BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 112

READT 06/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**MURRAY BROOKS**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**MARIA STEPHENS**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF DECISION 20 December 2013

REPRESENTATION

The appellant on his own behalf
Ms J MacGibbon, counsel for the Authority
Mr R J Latton, counsel for second respondent

DECISION OF THE TRIBUNAL

Introduction

[1] This is an appeal against penalty, as explained below, because the appellant complainant, Mr M Brooks, feels that the Committee's penalty against the second respondent licensee, Maria Stephens, (and her supervisor, Mr M T Biddick), was too light.

[2] In a 5 October 2012 decision, Complaints Assessment Committee 20002 found the licensee guilty of unsatisfactory conduct. In a decision dated 23 January 2013 that Committee ordered that the licensee pay a fine of $5,000; and the licensee has not appealed that penalty.

[3] However, the appellant appeals against that penalty imposed against the licensee and seeks:

[a] $65,000 compensation for the loss in value of a property at 151C Clovelly Road, Bucklands Beach as referred to below;

[b] $12,979.39 for the improvements undertaken by the appellant on the property; and

[c] A costs award of $8,273.00.

[4] In his submissions to us, the appellant seeks a further compensation order for *"unrealised gain"* of $36,117.50.

[5] The notice of appeal also states that compensation is sought from Mr Biddick (supervisor of the licensee). However, the Committee, on its own motion, made a separate determination in relation to Mr Biddick, found that he had engaged in unsatisfactory conduct in his supervision of the licensee, and imposed a $5,000 fine against him. Neither the appellant complainant, nor Mr Biddick, have appealed that penalty decision against Mr Biddick, so that he is not a party to this appeal, has not been given the opportunity to respond, and no orders can be made against him in this appeal brought by the complainant against Ms Stephens.

Basic Facts

[6] As gleaned from the submissions to us on penalty, the essential facts must be that in April 2011 the appellant and his wife purchased the property for $845,000, allegedly on the basis of it having stunning sea views. However, fairly soon that view was blocked by the erection of a house on a neighbouring property. In any case, they received a letter dated 27 April 2011 from the neighbour advising that her current plans for developing her property would *"completely obscure the view you presently have"*. Less than one year later, in January 2012 the appellant and his wife sold the property for $930,000 but they consider that, but for the neighbouring building, they would have achieved a much higher profit as covered below.

Background Before the Committee

[7] The appellant and his wife purchased 151C Clovelly Road, Bucklands Beach in March 2011. The licensee was the listing agent responsible for selling the property on behalf of the vendor. Some time following settlement of the sale and purchase agreement, the appellant discovered that a proposed new two level home would be built very close to the appellant's western boundary and largely obstruct the appellant's sea views.

[8] The appellant alleged to the Committee that the licensee:

[a] Had offered to ask the neighbour in front of the property about any plans to build which would affect his views, but did not;

[b] Had incorrectly advised the appellant that he would have the right to contest with the Council any plans the front neighbour might have to build;

[c] Was not supervised adequately; and

[d] Advertised the property for six months after it had been sold to the appellant and his wife.

[9] The Committee observed that there was no dispute that the property was advertised with reference to elevated and stunning sea views. However, the Committee found inconsistencies in the licensee's responses about a conversation she had with the vendor over the possibility of the view being built out.

[10] The vendor confirmed to the Committee that although he had told the licensee on 20 March 2011 that he was not aware of any plans to build out the view, he had also told real estate agents (including the licensee) from the outset that *"if I was going to sell a house with a view I would have actually put the price up more"*. The vendor also said that he had insisted that the sea view was never put as a selling feature. He also said that he told the licensee, near to the time of signing the sale and purchase agreement with the complainant, that when he purchased the property himself he had been told to *"enjoy the view while you can because it is not going to last"*.

[11] The Committee considered that these statements should have alerted the licensee to the possibility that there could be building work on a front site which would affect views from the property at 151C Clovelly Road, Bucklands Beach, in the future.

