BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 19

READT 005/12

IN THE MATTER OF	a charge laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY CAC 10073**
	Prosecutor
AND	**PHILIP KENNY REAL ESTATE LTD (LICENSED AGENT)**
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at CHRISTCHURCH on 27 February 2013

DATE OF DECISION 8 March 2013

COUNSEL

Mr L J Clancy for prosecution
Mr A D Argyle for defendant

DECISION OF THE TRIBUNAL ON PENALTY

The Charge

[1] The defendant company (the licensee) has admitted a charge of misconduct under s.73 of the Real Estate Agents Act 2008 ("the Act"). The formal charge of 14 February 2012 reads as follows:

> *"1.1 Following a complaint made by J Millichamp & Sons Ltd (complainant), Complaints Assessment Committee 10073 (Committee) charges the Defendant with misconduct under s 73(c)(i) of the Real Estate Agents Act 2008 (Act) in that its conduct consisted of a wilful or reckless contravention of the Act.*
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> *Particulars:*
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> *(a) Between 24 January 2011 and 20 May 2011, or thereabouts, the Defendant wilfully or recklessly contravened section 122 of the Act in that it failed to pay to the Complainant $6,235.12, being the balance of the purchaser's deposit less commission in respect of the sale of 11 Wisteria Place, Ashburton (Funds).*

> *(b) Further, on or about 20 May 2011, the Defendant transferred the Funds from its trust account (account number 0837-0112282-02) to its general account (0837-0112282-00), knowing that legal entitlement to the Funds was in dispute between the Complainant and the Defendant."*

[2] The charge relates to part-deposit funds of $6,235.12 which the licensee failed to pay to the complainant vendor client in breach of s.122 of the Act. The licensee accepts that the funds were not paid to the complainant, were transferred from the licensee's trust account to its general account on 20 May 2011, and at that time the licensee was aware that legal entitlement to the funds was in dispute.

[3] Section 122 of the Act reads:

> *"**122 Duty of agent with respect to money received in course of business***
>
> *(1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions.*
> *(2) Despite subsection (1), if an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to the money, he or she must take all reasonable steps to ascertain as soon as practicable the person who is entitled and may retain the money in his or her trust account until that person has been ascertained.*
> *(3) Pending the payment of any such money, the money must be paid by the agent into a general or separate trust account at any bank carrying on business in New Zealand under the authority of any Act and may not be drawn upon except for the purpose of paying it to the person entitled or as that person may in writing direct.*
> *(4) No money to which this section applies is available for payment of the agent's debts, nor may it be attached or taken in execution under the order or process of any court at the instance of any of the agent's creditors.*
> *(5) Nothing in this section takes away or affects any just lien or claim that an agent who holds money to which this section applies has against the money.*

Agreed Summary of Facts

[4] On 20 December 2006 the complainant vendor entered into an agreement to sell a section in a new subdivision in Ashburton. The licensee was the real estate agent acting on the sale. The agreement provided for a $19,000 deposit to be paid to the vendor's solicitor upon acceptance of the agreement. Settlement was due 10 working days after availability of clear title.

[5] On 2 February 2007 the licensee issued an invoice to the complainant vendor's solicitor for commission of $7,375 plus $921.88 GST (a total of $8,296.88), but the invoice was not paid.

[6] On 9 June 2009 the complainant's solicitor wrote to the licensee advising that the agreement for sale of the section had been terminated *"by way of purchaser default"* so that no commission would be paid to the licensee. Correspondence between the licensee and the complainant's solicitor ensued with the licensee claiming entitlement to commission on the basis that it had arranged an unconditional agreement, notwithstanding that the transaction ultimately failed to settle. The

purchaser's deposit in respect of that agreement had been released to the complainant vendor by its solicitor when the purchaser failed to settle, but the commission dispute between the licensee and the complainant vendor was not resolved.

[7] On 22 January 2011 the complainant entered into an agreement to sell a residential property it owned in Ashburton. Again, the licensee was the real estate agent acting on the sale. That agreement provided for a $13,000 deposit to be paid by the purchaser to the licensee's trust account on the complainant's (the vendor) acceptance of the agreement.

[8] On 3 March 2011 the licensee issued an invoice to the complainant's solicitor in respect of that $13,000 deposit. The licensee sought to retain all that deposit of $13,000 on the basis that it considered it was entitled to a commission of $5,882.50 plus $882.38 GST (a total of $6,764.88) in respect of that second agreement and also the said outstanding $8,296.88 (but now shown as $8,481.25 apparently due to the increase in the rate of GST from 12.5% to 15% in the meantime) in respect of the said first agreement.

[9] Accordingly, the invoice requested payment by the complainant of $2,246.13 (being the total of the two claimed commission amounts less the $13,000 deposit).

