BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2011] NZREADT 38

READT 065/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**SUMMIT REAL ESTATE LTD**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10012)**
	First respondent
AND	**DAVID LEWIS**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

HEARD at NELSON on 18 November 2011

DATE OF DECISION: 7 December 2011

COUNSEL

Mr G P Barkle for appellant
Dr H McKenzie for first respondent
Mr M J Logan for second respondent

RESERVED DECISION OF THE TRIBUNAL

The Issue

[1] Was the overall penalty imposed on 1 June 2011 against the appellant licensee by the first respondent Real Estate Agents Authority (through its Complaints Assessment Committee) manifestly excessive for the particular conduct determined as unsatisfactory?

[2] The appellant was ordered to pay the complainant (the second respondent) $4,198 (including GST) as reimbursement of legal costs and disbursements and also $2,200 to the Authority as a fine.

The Basic Facts

[3] The second respondent had complained about a clause in his contract with the licensee for management of a residential tenancy. That clause purported to entitle the appellant licensee to commission if the property were sold to a tenant or associated person. He also complained about the licensee's attempts to enforce that term which, he maintains, was not brought to his attention when he signed the agreement and he asserts that it should have been.

[4] The dispute behind this appeal centres around the second respondent landlord (operating through his family trust) selling his house to the tenant introduced by the licensee as property manager. The landlord had not advised the licensee of the sale and did not pay commission purportedly due to the licensee by clause 8.2 of its then standard Residential Management Authority form. That clause read:

> *"8.2 If the Owner sells the property to a tenant (or some third party connected to the tenant) introduced to the property through the Manager's instrumentality, the Owner hereby appoints Summit Real Estate Limited (the Manager) as agents for the sale of the property. In the absence of other written agency terms the Manager's fee will be 3% of the purchase price plus GST."*

[5] On 22 January 2010 the second respondent had met with the appellant licensee about renting out his family trust's property under a suitable Residential Management Authority document. There were discussions and the second respondent formally engaged the licensee to find a tenant and manage the property at a commission rate of 8.5% of rent achieved. There was no discussion regarding selling the property or it being on the market.

[6] However, under a private treaty dated 9 September 2010 with settlement on 17 September 2010 the property was sold to the tenant by the second respondent. Subsequently, the appellant licensee attempted to claim commission on the basis of the signed Residential Management Authority with reference, of course, to the said clause 8.2 of that document.

The Orders of the Authority

[7] In a 6 March 2011 decision the Authority (through its Complaints Assessment Committee) found the licensee guilty of unsatisfactory conduct due to its insertion of an agency appointment (to give commission for any sale) within a residential property management agreement which did not comply with the requirements of the Real Estate Agents Act 2008 ("the Act"). Under the heading of *"Discussion"* the Authority held, inter alia, as follows:

> *"The Complaints Assessment Committee (the Committee) accepts that the clause was not hidden in 'small print' being the same size as the rest of the terms but agrees with the complainant that the heading of clause 8 "Property on the Market" would not quickly alert a reader to the purported agency appointment. The Committee does not accept that it is a usual term in a property management agreement that a consumer could expect and for this reason, that it would ideally have been brought specifically to the Lewis's attention. However the Committee notes that Summit says their offer to go through the agreement with Mrs Lewis was not accepted.*

The Committee's view is that the management contract does not suffice as an agency agreement within the meaning of section 126(1)(a) or (b) of the Act. The agreement was not signed by the agent and the regulations in respect of an agency agreement require a statement about rebates, discounts and commissions that was not in the management contract. So while clause 8.2 of the contract purports to appoint Summit as an agent in the event of a sale to a tenant, it cannot do so and comply with the Act and regulations made under the Act.

...

The Committee is also of the view that it was a breach of section 127, the requirement to provide an approved guide before an agency agreement is signed, because the property management agreement by virtue of clause 8.2 "relates to the proposed sale of a residential property in respect of which the agent is carrying out real estate work" albeit real estate work in the future and the intention that Summit will be appointed as an agent without the necessity of doing any work to assist the sale. Compliance with section 128 does not arise because there was no claim for expenses from the Lewis's. The Committee accepts that Summit was not in a position to provide the approved guide about the sale of residential property before Mr Lewis signed the sale and purchase agreement as it was not aware of the impending sale.