[12] The licensee denied that she told the appellant that he would have the right to contest any loss of view or that there was any discussion with the complainant about *"building conditions"* on 20 March 2011. However, others present at the time provided statements to the Committee recalling asking the licensee questions about the possibility of the view being built out and the licensee referring to *"building codes"* and *"height restrictions"*.

[13] The Committee observed that, despite the licensee being registered as a real estate agent under the Act for only two months prior to the transaction, she had carried out a lot of the work with little supervision.

[14] Finally, the Committee considered that a genuine administrative error resulted in the property being advertised on Trade Me and Superior Realty Ltd's website after it was sold.

[15] Essentially, the Committee found Ms Stephens guilty of unsatisfactory conduct because she was asked by the complainant on 20 March 2011 to investigate the possibility of the view of the property being built out and did not do so; and had advertised the property as having a *"stunning elevated view"*.

[16] It is helpful to note the Committee's reasoning as follows when imposing penalty against he licensee by its decision of 23 January 2013, namely:

> *"**Discussion***
>
> *3.1 The fact that the licensee was relatively new to the real estate industry does not excuse her from being diligent in the handling of the sale and purchase transaction. This is particularly so having been alerted that there was likely to be construction on the front site. By not following up with the parties involved and simply accepting the vendor's advice that he was not aware of any plans by the neighbour, the licensee's actions were inadequate.*

3.2 The purchasers for their part could have been more active in following up on any concerns that they had themselves. The complainants allege that the licensee advised them incorrectly that they had the right to contest an application to the Council by the owner in front if, in the future, the present owner or subsequent owner was to build and block the view. The Committee questions the wisdom of the complainants not having their solicitor at least list a condition in the sale and purchase agreement a question as to the possibility of having views obstructed by any construction on the front site.

3.3 In considering the issue of what orders to make, the Committee recognises that its responsibility is to ensure that salespersons licensed by the Real Estate Agents Authority adhere to the rules and regulations that are imposed on licensees. Unless a wrong has clearly resulted from a licensee's actions the Committee would not usually participate in such questions of compensation as are addressed by the complainant.

3.4 In considering the complainant's submission for compensation, the Committee concluded that there is no evidence that a loss has resulted from the complainant's purchase of the property. Indeed the property, according to the complainant's own calculations, has increased in value by $143,650. Accordingly, the Committee views the compensation settlement sought as unsupported by facts and opportunistic rather than realistic.

3.5 The licensee submits that publication of this finding for the licensee, who is at the beginning of her career in real estate, would outweigh the consequences of her unsatisfactory conduct."

[17] The Committee found that the licensee had engaged in unsatisfactory conduct, imposed a $5,000 fine against her, and directed that the decision be published.

A Summary of the Appellant/Complainant's Case

[18] The appellant fails to understand what he regards as a totally inadequate penalty against the licensee when, he puts it, *"the emphatic determination [of the Committee] was in favour of our complaints"*. He remarks that the fine imposed against the licensee by the Committee is approximately 10% of, the commission she gained from the two sales in question (presumably, the sale to him and his re-sale). He also contests a lack of penalty against her supervisor licensee, Mr M Biddick of LJ Hooker Howick/Pakuranga, who the complainant puts it *"had a director influence on the outcomes as revealed has not been addressed"*. However, we have explained that Mr Biddick is not a party to this appeal to us by the complainant about the penalty imposed on Ms Stephens.

[19] The complainant refers to the great stress imposed on his wife and himself over the above events. He claims that they received a much lower price on re-selling the property *"than we would have realised if the original expansive view was still part of the property's attributes"*. He noted that he had adduced to the Committee a formal valuation assessing the drop in valuation of the property at $65,000 due to the loss of view, but (he put it) the Authority did not take that into account. He fails to understand how the Committee could have felt that no loss could be determined on his part; and he noted that the Committee had said at paragraph 3.4 of its decision

"the Committee concluded that there is no evidence that a loss has resulted from the complainant's purchase of the property".