[10] On 7 and 17 March 2011, the complainant's solicitor wrote to the licensee requesting payment of $6,235.12 as the balance of the $13,000 deposit in excess of the $6,764.88 commission owed by the complainant vendor to the defendant in respect of the second agreement.

[11] On 19 March 2011 the complainant made a complaint to the Authority.

[12] On 20 May 2011, prior to resolution of the commission dispute, the licensee transferred the $13,000 deposit funds from its trust account to its general trading account by way of two payments, one of $6,235.12 and the other of $6,764.88. Subsequently, the defendant accepted that it had deducted $6,235.12 *"from a completely separate sale of a completely separate lot, without the authority of the complainant"*. But also stated: *"it seems that the only way we were going to get paid was to deduct the monies"*.

The Issue

[13] What is the appropriate penalty in all the circumstances of the licensee's said offending?

A Summary of the Submissions for the Prosecution

[14] We are reminded by Mr Clancy that we have made it clear we treat breaches of duties by licensees concerning client money very seriously. Mr Clancy emphasised that the present case involves a licensee accessing client funds in breach of its obligations on the grounds that it believed it was entitled to the money; but the licensee's entitlement was in dispute and the licensee has put its own financial interests ahead of those of the complainant.

[15] Mr Clancy made submissions about the type of penalty to be appropriate, and he obtained information for us about costs incurred by the complainant due to the said offending of the licensee.

[16] He advises that the defendant has no previous findings of unsatisfactory conduct or misconduct against it and the same is true of its managing director/principal.

[17] Mr Clancy also reminded us that the sections of the Act regulating handling of money by licensees are a very important part of the Act and any breach of them is very concerning and (he put it) would usually warrant a firm penalty as there must be strict compliance with the handling of clients' money by a licensee. However, he accepted that against that serious principle in this case, there are some notable mitigating factors. He referred to the defendant's early guilty plea, the repayment of the amount in dispute together with interest, and to the defendant having acted at material times on rather inappropriate legal advice (and we note that was not the advice of present counsel Mr Argyle).

[18] Mr Clancy also accepted that the impact of a suspension would be rather severe to the defendant/licensee company and its salespersons and staff. He emphasised the need for deterrence but seemed to accept that could be met, on the particular facts of this case, by a substantial fine with coverage of the costs of the complainant.

[19] On behalf of the Authority, Mr Clancy expressed firm opposition to an application of the defendant for name suppression and submitted that there must be transparency in a case such as this in the public interest. He also referred to our indicated intention to set out this sentencing against its full context which would abrogate from any perceived need for a name (and identifying details) suppression order.

[20] We are in broad agreement with Mr Clancy's submissions.

The Stance for the Defendant

[21] For the defendant licensee, Mr Argyle acknowledged that its action of deducting the commission in relation to the 2006 agreement (as explained above) from the deposit paid on the 2011 agreement was without authority.

[22] He emphasised that, at the time of such deduction of commission in relation to the 2006 agreement from the deposit paid in 2011, the managing director of the licensee sought advice in person from its then solicitor and that advice was that the matter of the disputed commission could be handled in one of two ways. It was put that one way was for the licensee to sue the complainant for it, and the other was that the licensee retain the balance deposit from the 2011 agreement which would force the complainant to sue it for that balance at which point the licensee would counterclaim for commission on the first transaction. Mr Argyle put it that, unfortunately, the defendant company took the latter course of advice. Accordingly, the licensee transferred $6,235.12 to its own trading account without the authority of the complainant. There is no dispute that it was that step which is the gravamen of the complaint.

[23] It was also emphasised for the licensee that this was not an action prompted by any financial pressures facing it and that it has operated a particularly successful branch for many years in Ashburton so that its principal is a man of significant financial means.

[24] Mr Argyle emphasised that the actions of the licensee company reflected a feeling of exasperation over the way in which the disputed commission has been handled by the solicitors for the complainant vendor. He put it that, in 2006, the defendant had secured for the complainant a contract for sale of one of the lots in a particular subdivision (the 2006 agreement) and that contract had, eventually in 2009, been made unconditional once titles for the subdivision had issued. Mr Argyle submitted that, at that point, the commission was legitimately payable (and he referred to *Latter v Parsons* (1906) 26 NZLR 645 (C.A.) as reaffirmed in *McLennan v Wolfsohn* [1973] 2 NZLR 452 (HC). We note that the relevant parts of the headnote to the latter case read:

> *"2. An agent is prima facie entitled to his commission, provided he is not in breach of his duty, when he has procured a person approved by the vendor to enter into a binding contract of purchase upon the terms of his authority, whether the purchase is completed or not (see p. 458, line 2).*
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> *Latter v Parsons (1906) 26 NZLR 645; 8 GLR 596, followed and applied.*
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> *Dustin v Pember (1970) 13 MCD 207, approved. ...*
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> *... 5 Commission is payable to the agent if, on a reasonable interpretation of the agency contract, after procuring a binding contract of sale the agent has substantially performed his contract (see p 459, line 27).*
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> *Hoenig v Isaacs [1952] 2 All ER 176, and Latter v Parsons (supra), referred to."*

[25] There had been substantial delay in the completion of the subdivision and, by the time title eventually issued, the circumstances of the purchaser had changed radically to the point where the purchaser defaulted on the purchase contract. Accordingly, the complainant cancelled the agreement, retained the purchaser's $19,000 deposit and purported to reject any liability for payment of a commission on the sale. Matters got to the stage where the proprietor of the licensee defendant company simply wanted to bring the dispute to an end and, regrettably, took the above action which has led to this prosecution and it is put that is *"an action which he now bitterly regrets"*.

[26] The defendant licensee has been in business in Ashburton for 28 years and its principal has been a real estate agent for 30 years. There is no dispute that this is the first occasion when either of them has been the subject of a complaint under legislation relating to real estate agents.

[27] Mr Argyle also put it that these proceedings have been a salutary lesson for the licensee and its proprietor with their previously unblemished records and, in the case of the proprietor, significant contribution to the industry and to his Ashburton community.

[28] Of course, there was reference to the licensee having refunded the portion of the deposit which it incorrectly retained together with $477.42 interest as compensation for the vendor's loss of interest on those funds.

[29] It is submitted by Mr Argyle that there was no element of dishonesty on the part of the licensee which quite openly notified the solicitor for the complainant of its intention to deduct the funds from the deposit received, that the deposit was

legitimately payable; and the licensee had sought, and believed it was acting on, legal advice regarding the retention of the funds.

[30] There was reference to the licensee having made an early guilty plea and having acted throughout in a thoroughly contrite manner.

[31] Mr Argyle particularly emphasised that any period of suspension of licence would not only affect the licensee defendant company and its managing director, but would also affect all the 11 real estate agents employed by it plus other staff. It was put:

> *"If the defendant company is forced to suspend its operations even for a short period of time then, in all likelihood, the effects on its business would be disastrous. It carries on business in a small community where there are eight firms operating. The majority of its referrals are by way of word of mouth which are generally reliant upon the personal reputation of the agents concerned. A suspension which, as a consequence, would prevent the agents from practicing as well, could seriously financially penalise those agents and albeit unintentionally reflect on their own credibility and reputation".*

[32] It was also emphasised that the managing director/proprietor has learned a very real lesson, and that any repetition of such offending is most unlikely, and that this matter has caused the managing director *"immense distress"*.

[33] Mr Argyle submitted that, all in all and in context, the licensee's offending was at the lower end of the scale. We are inclined to agree with that in all the particular circumstances.

[34] We take into account the above factors emphasised by Mr Argyle.

[35] Mr Argyle sought name suppression for the defendant licensee and its managing director and put it that publication of this proceeding would be, in effect, an additional severe penalty. He referred to Ashburton being a relatively small community where the public may not read the full report of these proceedings and put it that the bare facts would put the defendant in a bad light and would lead to financial penalties from loss of business.

[36] As indicated above we had mentioned that it is our practice to set out the proper context for our sentencing.

The Penalty Package

[37] We took a half hour adjournment and considered the above factors. We now set out by way of confirmation our sentencing of the defendant licensee imposed in Christchurch on 27 February 2013 at the end of this hearing about penalty, namely:

[a] The defendant licensee company is fined $7,000 to be paid within 10 working days to the Registrar of the Real Estate Agents Authority; and

[b] Within 10 working days of this decision, the defendant is to pay $2,282.75 to the complainant as reimbursement of the legal fees it incurred in consequence of the defendant's offending (as set out in a note of costs dated 28 August 2012 to the defendant from Messrs Cooney Silva Evatt Ltd, barristers and solicitors, Ashburton); and

[c] Within 10 working days of this decision, the defendant must pay $3,000 to the Registrar of the Authority and a further $3,000 to the Tribunals Unit, Ministry of Justice, (total $6,000) as a contribution towards the costs of this prosecution.

[38] It will be apparent that, in all the circumstances, there is no order for suspension against the licensee. We have not needed to make any order for compensation relating to the funds wrongfully taken because those funds have been returned together with appropriate interest as explained above.

[39] Also, having considered the submissions in support of the licensee's application for name suppression, we decline that application because we do not consider suppression appropriate having regard to the interests of the parties and to the public interest.

[40] We observe that the character or nature of his offending is serious and comprises a breach of the Act but, in this particular case, can be regarded as at the lower end of the scale due to the factors set out above.

[41] 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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Ms N Dangen
Member