The Committee has sympathy with the complainant's view that he paid Summit what was required to find a tenant and manage the property and that Summit did no additional work in relation to the tenant buying the property. Mr Lewis says the effect of Summit's claim is to increase his property management fees by $30,000, the claimed commission amount ..."

[8] By further decision of 1 June 2011 the Authority imposed the said penalties and, inter alia, stated as follows:

"The Committee accepts that some weight should be given to the newness of the Act at the time the property management agreement was signed and the fact that the complaint has had media attention, which has not been positive for the Licensee. However, the Licensee did have an opportunity to re-think its claim for commission once the objection to pay it was made by the Complainant, but decided to pursue it. The legal costs incurred by the Complainant due to the demand for commission are also considered relevant as they are a direct result of the Licensee's actions.

...

The Committee does not accept that the offending clause was unacceptable only in reference to the technical requirements of the new Act but views it as an inappropriate inclusion within the property management agreement.

The Committee's view is also not that the breach was a technicality; there was demand for a significant amount of money and the repeated assertion of the right to claim commission. We have decided on a fine of $2200. The fine is at the lower end due to the fact that the Licensee is also required to reimburse the Complainant's legal costs incurred due to this dispute being $4198.98 (incl.

GST). Given the Licensee have said that they will no longer seek commission, an order cancelling the claim for commission is not required. ..."

The Stance for the Appellant

[9] As Mr Barkle put it, the unsatisfactory conduct arose from the appellant seeking to be paid a fee on the sale of the property owned by the family trust of the second respondent when the appellant had been managing the tenancy of that property in the preceding eight months.

[10] Mr Barkle also submitted that the Authority acted beyond its power under s.93(1)(i) of the Act in deciding the appellant should pay all the legal costs of the second respondent. It seemed that, essentially, that submission was based on alleged lack of nexus between the costs and expenses and this case.

[11] Mr Barkle then summarised the basis of the appeal as in the following fourfold way:

"(i) in the circumstances that prevailed it was unreasonable to have expected Summit to do any more than it attempted to do to bring clause 8.2 of the Residential Management Authority agreement ("authority agreement") to the attention of the complainant;

(ii) little if any weight was given to the opportunity provided to Mr Lewis, an experienced businessman, to consider and read the authority agreement;

(iii) there were significant benefits obtained by the Lewis Family Trust, owner of the Highfield Grove property, from Summit locating the tenant of the property that were not taken into account by the CAC;

(iv) by deciding not to pursue available contractual remedies Summit agreed to forego a substantial sum and that matter together with other mitigating factors were given insufficient weight by the Tribunal in deciding on the appropriate penalty;"

[12] Mr Barkle then dealt with the facts in some detail and with the reasoning of the said Committee of the Authority. Inter alia, he emphasised that the two licensees met with and provided documentation to Mrs Lewis on two occasions in January 2010 when the Residential Management Authority was signed between appellant and second respondent; that those agents offered to discuss the documentation and, particularly, the Authority agreement with Mrs Lewis, but she declined; the Authority agreement was with her for some days; she made no contact nor did Mr Lewis to discuss any of its terms; and when Mr and Mrs Lewis chose to sell the property they did that, Mr Barkle put it, without any advice to the appellant and, therefore, did not give the appellant the opportunity to bring clause 8.2 to their attention which would have occurred as a result of a sale process being under way.

[13] Mr Barkle added a number of matters to his submissions made with a view to reduction of penalty as follows:

"(i) the Authority agreement was entered into by Summit and the trustees very soon after the REAA 2008 became law;

(ii) considerable time and resources had been expended by Summit to ensure compliance with the new Act. Mr Naider referred in his documentation provided to CAC to over $20,000.00 having been spent;

(iii) the non-compliance by Summit with the new statutory requirements was inadvertent;

(iv) because of Mr Lewis's preference to communicate through the media, particularly the Nelson Mail, Summit had already received considerable adverse publicity;

(v) Summit has had no breaches of the applicable legislation since incorporation in 1992;

(vi) the decision by Summit not to pursue its contractual remedies;

(viii) deletion by Summit of clause 8.2 from its management authority agreements as a result of the decision of 11 March 2011."