[20] As part of the complainant's original claim he had suggested that the real estate agency purchase the property from him and his wife for the original price paid by them plus the percentage increase in values in the area and plus certain expenses. He put it that the increase in value of their property over material times *"was compromised by the new building that now blocked our initial expansive views"*. He refers to REINZ statistics over April 2011 to 2013 showing an average increase in the area of 26.3% and feels it unrealistic that the Committee decided that he (and his wife) had not experienced any loss because the overall values in the immediate area had increased dramatically over material times.

[21] The complainant emphasised that he and his wife had purchased the property in March 2011 for $845,000. In about January 2012 they sold it for $930,000 which they regard as equating a 10.06 increase in price when the price value increase in the area was 26.3%. Therefore, according to them, their resale should have yielded them a sale price of $1,067,235. Accordingly they put it that there has been a drop in their *"realisable capital gain"* of 16.24% or in dollar terms $137,235. They then put it:

> *"**Compensation costs requested as a minimum***
> *Compromise at half way between unrealistic gain and loss of view as*
> *Confirmed by Seager and Partners 137235-65000=$72235*

(72235/2) + 65000	*$101,117.00*
Legal costs to date	*$ 6893.00*
Valuation costs Seager and Partners	*$ 1380.00*
Total	***$109,390.00**"*

[22] In his submissions to us on penalty, the complainant seems to be claiming the above compensation against both Ms M Stephens, the second respondent licensee, and the said Mr M Biddick as principal and manager of the said LJ Hooker agency. However, Mr Biddick is not a party to this appeal. Indeed, the appellant states that as well as seeking a more fitting penalty on them for what he regards as a misrepresentation, he does not believe that Ms Stephens should be the only party penalised but that Mr Biddick should be held responsible for his alleged lack of supervision not only of Ms Stephens but also of the processes of the agency. The complainant then stressed *"to allow the continued advertising of our Thornbry Cres property 6 months after an unconditional sale on two separate websites can only be seen as false lead generation"*.

The Stance of the Licensee Ms M Stephens

[23] Mr Latton (as counsel for the licensee Ms Stephens) recorded that she accepts the finding of unsatisfactory conduct which the Committee found against her and the Order that she pay a fine of $5,000 to the Authority. Ms Stephens also seems to accept that the Committee's decision be published.

[24] Mr Latton noted that the appellant/complainant is not satisfied with the Committee's decision to not award compensation to him (and his wife) under s.93 of the Act; nor with the level of the fine against Ms Stephens and against her principal, Mr M Biddick.

[25] Mr Latton notes that the appellant has since sold the property at Clovelly Road, after owning it for about two years, and realised a capital gain on that sale of

$85,000. Mr Latton notes that the crux of the appellant's stance on appeal to us, about the penalty imposed on Ms Stephens, is that the $85,000 capital gain was, the appellant puts it, less than the average percentage gain for the area. Accordingly, he seeks reimbursement of $101,117 as the difference, between the price he obtained and the said average increase in the area, plus the costs referred to above.

[26] Mr Latton submits that the appellant is seeking *"expectation damages for loss in expected capital gain"*. Mr Latton notes that it is difficult to precisely assess the basis on which such damages are claimed but that the appellant seems to be seeking not only an amount which he alleges he overpaid for the purchase of the property, but also the capital gain he alleges should have been realised on resale.

[27] Mr Latton notes that in The Law of Contract in New Zealand (Burrowes, Finn & Todd, 4th ed, at page 823) expectation damages are described as *"The right to compensation for the loss of the bargain, the object being to financially restore the innocent party to the position they would have occupied had the contract been performed"*.

