own facts and while it is undeniably distressing for Ms Kennedy to know that on two occasions persons unauthorised her were in her house and have put away her property, the focus must be on the level of wrongdoing by Mr Lonergan- as this is a disciplinary process. He clearly should not have enabled anyone to stay on the property without having checked with Ms Kennedy that she consented. However, was the conduct disgraceful or reckless or negligent real estate agency work? The Tribunal do not consider it was so. Mitigating factors must be considered in assessing the degree of seriousness of his conduct and the fact that Mr T knew where the property was and knew the name of the owner and indeed believed himself he had permission to be there is a mitigating factor. Further it was late at night and the family had young children. This does not remove from Mr Lonergan the obligation to call Ms Kennedy. Having gone to the office to get a key that first night there is no reason why he could not have found her number and given her a call from there. But these factors mean his conduct does not fall within the definition of disgraceful or seriously negligent conduct as set out in the decision of *Morton-Jones* (above). The required element in this case would be an element of deliberate behaviour or a significant degree of recklessness or indifference to the need to prevent unauthorised persons from having access to the Bach. The Tribunal do not consider that the conduct had any such element on the facts of this case. The Complaints Assessment Committee has therefore not made an error of law or taken into account some factors which they found mitigated the conduct.

[37] Further, the availability of compensation to Ms Kennedy is not a ground for setting aside the Complaints Assessment Committee's decision. The focus in any disciplinary case is on protection of the public and maintenance of standards. Thus, the focus must be on the real estate agent's conduct rather than on the need for compensation for the complainant which can be obtained through civil means if necessary. For these reasons the appeal on complaints 1 and 10 is dismissed.

Complaint 2: the reduction in purchase price without consent of Ms Kennedy

[38] The Complaints Assessment Committee was correct to find that Complaint 2 amounted to a breach of Rule 5.1. The price should not have been reduced except in writing. However, for the reasons set out above in [36] we do not think this conduct does amount to disgraceful or seriously reckless or negligent real estate agency work. Again, the necessary element of deliberate or recklessness is simply lacking in the facts of the case. We repeat there has been no error of law, wrong assessment of the factual material or reliance on incorrect material and is not clearly wrong. Mr Lonergan's conduct, which includes Mr Lonergan's evidence (which is contested by Ms Kennedy), that he had her consent to drop the price is not, in the Tribunal's opinion conduct which is anything more than unsatisfactory conduct. The level of wrongdoing does not reach the necessary level of seriousness as set out in *Morton_Jones v REAA*. Again, the loss to Ms Kennedy is not a reason for the Tribunal to reach a different conclusion on the seriousness of the conduct. The Tribunal conclude that there has been no error of law, wrong assessment of the factual material or reliance on incorrect material and is not clearly wrong

[39] The decision of the Supreme Court in *Stephens v Premium Real Estate* is not relevant to this case where there clearly has been no similar breach of fiduciary duty by Mr Lonergan with respect to his obligations to Ms Kennedy as the agents from Premium breached their fiduciary duties to Mr and Mrs Stephens. We dismiss the appeal on this complaint.

Complaint 3

[40] The Tribunal dismiss this appeal. As Complaint 2 was correctly held to be a breach of Rule 5.1 Complaint 3, (Mr Lonergan failing to reduce the price without written authority), cannot also be a breach of the Rules. We concur with the CAC's finding that Mr Lonergan should have conveyed the need for the reduction to be in writing to Ms Kennedy and failed to do so, but also do not interfere with their finding that this did not amount to unsatisfactory conduct. We repeat there has been no error of law, wrong assessment of the factual material or reliance on incorrect material and is not clearly wrong. The Tribunal dismiss this appeal.

Complaint 4(a)

[41] The Complaints Assessment Committee made a finding of fact on this point (as to the level of communication with Ms Kennedy). The Tribunal cannot interfere with this finding of fact without hearing evidence. It has not done so therefore it must accept the finding of the Complaints Assessment Committee which is supported by some of the evidence. If the Tribunal were making its own decision on the point based on the evidence before it, it would also have dismissed this complaint. The duty to keep the vendor informed is an important duty but there is no requirement as to how this should be done. The licensees approach was casual and a bit slack but nothing more. The Tribunal therefore dismiss the appeal on this point.

Complaint 9

[42] Mr Lonergan was found not to have breached his obligations by arranging for Mr and Mrs T to leave the key hidden outside the Bach hidden. While the Tribunal agree with Ms Kennedy's submissions that there should be no difference between the level of security expected between one part of New Zealand and another, we understand the circumstances that led to Mr Lonergan making this arrangement and consider that the facts of this aspect of the case are more part of the complaints 1 and 10. The simple fact of the matter is that Mr Lonergan should not have allowed anyone to have access to the property or the key without confirming with Ms Kennedy that this was appropriate. Leaving a key in a hidden spot for a short time may not be ideal but in some circumstances, it is necessary. The Tribunal can see that for houses where the owners do not live on the island there may be times when they agree to leave a key out for a tradesman or agent. In this case the real mischief was letting anyone into Ms Kennedy's house without consent and the key issues seems an incidental complaint. On balance the Tribunal do not find that this was unsatisfactory conduct. Further the Tribunal can find no error of law or that the CAC took into account irrelevant considerations or failed to take into account relevant considerations or was plainly wrong.

[43] The Tribunal therefore dismiss Ms Kennedy's appeal on all matters.

[44] The Tribunal draws to the parties' attention to the appeal provisions of s 116 of the Real Estate Agents Act 2008.

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member