[14] In his initial typed submissions, Mr Barkle submitted that the solicitors' invoices to the second respondent revealed little detail as to the nature of the legal services provided. Since then more helpful invoices have been exhibited; and it cannot now be said that the legal costs in question incurred by the second respondent family trust *"cover a far wider range of activity than what is legitimately involved with the CAC activities"* as Mr Barkle had in good faith put it at that point. He had then submitted that the award of legal costs cannot be sustained and should be cancelled.

[15] He concluded on the note that the appellant had conducted its property management business for many years before the Act and the second respondent had abundant opportunity to become aware of the terms of the Property Management Services agreement but did not and so contributed to the issues of this case. Mr Barkle submitted that there should have been more consideration given to the following factors; the decision of the appellant that it would not pursue its contractual remedies for potentially a significant sum of commission; that it had since decided to remove clause 8.2 from its Residential Management Authority agreement; that it had been operating without blemish for decades in a substantial way of business; the Act did not cover residential property management but the appellant had now taken substantial steps towards compliance; and the appellant had received much adverse publicity arising out of this case.

[16] Accordingly Mr Barkle submitted that *"when one balances all matters"*, the finding of unsatisfactory conduct in itself has been a sufficient punishment and there should be no further financial penalty.

The Stance of the First Respondent

[17] As usual we received thorough and most helpful submissions from the first respondent also but because we agree with them we do not detail them.

[18] However, Dr McKenzie referred to s.126 of the Act about no entitlement to commission or expenses without an agency agreement; s.127 regarding approved guide to be provided before an agency agreement for residential property is signed; and s.128 that an agency agreement must disclose rebates, discounts and

commissions. As she said, those provisions provide substantial consumer protections; and it is important that a consumer is clearly advised when potentially incurring significant financial liability; and an agency agreement is the foundation upon which transactions involving the sale and purchase of a property rest and, as such, is the cornerstone of the current Act and its regulatory regime. There is further regulation under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 particularly as Dr McKenzie put it;

> *"(a) Rule 9.5: appraisal and pricing. Read together with rule 9.8(a) (see below), a written appraisal of the property (that is, of the sale price) is required before a client is invited to sign an agency agreement;*
>
> *(b) Rule 9.8(b): agency agreements and contractual documents. This rule requires a licensee to provide a prospective client in writing with the conditions under which commission must be paid and how it is to be calculated, including an estimated cost (actual monetary amount) of commission payable by the client based on the appraised price of the land or business; and*
>
> *(c) Rule 9.9: legal, technical, or other advice. Rule 9.0 mandates a licensee to ensure that a prospective client entering into an agency agreement is aware that he or she can, and may need to, seek legal, technical, or other advice and information, and allow the client a reasonable opportunity to do so."*

[19] We agree with her that these provisions together cannot be categorised as merely technical; they are important substantive provisions to promote and protect the interests of consumers in relation to real estate transactions.

[20] Dr McKenzie acknowledged that, in principle, payment of legal fees unconnected to the investigation in this case would not fall within the scope of s.93(1)(i). Such costs or expenses must be in respect of an enquiry, investigation or hearing. However (she put it), the Authority did not purport to reimburse the legal fees under s.93(1)(i). We agree it did not refer to s.93 and did not need to do so. We agree with Dr McKenzie that it was open in law to the Authority's Committee to order that legal fees be repaid to the complainant under s.93(1)(f)(ii) where those fees were incurred as a result of the licensee's error or omission; but the appropriate provision for the legal fees is s.93(1)(i). The Committee had correctly found that the complainant's legal costs of $4,198.98 were *"incurred due to this dispute"* so that they come within s.93(1)(i).

