Decision No: [2013] NZREADT 20

Reference No: READT 025/12

**IN THE MATTER OF** of a charge made under s.91 of the Real Estate Agents Act 2008

**BETWEEN** **REAL ESTATE AGENTS AUTHORITY (CAC 20002)**

Prosecutor

**AND** **JOHN RICHARD LLOYD**

Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Ms K Davenport - Chairperson
Ms N Dangen - Member
Mr J Gaukrodger - Member

**APPEARANCES**

Mr L Clancy for the Real Estate Agents Authority
Mr J Waymouth for the Defendant

**HEARD** at AUCKLAND on 14 & 15 February 2013

## DECISION

### *Introduction*

[1] Mr Lloyd is a real estate agent practising in Tairua. He commenced working as an agent in June 2007. Mr and Mrs Calder, (the complainants) were introduced to Mr and Mrs Lloyd in mid 2006. The parties began to discuss whether or not the Calders would purchase from the Lloyds a semi-detached townhouse as part of a development that Mr and Mrs Lloyd (through their company Elephant Investments Limited) were contemplating at 10 Manaia Road, Tairua. The proposal was that the Lloyds would develop two units to a design standard that was acceptable to the Calders who would buy the land and the completed unit from the Lloyds. In 2006 the Calders decided not to proceed with the project. However by April 2007 contact had been re-established and the parties appeared keen to work together to reach an agreement over construction of the unit and sale of the land.

[2] To progress their discussions in May 2007 Mr Lloyd prepared a document called a Memorandum of Understanding (MOU). He sent it to the Calders on 7 May

2007 by e-mail. In the e-mail Mr Lloyd described the MOU as a document to *"document past discussions, record the present and future outcomes for us both"*. The Memorandum of Understanding covered the parties' obligations to each other, their intention that the townhouse would be built to plans and specifications acceptable to the Calders and that eventually an Agreement for Sale and Purchase would be entered into. He proposed that a deposit of $10,000 would be paid to the Lloyds on the signing of the Memorandum of Understanding. The Memorandum of Understanding was not signed. Mrs Calder told the Tribunal that she did not like the terms of the Memorandum of Understanding and did not consider that it was necessary. On or about 20 May she paid $5,000 to Mr Lloyd for plans and the parties proceeded to continue to discuss and develop a proposal.

[3] Mr and Mrs Calder say that in March 2008 after a design had been agreed they were told by Mr Lloyd that resource consent had been obtained. On that basis they entered into an Agreement for Sale and Purchase on 31 March 2008 for purchase of the land and construction of the townhouse at a fixed price. Differences arose between the parties. In October 2008 the Calders cancelled the agreement. During the course of the parties' discussions and negotiations following the cancellation, a copy of the Memorandum of Understanding was sent by the solicitors to the Calders. In the correspondence between the solicitors on 4 November 2008 Mr Lloyd's lawyers said:

> *"You failed to make any mention in the Memorandum of Understanding signed sometime in May 2007. This set out a procedure in Clause 2 which has been closely followed by the parties throughout the transaction".*

The Calders' solicitor replied that the Memorandum of Understanding was never signed by Mr and Mrs Calder. Mr Lloyd's lawyers disagreed and said that the Memorandum of Understanding had been initialled by all of the parties. The Memorandum of Understanding was subsequently produced for Mr and Mrs Calder. This document has apparently been initialled by all the parties on page 2. Mr and Mrs Calder denied that they had ever signed this Memorandum of Understanding or that the initials were theirs. In 2011 the Calders complained to the Real Estate Agents Authority about the signature on the Memorandum of Understanding. This document was sent to Ms Morrell a forensic document examiner. As part of the evidence supplied to Ms Morrell other signatures of the Calders were sent, including a copy of the Agreement for Sale and Purchase. In the course of preparing her report she raised a question about some of the initials on the Agreement for Sale and Purchase. She considered that the initials which appeared to be those of Mrs Calder were not. The Complaints Assessment Committee having received her report, determined to lay a charge against Mr Lloyd.

