

Decision No: [2013] NZREADT 22

Reference No: READT 078/12

**IN THE MATTER OF** s.111 of the Real Estate Agents Act 2008

**BETWEEN** **MS N**

Appellant

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

First Respondent

**AND** **MR X**

Second Respondent

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Ms K Davenport - Chairperson  
Ms N Dangen - Member  
Mr G Denley - Member

**APPEARANCES**

Mr Maxton Eves representative for the appellant (who was not present)  
Ms MacGibbon for the First Respondent  
No appearance for the Second Respondent

**HEARD** at AUCKLAND on 22 February 2013

***Introduction***

[1] Ms N is a real estate agent who also practices as a financial advisor. Ms Nc and Mr F came to see Ms N in August/September 2011. She offered them “*Money Management Mentoring Services*” under her business X X Limited. She provided them with a copy of a disclosure statement entitled “*Advisor Disclosure Statement*” which was a disclosure of her obligations in terms of the Securities Markets Act 1988 and the Securities Markets (Investment Advisors and Brokers) Regulations 2007. In the body of that document under a heading “*Property Investment Commission*” there was the following statement:

*“X X Limited receives either commissions or profits from the sale of the property being purchased by X X clients. These earnings are payable by the vendor directly to X X as a commission or by the profit of the on sale of the property by X X Limited. There are no commissions or finders fees charged to the purchaser.”*

[2] The last page of the document was signed by Ms Nc and Mr F. They had ticked the box at the end of the document which showed that they were seeking “*Mentoring advice*” rather than the other option “*Residential Investment Property Analysis*”.

[3] In November 2011 X X Limited purchased a property at X X X, X from Mohammed Unus for \$365,000. On 15 December 2011 X X Limited on-sold the property to GAPH Investments Limited (Mr F and Ms Nc) for \$398,000. Sometime around that time Mr F and Ms Nc signed a document acknowledging that they were aware that the purchase of X X X, X was a “contemporaneous settlement and is currently owned in the name of Mohammed Unus”. The agreement to purchase the property from X X was subject to finance. Mr F and Ms Nc went to see the complainant Mr X to obtain finance. He complained about the transaction to the Real Estate Agents Authority and the transaction was subsequently cancelled.

[4] The complaint was considered by the Complaints Assessment Committee. In its decision dated 24 July 2007 the Complaints Assessment Committee found Ms N guilty of breaches ss 134, 135 and 136 of the Real Estate Agents Act 2008. In making their finding under s 136 the Committee found that the Disclosure Statement signed in September 2011 was not specific to the planned purchase of X X X, X and was in fact an omnibus disclosure which was not sufficient to comply with s 136. The Tribunal do not have a copy of the Penalty Decision but understand Ms N to have been reprimanded.

[5] It is common ground that Ms Nc and Mr F were told by Ms N that she would be making a profit on their purchase of X X X.

[6] It is equally common ground that the Complaints Assessment Committee erred in making findings under ss 134 and 135 against Ms N. It is agreed that these provisions could not apply to the on-sale from X X to Mr F and Ms Nc. They were only applicable to the first transaction in which X X purchased the property and where Barfoot and Thompson not Ms N’s agency was the agency acting on the transaction. The Tribunal accordingly reverses the decision of the Committee to make orders against Ms N under ss 134 and 135 of the Real Estate Agents Act.

[7] The real issue in this appeal is whether or not the disclosure made by Ms N in writing complies with s 136. s 136 of the Act provides:

***Disclosure of other benefits that licensee stands to gain from transaction***

1. A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to a transaction whether or not the licensee or any person related to that licensee may benefit financially from the transaction.
2. Subsection (1) does not apply to any matter disclosed under ss 128 or 134.
3. The licensee must make the disclosure required by Subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.

4. For the purposes of this section an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect to the transaction.
5. A contract entered into in the contravention of this section may not be cancelled merely because of that contravention.

[8] Section 136 therefore requires:

1. The licensee must disclose in writing to any prospective party:
2. to the transaction
3. whether or not the licensee may benefit financially from the transaction.

[9] In the Tribunal's opinion the important matters to be covered under s 136 are:

1. Disclosure in writing.
2. about the transaction (i.e. not any transaction).
3. That there may be a financial benefit from the transaction to the agent.

[10] In this case the written disclosure document was prepared by Ms N as a standard disclosure document to satisfy her financial advice obligations. It referred in very generic terms to the way in which X X might make a profit from a sale. It did not refer specifically to the transaction, i.e. the purchase by the vendors from X X of X X X, X. It did not specifically provide that Ms N (as opposed to WMS) as agent may make a profit from the transaction. The contemporaneous settlement document does not sufficiently comply with s 136.

[11] The Tribunal finds that the disclosure made by Ms N fails to comply with s 136. The Tribunal have considered what guidance it can give to the profession as to what should be contained in a disclosure document under s 136 as there are no forms in the Act or Rules. The Tribunals suggest a document which is headed with the name of the licensee, the name of parties, the date and the address of the property and then a statement to the effect that the purchaser (or client) acknowledges that the vendor or related party to this transaction at (address) is a licensed real estate person and may benefit financially from the transaction.

[12] It is not necessary but might prevent later problems to also add that the purchaser acknowledges that they are advised to seek legal advice concerning this disclosure prior to entering into any Agreement for Sale and Purchase.

[13] We therefore confirm the decision of the Complaints Assessment Committee insofar as it relates to the decision under s 136 of the Act.

[14] We have considered what penalty ought to be imposed upon Ms N. In this case all parties agree that as a matter of fact there had been oral disclosure to the purchasers of the fact that Ms N was to receive a financial benefit.

[15] In the circumstances therefore the Tribunal considers that this decision should be in the nature of an educational decision for the members of the real estate industry. Accordingly they impose no penalty upon Ms N. Further the Tribunal makes an order permanently suppressing Ms N's name and any details which might identify her, Pursuant to s 108 of the Real Estate Agents Act 2008. The Tribunal's reason for doing this is that they consider it is proper to do having regard to Ms N's interests and the fact that she did orally comply with s 136 and also provided written disclosure, although the Tribunal have found that it did not comply with s 136. In these circumstances we consider that she has complied with the spirit if not the letter of the law and therefore consider that it would be unduly punitive to publish her name and thus impugn her reputation. In this circumstance Ms N's interest override the public interest in knowing the name of the agent charged.

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

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

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Ms K Davenport  
Chairperson

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Ms N Dangen  
Member

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Mr G Denley  
Member