[21] Inter alia, we agree that at the time a property management agreement is entered into, a potential landlord is typically concerned with and focused on renting out his or her property and would not be contemplating selling it; yet in this case the vehicle by which they expect to be renting their property could have bound them to commission should they later sell it to a purchaser introduced by the property manager even if a tenant.

The Stance of the Second Respondent

[22] Counsel for the second respondent (Mr Logan) noted the second respondent complainant's dismay at the additional expense of this appeal. It is also put that the appellant seems to be in complete denial regarding its *"deceptive and misleading*

conduct regarding this agreement" and that the complainant is concerned at the appellant maintaining that it has been *"tripped up"* by a purely technical breach arising from new legislation. It is also emphasised for the complainant that the appellant seeks to blame it for what has happened.

[23] Mr Logan dealt with the facts and the issues raised by other counsel. He also submitted that the first respondent did have jurisdiction to make its cost order pursuant to s.93(1)(i), and we agree. He noted that the claim form which initiated this matter is dated 20 September 2010 and that all notes of costs are dated after that and cover attendances ultimately relevant to the enquiry, investigation or hearing.

Our Conclusions

[24] It needs to be emphasised that this appeal is about penalty only and not about the relevant guilty conduct which is now accepted by the appellant. Also we agree with the points made by the Committee and its reasoning as we have cited it above.

[25] In the course of the dispute, the licensee appellant broadly argued that the terms of clause 8.2 are not hidden in the document; that the complainant and his wife declined its offers to explain the document; the complainant and his wife had the document for about a week before it was returned and signed to the appellant; that the appellant did not have the opportunity to provide the complainant with the various sale-related documentation required because it did not know a sale was afoot and only discovered this after the sale; and in the course of the dispute preceding the complaint, the licensee offered to reduce commission from $30,000 to $12,000 and, eventually, renounced any claim for commission.

[26] Frankly, while we appreciated Mr Barkle's clarity and understand his concerns, we do not find the stance for the appellant very compelling. A property management agreement is quite a different concept from an agency with commission for the sale of the property. If a sale commission obligation is to be slipped into a property management agreement, it seems to us to be improper if it is not clearly drawn to the attention of the property owner and it is insufficient to merely offer to go through the agreement with the wife of the owner or to give the owners time to peruse the agreement themselves. A conceptual change such as a sale agency should have been drawn to the attention of the owners orally and by covering letter. In the circumstances of this case one wonders whether clause 8.2 was binding at law. We cannot accept the submission for the licensee that its non-compliance was inadvertent or an oversight. Nor did the licensee lightly renounce its claim for commission.

[27] One would hardly have expected the property owners to have consulted the appellant about the sale. They were unaware of the effect of clause 8.2 which was not particularly noticeable as containing an entirely different condition from what would be expected in an agreement to manage a tenancy. Indeed, clause 8 had the ambivalent heading *"Property on The Market for Sale"* and was then followed by a rather off-putting clause 8.1 which read:

> *"8.1 The Owner warrants that the rental premises is not on the market for sale and will not be on the market for a minimum of six months from the date of this agreement or the commencement of any new tenancy. If the property does go onto the market for sale, the Owner warrants that the Owner will give the tenant(s) the required notice under s47 of the Residential*

Tenancies Act 1986 or instruct the Manager to do so on their behalf prior to the property being marketed."

[28] Since there is no dispute about the facts or the findings concerning the appellant's conduct, we only need to apply common sense to the financial penalties imposed by the first respondent in the context of this case. We are in no doubt that the sum of $4,198 ordered as reimbursement for legal fees of the second respondent as at 1 June 2011 is fair and accurate with a strong nexus to this case. We consider that the $2,200 fine imposed against the appellant for payment to the Authority is rather modest.

[29] Accordingly, this appeal against penalties is dismissed. The orders of the first respondent are confirmed. The issue of costs on this appeal needs to be addressed so that we reserve leave to apply in that respect for 21 working days.

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Judge P F Barber
Chairperson

_____
Ms J Robson
Member

_____
Mr J Gaukrodger
Member