[4] *The first charge is a charge of misconduct under s 73A 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***

*The first charge is a charge of 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.*

***Charge 1:***
*In respect of the sale of a property at 10 Manaia Road, Tairua by the defendant to the complainants, forgery by the defendant of:*

*(a) The initials of the complainants on a document dated 7 May 2007 described as a Memorandum of Understanding; and*

*(b) The initials of Coleen Calder on the appendices additional to the Agreement for Sale and Purchase for the property.*

***Charge 2:***
*The Complaints Assessment Committee 2002 further charges the defendant John Lloyd with misconduct under s 73 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***
*In respect of the sale of the property by the defendant to the complainants misleading the complainants by stating that Resource Consent had been granted in respect of the property when it had not.*

***The Issues***

Having considered the charges and the evidence there are a number of issues for the Tribunal.

Charge 1(a)
1. Did the Calders sign or initial a Memorandum of Understanding dated 7 May 2007?
2. If the Calders did not sign it who could have signed it?
3. Is there evidence on the balance of probabilities, [bearing in mind the seriousness of the charge] to find that Mr Lloyd forged the initials?
4. If so, was he an agent at the time of the forgery?

Charge 1(b)
1. Did Mrs Calder sign the appendix to the Agreement for Sale and Purchase?
2. If she did not then who could have signed it?
3. Is there evidence (on the balance of probabilities, bearing in mind the seriousness of the charge) to find that Mr Lloyd forged these initials?

Charge 2
(i) Did Mr Lloyd say to Mrs Calder [prior to the Agreement for Sale and Purchase being signed] that the resource consent had been given?

***Starting Point – the Law***

[5] The Tribunal need to be cogniscent of a number of important matters in considering the evidence:

1. The Complaints Assessment Committee must prove the charge on the balance of probabilities [having regard to the seriousness of the allegation]. See *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

2. If the Tribunal cannot determine if the case is proved it must resolve this uncertainty in favour of the defendant.

3. Assessing evidence where there are number of different pieces of circumstantial evidence requires the Tribunal to assess the varying pieces of evidence individually and collectively. As Robert Fisher QC said in his recent report to the Minister of Justice at [46]:

   *"The fundamental principle is that the probative value of multiple items of evidence supporting the same factual allegation is greater in combination than the sum of the parts. As each item of evidence implicating the accused is aggregated the probability of guilt increased exponentially [R v Guo [2009] NZ CA at 612] ...*

   *In assessing a circumstantial evidence case it is not enough to evaluate each item in isolation then stop; it is necessary to go on and consider the effect of all relevant items in combination. Strictly speaking the rope analogy underrates the importance of combining the different items of evidence. The effect of combining is not so much a matter of adding the various strands in the rope as multiplying them – the whole is greater than the sum of its parts."*

   [From Report to the Minister of Justice December 2012]

4. We also note the transitional provisions contained in s 172 which apply to this case.

***The Memorandum of Understanding***

***Issue 2***

[6] Mrs Calder gave evidence that the Memorandum of Understanding was discussed in a meeting with the Lloyds. She was clear that neither she nor her husband had ever signed a Memorandum of Understanding and that it was not her (or his) initials signatures on the second page of the document.

[7] Ms Morrell the document examiner said that she had reached the conclusion that the initials were not Mr and Mrs Calder's but that of another writer. She set out in detail how she had reached that conclusion. However she said that her conclusion was qualified because the document in question was not the original document [as to which see the evidence of Mr Lloyd]. Further the set of initials that she had to work with gave a very limited amount of material. However her conclusions were that the evidence pointed away from the initials being genuine. In cross-examination she was asked how certain she was that they were forged. She said that there was a scale. The top of the scale was beyond reasonable doubt the document was forged. The second level was that there was a high probability that the document was forged, the third level was that it was probable on the balance of probabilities that there was an attempted simulation of the initials. The fourth level was probable, the fifth was possible and the sixth was inconclusive. She said on this scale she had reached a conclusion these initials were at the third level, i.e. probable and that there was an attempted simulation of the initials. She referred to the fact

that under magnification there could be seen to be pen marks where the person writing the initials had stopped and started which were very unusual on a genuine signature.

