

Decision No: [2012] NZREADT 49

Reference No: READT 008/12

IN THE MATTER OF an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN **SAY (JAMES) LAW**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 20001)**

First Respondent

AND **HEATHER LEWIS**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Ms J Robson - Member
Mr G Denley - Member

APPEARANCES

The appellant in person
Mr Clancy for the First Respondent
No appearance for the Second Respondent

HEARD at Auckland on 1 August 2012

Introduction

[1] Mr Law appeals against a decision of the Complaints Assessment Committee 10062 dated 20 December 2011 to find him guilty of unsatisfactory conduct. He was subsequently fined \$1,000. The CAC found him guilty of unsatisfactory conduct in respect of interaction between himself and Heather Lewis, the complainant through her company Shel Investments Limited.

Summary of Complaints

[2] Shel Investments owns two properties which were available for lease, one at 8 Dundonald Street, Eden Terrace and 1B Olive Street, Penrose. Ms Lewis listed these properties initially with Jirah Realty Limited on 5 February 2010. This company

was trading as Ray White and the agent on the agency agreement was shown as Mr James Law. Ms Lewis subsequently agreed to transfer the agency agreement to New Zealand International Realty Limited trading as NAI Harcourts. Again Mr Law was shown on the listing agreement as the agent.

[3] Mr Law gave notice to Harcourts in late 2010. He left Harcourts and commenced his own business as James Law Realty Limited in early 2011. Shortly prior to his departure from Harcourts he had e-mailed the complainant with a request for information about one of the properties. Ms Lewis responded on 22 November giving some further information about Dundonald Street. No further correspondence was entered into between Ms Lewis and Mr Law until 14 April 2011 when Mr Law e-mailed Ms Lewis. He said that he had been working on leasing the property for some time, he gave his new contact details and said that he hoped to be able to continue working on the property. On the same date Ms Lewis says she called Mr Law and she refused the request for permission to list or advertise the properties. On 20 May she discovered that the licensee had continued to advertise the properties. On 20 May 2011 Ms Lewis e-mailed Mr Law saying that Mr Law was still advertising the property on the internet, that he did not hold a listing and had 24 hours to remove the listing (1B Olive Road) from the internet.

[4] Mr Law advised Ms Lewis that he could not find the advertisement on the internet and she sent him a link to 'Findspace'. He immediately e-mailed them and arranged for the advertisement to be manually taken off their website. He has provided the Tribunal with a copy of a letter from Findspace explaining that the advertisement had been manually uploaded to the site in 2010 and by error (Findspace's) had not been deleted.

[5] In late July Ms Lewis again noticed that there was an advertisement for the property on the website of Mr Law. She provided a screen shot of the advertisement with her complaint. Ms Lewis complained to the REAA that Mr Law was still advertising their property in July 2011. She attached the material from Mr Law's website. Mr Law acknowledges that he did not have an Agency Agreement in the name of James Law Realty. However he says that www.findspace.co.nz was a listing that was put on in October 2010 at a time when NAI Harcourts had a listing and he was working there. It had been done by them, it had not been updated by him and as soon as he found out that they were continuing to list the property he immediately withdrew it.

[6] On 20 September 2011 Mr Law wrote to the REAA in response to the complaints and said *inter alia* that the property was carried over with the hope of getting a tenant for Ms Lewis's properties faster and assuming that an individual salesperson/agent still had the authority to find a tenant for her properties.

[7] The CAC found that placing advertisements in the absence of an agency agreement was unsatisfactory conduct.

[8] In Mr Law's Notice of Appeal he raised a number of issues:

- He did not consider that this was real estate agency work as the definition of real estate agency work under s 4 of the Act excluded publication of newspapers, journals or magazines.

- He challenged the CAC's finding that he has continued to advertise the complainant's property at Dundonald Street, Eden Terrace and 1B Olive Street, Penrose.
- He said that he dealt with the complainant's concerns in a timely manner and as soon as he received the e-mail on 20 May 2011 he moved immediately to address the concerns of the complainant but could not find listings under the name of the respondent relating to Dundonald Street, Eden Terrace and Olive Street, Penrose. He referred to the www.findspace.co.nz website and said he had immediately taken steps to have the properties removed manually from this website.