[28] Simply put, the appellant seeks to be placed financially in the position in which he (and his wife) would have been had the neighbour's development plans not occurred, the original views been preserved, and a larger capital gain realised on resale. Mr Latton notes that the appellant does not specifically refer to s.93(1)(f) of the Real Estate Agents Act 2008 ("the Act") as the section upon which he relies, but assumes that to be so because the second respondent licensee has been found to have engaged in unsatisfactory conduct rather than misconduct.

[29] Section 93(1)(f) of the Act reads as follows:

> *"**93 Power of Committee to make orders***
>
> *(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:*
>
> *...*
>
> *(f) order the licensee—*
>
> *(i) to rectify, at his or her or its own expense, any error or omission; or*
>
> *(ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:"*

[30] Mr Latton then referred to the decision of Brewer J in *Quin v REAA & Anor* [2012] NZHC 3557, 19 December 2012, Tauranga High Court, where at paragraph [58] His Honour stated: *"Section 93(1)(f) does not empower a Committee to order a licensee to make payments in the nature of compensatory damages. That is a power which is given to the Tribunal under s.110, but to a limit of $100,000."*

[31] Accordingly, Mr Latton submits that we do not have power to award the damages now sought by the appellant, but he accepts the appellant might be able to seek them on some other basis such as in tort or under the Fair Trading Act 1986.

He also puts it that we are ill-equipped to investigate quantum of loss, causation of loss, an appellant's contribution to loss, or mitigation of loss, and that such matters are properly left for the civil courts. We would not have thought we were so ill equipped should the need arise and if we have appropriate jurisdiction.

[32] Mr Latton made various submissions to the effect that the valuation report on which the appellant relies is inadequate. He then submitted that the legal costs for which the appellant seeks reimbursement may not relate to the content of the complaint against the licensee but to a prospective civil Court claim which was ultimately not pursued. He puts it that the valuation seems to have been obtained for that civil claim purpose also, rather than for the purpose of proving unsatisfactory conduct in the proceedings before the Committee of the Authority. Accordingly, he submits that the valuation and legal costs claimed by the appellant do not relate directly to the proceedings before the Committee regarding unsatisfactory conduct so that they cannot be recovered under s.93(1)(i) of the Act which reads: *"(i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee."*

[33] Mr Latton then submits that the $5,000 fine imposed on the licensee is in the upper band of appropriate sanctions for unsatisfactory conduct of the nature found against Ms Stephens and is a significant financial penalty for her.

General Principles

[34] We agree with Ms MacGibbon that, in determining the appropriate penalty, we should emphasise the maintenance of high standards by real estate agents and the protection of the public. While this may mean that orders made in disciplinary proceedings have a punitive effect, this is not their purpose: *Z v CAC* [2009] 1 NZLR 1 at [97] where McGrath J said for the majority of the Supreme Court (Blanchard, Tipping and McGrath JJ):

> *"... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned."*

[35] In terms of the particular statutory scheme under the Real Estate Agents Act 2008, we summarised the position in *CAC v Walker* [2011] NZREADT 4 as follows:

> *"[17] Section 3(1) of the Act sets out the purpose of legislation. The principle purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate agency work". One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (s 3(2)).*
>
> *[18] This function has been recognised in professional disciplinary proceedings involving other professions [and] ... is reinforced by the reference in the purpose provision to the Act (s 3) to raising industry standards and the promotion of public confidence in the performance of real estate agency work.*
>
> *[19] In Patel v Dentists Disciplinary Tribunal High Court, Auckland, CIV 2007-404-1818, 13 August 2007 Lang J held* ***that disciplinary proceedings inevitably involve issues of deterrence and penalties are designed in part***

to deter both the offender and others in the profession from offending in a like manner in the future.

[Emphasis added]

[36] Accordingly, the purpose of disciplinary proceedings is not to punish, but to emphasise the maintenance of high standards and public protection through both specific and general deterrence.