[8] Mrs Lloyd said that she could not remember signing the Memorandum of Understanding but confirmed that her initials did appear on the Memorandum of Understanding. She said she had a recollection of her husband having crossed out the sum of $10,000 and writing $5,000 and deleting other parts of that clause in the presence of the Calders. She was able to specifically recall the amendment to page 2 of the Memorandum of Understanding being made by Mr Lloyd but could not recall when it was actually signed.

[9] Mr Lloyd told the Tribunal that he had prepared the Memorandum of Understanding and the parties had agreed to follow the words of the memorandum in their conduct as they worked towards signing an Agreement for Sale and Purchase and obtaining Resource Consent. He categorically denied that he had forged the initials of Mr and Mrs Calder but said he could not recall how and when the Memorandum of Agreement came to be signed. He stressed that the first time that he saw the memorandum was after he received the files from his solicitors which was when he opened the two packets of files that he had received from Knight Coldicutt in the presence of Mr Gallacher (the Real Estate Agents Authority investigator).

[10] Mr Lloyd told the Tribunal that he had not forged the documents but if he had he would have ensured that the agreement was signed on every page not just Page 2. He accepted that his solicitors had referred the letters received from Glaister Ennor (the Calder's solicitors) to him and prepared their responses based on instructions from him in which the Memorandum of Understanding was put forward as being signed and binding. However he denied any suggestion that the initials were the only thing that bound the Calders to the Memorandum of Understanding and said that all parties had been working and moving forward on the basis set out in the agreement. He said that he did not recall signing the document or how the signatures were made but he found the document on the file once he had received it back from Knight Coldicutt. He was adamant that once contacted by the Real Estate Agents Authority he had requested files back from Knight Coldicutt. He said he received the files by courier but without opening them he determined (because of the shape of the package) that they had not sent to him all of his files. He said he collected a second file from Knight Coldicutt in July 2011 and held them unopen in his office until he met with Mr Gallacher in September 2011.

[11] Mr Gallacher gave evidence. He told the Tribunal he had been seeking the original of the Memorandum of Understanding and so went to see Mr Lloyd in Tairua. He said Mr Lloyd had the files with him. He described the files as being sealed with sellotape. He said Mr Lloyd carefully took off the sellotape in his presence and he was unable to tell whether or not they had been opened previously. He thought it was most likely that they had been (given Mr Lloyd had had them for months) and been stuck down again. He says that Mr Lloyd gave him a copy of what he said was the original agreement and Mr Gallacher pointed out that it was a colour copy. In the file note made by Mr Gallacher he recorded Mr Lloyd having said to him in a telephone call on 7 September 2011 that the "*Calders are liars and are not getting the originals*". This was not challenged on cross-examination of Mr Gallacher.

[12] The Tribunal has a number of different strands of essential circumstantial evidence to examine to answer the questions/issues raised.

1. ***Did the Calders initial the Memorandum of Understanding?***
   No, the Tribunal are convinced by Mrs Calder's evidence [confirmed by Mr Calder who was not required for cross-examination] and the evidence of Linda Morrell that the document was not initialled by the Calders.

2. ***Who did initial it?***
   There are three possibilities:
   (i) Some unknown third person.
   (ii) Mr Lloyd.
   (iii) Mrs Lloyd.

[13] As the Calders and Lloyds were the only parties who were interested in the Memorandum of Understanding we rule out any unknown third person as it would seem improbable that anyone else would be interested in forging initials. Further there has been no suggestion that Mrs Lloyd had any direct involvement in signing the Memorandum of Understanding. Indeed the evidence presented in respect of Charge 1(b) was that she authorised her husband to sign the Agreement for Sale and Purchase on her behalf. This only leaves Mr Lloyd who denies signing it.

[14] What is the circumstantial evidence that we have to analyse to determine whether or not it was Mr Lloyd who signed it? We find that Mr Lloyd did forge the initials of Mr and Mrs Calder.