Mr Law said that the listing found by Ms Lewis in her complaint dated 24 July 2011 was not a new listing created after the respondent left Harcourts but a database error that was carried over from a listing acquired in February 2010. He referred to the evidence from the Database Administrator who confirmed that the property at Dundonald Street was first put on the website on 28 October 2010. The listing was on Mr Law's own website.

[9] At the hearing Mr Law referred to screen shots he had taken on the OSL Office Listings website which showed no listing for Olive Street and that Dundonald Street (incorrectly loaded as Donald Street) had been uploaded to the website on 1 April 2011, that the name had been amended to the correct address on 8 June 2011 (i.e. after Mr Law searched the website to check that the listings were not still available). He showed screenshots showing the search of Dundonald Street and Olive Street produced nothing. He said in evidence that the OSL Office Listing in April 2011 was due to an error by his office in uploading material to the OSL website for listing.

- He said further that persons searching for properties would not go to his website (www.jameslaw.co.nz) but would go to www.trademe or www.realestate.co.nz or www.primecommercial.co.nz sites and they would not have found the properties on those sites. Mr Law denied that he believed that he had authorisation to list the properties after moving to his own business and pointed to the fact that he sought a listing authority from Ms Lewis in April 2011.

[10] We find that an agent who advertises in print media is still carrying out real estate agency work in terms of s 4. We agree with the REAA submission that the exclusion is designed to exclude from real estate agency work those businesses who place or design advertisements. We agree with Mr Clancy that if agents were not caught by the provisions of the Act when placing advertisements then it could lead to unusual results which were potentially harmful to the public.

[11] We find that Mr Law did not have a current listing for the properties when he moved to his own business. What then are his obligations as an agent? His obligations as an agent are to ensure that properties are not listed even as a general agency on his website or other websites at his request without having an authority to do

so. We accept what the Tribunal said in *Handisides* (NZREADT [2011] NZREADT 36) at 21 and following. Mr Law was therefore carrying on real estate agency work by placing or keeping an advertisement on his website without a signed agency agreement and therefore was in breach of Rule 9.15. However we accept that an agent who can show that a technical breach of this rule because of inadvertence (or other matters) is not guilty unsatisfactory conduct.

[12] We therefore consider the three advertisements for these properties in turn:-

(i) **www.findspace.co.nz**

We accept that this property appeared to have been listed on this website in 2010 and that Mr Law could not reasonably have discovered that this was still listed there as it was not a part of the OSL network and not within his control. We therefore find in respect of the Findspace advertisement that Mr Law took all reasonable steps to avoid a breach of Rule 9.15.

(ii) **OSL website**

In respect of the OSL website we find that someone from Mr Law's agency, as he acknowledges, inadvertently uploaded the Dundonald Street property listing to the website. The fact that no one was able to find the property because it was placed there with the wrong address is not a matter that we need to consider. What are Mr Law's obligations when inadvertence or error by an administrator in placing an advertisement is asserted? Is it sufficient to provide a defence for Mr Law? An agent does not have to be omnipotent; on the other hand advertising properties for which they have no agency agreement is prohibited. The agent therefore has the obligation to ensure that he or she does not advertise those properties for which he or she does not have an agency agreement and that responsibility rests with him. We consider that an agent setting up their own business with listings received from other agencies should be especially careful to ensure that they have listing agreements before advertising a property.

(iii) To this extent we uphold the finding of unsatisfactory conduct for this advertisement.

C) Mr Law's website

We consider that Mr Law should have been aware of what properties were listed on his own website, even if these were many hundreds as he suggests. This is especially true when an agency is setting up as new agency; it should take care to ensure that all of those properties formerly listed for which no new listings are carried forward are to be removed. However we accept Mr Law's explanation about the steps that he took to address this and the inadvertent nature of this error. We make no finding in respect of the old listing which remained on Mr Law's website.

[13] We therefore modify the decision of the Complaints Assessment Committee by continuing to uphold the finding of unsatisfactory conduct for the reasons that we have

set out above. However we reverse the penalty decision of the Complaints Assessment Committee. We consider that a fine of \$1,000 is too great for this one error and we substitute instead the following penalty under s 73:

We order that the licensee apologise to Ms Lewis and explain to her the inadvertent nature of the error. We fine Mr Law \$200.

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

DATED at AUCKLAND this 13th day of August 2012

Ms K Davenport
Chairperson

Ms J Robson
Member

Mr G Denley
Member