[37] Appeals against penalty decisions are appeals against a discretion, *Kumandan v Real Estate Agents Authority* [2013] NZHC 1528 (per Woolford J). In *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, our Supreme Court had confirmed that appellate courts will adopt a narrower approach and put it at [32] as follows:

> *"... the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."*

[38] That approach is appropriate in respect of appeals against the exercise of the discretion granted to Complaints Assessment Committees in determining penalties following unsatisfactory conduct findings. This means that the appellant will have to demonstrate that the Committee's penalty decision made an error of law or principle; or failed to take into account a relevant consideration; or took into account irrelevant considerations; or was plainly wrong.

Compensation

[39] One of the grounds of the appellant's appeal is that he seeks compensation for the loss of value to the property due to his loss of view. Following a finding of unsatisfactory conduct Committees can, pursuant to s.93(1)(f) of the Act, order a licensee to rectify, at his or her or its own expense, any error or omission; or where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequence of the error or omission.

[40] In *Quin* (supra) the High Court held that a Committee of the Authority cannot order licensees to pay complainants money as compensation for errors or omission for pure market or economic loss (compensatory damages). Instead, licensees can only be ordered to do something or take action to rectify or *"put right"* an error or omission. If the licensee can no longer *"put right"* the error or omission, they can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission. That may involve monetary payment and any expenses incurred by the licensee as a result of doing what he/she is ordered to do must be borne by the licensee.

[41] An order under s.93(1)(f) cannot be made in respect of a straight monetary loss, i.e. compensation for a loss in market value and potential unrealised gain, which is the case here where the appellant is seeking compensation of this kind in the sum of

$101,117 (loss in value and potential unrealised gain). Following the decision in *Quin*, neither the potential loss in value nor the loss of potential unrealised gain can be awarded.

[42] *Quin* was applied by us in *Orsborn v REAA and Collier* [2013] NZREADT 69 where we held:

> *"[33] However, an order under s.93(1)(f) cannot be made in respect of straight monetary loss, i.e. compensation for an alleged loss in market value, which is the case here. In terms of Quin, this cannot be awarded.*
>
> *This is not to say that monetary orders cannot be made under s 93(1)(f) in certain circumstances. However, when there is no possible way of rectifying the error other than paying damages for the difference in value, then the Quin decision precludes payment of monetary compensation"*.

Discussion

[43] The basis on which the appellant seeks compensation for loss in capital gain is speculative. Also, there is no evidence that he overpaid when purchasing the property, nor has any reasoning been given for that. In fact, he achieved an $85,000 profit on resale of the property in a relatively short time after his purchase.

[44] In any case, it seems to us that the appellant is seeking straight compensatory damages and, as such, they are not available as a penalty order. The sum of $12,979.39 sought for improvements made to the property may be available on the basis that this was necessary to rectify an error or omission. However, there is not enough information about what improvements were made and how they rectified the licensee's errors.

[45] The appellant also seeks costs for legal fees and the said property valuation. Counsel for the Authority supported the submission for the licensee that the invoices and other supporting documentation for a costs award must relate to services provided for the purpose of the disciplinary matters. It is a matter for us to determine whether the costs sought are sufficiently related to the matters before us and are costs which should be considered. We do not think that they are. Any costs which relate to work undertaken for the said civil proceedings are not relevant for the purposes of penalty in our forum but are costs which may be recoverable in civil proceedings.

[46] We are, of course, conscious that s.93(1)(i) reads:

> *"**93 Power of Committee to make orders***
> *(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following: ...*
> *(i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee."*

[47] However, the relevant unsatisfactory conduct found by the Committee was that the licensee did not investigate the possibility of loss of view when the property was advertised as having a stunning elevated view. It does not follow that she caused any loss to the appellant.

[48] It has not been shown to us that the Committee made any error of law or principle, or failed to take any relevant consideration into account, or took into account any irrelevant consideration, or was plainly wrong.

[49] Accordingly, we have no reason to disturb the penalty imposed by the Committee. This appeal is dismissed.

[50] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

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Judge P F Barber
Chairperson

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Mr G Denley
Member

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Mr J Gaukrodger
Member