Our reasons are:

(i) First, the document was put forward as genuine by his lawyers. The careful examination of the letters between Glaister Ennor and Knight Coldicutt in October and November 2008 show Glaister Ennor denying that the Memorandum of Understanding had been signed and Mr Lloyd's solicitors continuing to assert that the document was initialled by all of the parties (and was binding).

(ii) The only copy of the document where the initials of Mr and Mrs Calder appear is the copy from Mr Lloyd's file.

(iii) Mrs Lloyd told the Tribunal that Mr Lloyd liked to keep documents 'tidy' and that he had amended/changed the $10,000 on the Memorandum of Understanding to $5,000 to keep it in line with the Agreement for Sale and Purchase. She also said that he had signed her signature before, not only on the Agreement for Sale and Purchase (Charge 1(b)) but also on other documents (she suggested a cheque) when she had been sick.

(iv) The unchallenged evidence of Mr Gallacher of his telephone conversation with Mr Lloyd where Mr Lloyd said that the Calders were not going to get the original of the document.

(v) The absence of the original.

(vi) The fact that Mr Lloyd sought to rely on the signed copy.

(vii) Our assessment of the credibility of Mr Lloyd and Mrs Calder.

[15] Having analysed all of these strands of evidence and listened to and read the evidence of the Calders and Mr and Mrs Lloyd we come to the conclusion on the balance of probabilities that Mr Lloyd did forge the initials on the documents.

[16] He did not become a real estate agent until June 2007 and the Tribunal must therefore consider whether or not he was a real estate agent at the time that the document was used. If he was not then the Tribunal have no jurisdiction. Mr Waymouth urged upon us a definition of forgery contained in the Crimes Act which made the date of the commission of the offence the date on which the document was altered and re-submitted 7 May 2007. Mr Clancy submitted the analogy was more properly the criminal offence "*using a forged document*" where the date on which the document was put forward or used was the relevant date.

[17] We are satisfied that the date that the document was put forward as being genuine was October/November 2008 and that this is the correct date for the proof of this change. This is the date on which the Memorandum of Understanding was put forward as being signed by Mr Lloyd's solicitors. At October/November 2008 Mr Lloyd was a real estate agent.

[18] We therefore must consider whether or not the forgery by Mr Lloyd is a disgraceful conduct as that test is prescribed in *CAC v Downtown Apartments* [2010] READT 5:

> *"The word disgraceful is in no sense a term of art. In accordance with the usual rules it's been given its natural and popular meaning in the ordinary sense of the word. But s 73A qualified the ordinary meaning by reference to the reasonable regard of 'agents of good standing' or 'reasonable members of the public'. Thus the test is an objective one against which the Tribunal must assess the standards an agent of good standing would have and judge them against the behaviour of the agent."*

[19] We are satisfied that agents of good standing would objectively consider the forgery by an agent of initials on a document as disgraceful conduct. We accordingly find Mr Lloyd guilty of Charge 1(a).

***Charge 1(b): This relates to the initials on appendices to Agreement for Sale and Purchase.***

The Calders did not complain of this. This issue was raised only by Ms Morrell when sent an Agreement for Sale and Purchase as a comparison of the correct initials of Mr and Mrs Calder. The evidence of Mr and Mrs Lloyd was that they had never suggested that the initials were the initials of Mrs Calder. They say they are 'AML' (Mrs Lloyd's initials). The initials do look like 'CMC', [the initials of Mrs Calder] but both Mr and Mrs Lloyd say that they are actually 'AML', the initials of Mrs Lloyd. The Lloyds say they were put on the Agreement for Sale and Purchase by Mr Lloyd at Mrs Lloyd's direction because the document was signed late at night, they were not together and the agreement needed to be finalised. Ms Morrell confirmed that the signature could be "*AML*". In these circumstances the charge is not proved. We dismiss Charge 1(b).

***Charge 2: Did Mr Lloyd say that he had obtained Resource Consent prior to the parties entering into an Agreement for Sale and Purchase on 31 March?***
Mrs Calder's evidence was that it was very important for them to obtain Resource Consent before they entered into an Agreement for Sale and Purchase. She said that various discussions and e-mails from Mr Lloyd during the course of 2007 and early 2008 made her believe that Resource Consent was only a matter of weeks away. She said that sometime in March 2008 she received a phone call from Mr Lloyd telling her that Resource Consent had been granted. She said that she was very excited by this and immediately told her husband and brother who had had experience in similar developments and had been urging Mrs Calder not to proceed without getting Resource Consent. The parties then proceeded to document and sign an Agreement for Sale and Purchase. She subsequently assured her solicitor that he did not need to insert a special condition in the Agreement for Sale and Purchase because Resource Consent had been obtained. This Agreement for Sale and Purchase was duly signed. However Mr Lloyd had not applied for Resource Consent until approximately 12 March. He denies ever having said that the Resource Consent had been obtained and wonders whether Mrs Calder was confused about being told of the consent of a neighbour which was needed before the matter could be put before the Council.

[20] Mrs Calder rang the Thames Coromandel District Council in April 2008 and discovered that Resource Consent had not been granted. She sent Mr Lloyd an e-mail on 10 April 2008 saying *"PS They did say Resource Consent not through yet were awaiting more information. ... I'm not particularly concerned re that either way. Maybe you have and perhaps the right hand doesn't know what the right hand's doing or maybe you haven't".* Mr Lloyd responded on 11 April saying *"The CDC have come back requesting further info. – Architect and planner currently dealing to this. – There is some frustration here as Peter and Greg purposely choose (sic) the individual to deal with through the concept and design stage. To receive a request for info that has previously been dealt with and appears according to Peter to be erroneous is bad." ....*

[21] The Calders became increasingly disillusioned with the proposal. In their letter cancelling the agreement on 3 October 2008 their lawyer said that *"Prior to our client's signing the Agreement for Sale and Purchase you informed them that the Resource Consent had been granted. As a result of these representations they were induced to enter into the agreement".* Glaister Ennor confirmed that Mr Jackson, the solicitor then acting on the conveyance, was prepared to confirm that Mrs Calder had told him on or about 31 March that he did not need to insert a condition as to Resource Consent because it had been granted. Knight Coldicutt replied:

> *"If your clients had understood that Resource Consent had issued in March 2008 then it was only because of a misunderstanding and not as a result of confirmation by Mr Lloyd to that effect and that he was simply at that time confirming that the plans and specifications had been submitted to Council and no more)."*

[22] Knight Coldicutt referred to the e-mail of 10 April and commented that Mr and Mrs Calder were not concerned about Resource Consent in this e-mail.

[23] Having heard the evidence, read the documents and considered the evidence the Tribunal find on the balance of probabilities that Mr Lloyd did tell Mrs Calder that Resource Consent had been obtained. This is supported by her behaviour in March 2008, her e-mail of 10 April and her lawyer's stance on 31 March 2008 not to include a Resource Management consent clause as it was granted. However we do not find that this meets the threshold for disgraceful conduct. We consider that had Mr Lloyd been acting as an agent (as opposed to being an agent but acting for himself) that this would have amounted to unsatisfactory conduct. However because there is no real estate work involved in the transaction we cannot make a finding of unsatisfactory conduct against Mr Lloyd. We therefore we dismiss Charge 2 against him.

[24] Having found that the Charge 1(a) has been established we invite submissions from the parties as to penalty. We make the following timetable orders:

1. The submissions of counsel for the Real Estate Agents Authority are to be filed within 21 days of the date of this order.

2. Any submissions in response by counsel for Mr Lloyd are to be filed 21 days thereafter.

3. Any response by the Real Estate Agents Authority to the submissions of Mr Waymouth (but strictly in reply) are to be filed within a further seven days.

[25] The Tribunal draws to the parties' attention the right of appeal to the High Court contained in s 116 of the Real Estate Agents Act.

**DATED** at AUCKLAND this 11th day of March 2013

Ms K Davenport
Chairperson

REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms N Dangen
Member

Mr J Gaukrodger
Member