

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 33

READT 062/12

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

BETWEEN **MARK MILLER**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 20003)**

First respondent

AND **SHANE ROBINSON**

Second respondent

MEMBERS OF TRIBUNAL

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

SUBSTANTIVE CASE HEARD at DUNEDIN on 29 November 2012

DATE OF SUBSTANTIVE DECISION [2013] NZREADT 14 13 February 2013

DATE OF THIS DECISION ON PENALTY 3 May 2013

COUNSEL

Mr C S Withnall QC, for appellant
Mr R M A McCoubrey, for the Authority
Mr Peter J Napier, for second respondent

DECISION OF THE TRIBUNAL ON PENALTY

The Penalty Issue

[1] By our decision of 13 February 2013 ([2013] NZREADT 14) we found the second respondent licensee (Mr S Robinson) guilty of unsatisfactory conduct so that Mr M Miller's appeal was allowed. With regard to the appropriate penalty to be imposed on Mr Robinson, we stated at our paragraph [75]:

"[75] The parties are, of course, entitled to a hearing on penalty. In case it helps resolution, we currently contemplate that the licensee be censured, fined \$1,000, and be ordered to pay \$1,000 towards our costs. If the parties were to agree, we could confirm that; but, otherwise, we direct the Registrar to arrange a fixture to deal with penalty in the usual way."

Responses

[2] The response of the appellant (also a licensee) to the above was by email of 26 February 2013 stating that his objective in appealing to us *“was to get a decision that the conduct of Mr Robinson [his former employee] was unacceptable in terms of both the double commission issue, and the way that an agent of good standing leaves a business, and set a precedent for future guidance. We have achieved this objective”*. He then continued that he did not wish to be heard on penalty but drew our attention to his having incurred legal costs of \$1,694.71 in *“obtaining initial advice on our entitlement to the commission and recovering the commission”*

[3] Later that day, the appellant confirmed that Mr C S Withnall QC was still representing him. We then received an email from Mr Withnall confirming what the appellant had stated in his email of that date and adding *“the appellant does not wish to be heard on penalty, other than it seeks an order for reimbursement of the costs it incurred in recovering the commission, but otherwise will abide the decision of the Tribunal”*.

[4] Our Chairman then issued a memo to the parties on 5 March 2013 referring to the above para [75] of our decision of 13 February 2013 and adding:

“While there has been general acceptance of our suggestion in para [75] of our decision of 13 February 2013 as follows: ... [para 75 was set out as above.]

the successful appellant (through Mr C S Withnall QC) advises that he incurred \$1,694.71 legal fees in recovering the commission from Harcourts Highland Real Estate Group Ltd and the second respondent, and a further \$12,000 approximately (GST exclusive) legal fees related to the case before the Committee and this Tribunal.

I am thinking of recommending to my members that we also order payment by Mr Robinson to Mr Miller of a further \$5,000 (GST inclusive) as an overall costs award contribution; but I invite submissions by email, succinct preferably, on this compensation for costs aspect.”

[5] Mr Withnall's response to that memo advised that the appellant would accept an award of \$5,000 as suggested on the basis that it *‘is a reasonable contribution towards his solicitor and client costs of the appeal, and if the Tribunal is minded to make such an award, he would not wish to be heard further’*.

[6] Mr Napier (as counsel for the second respondent) filed the following memo of 18 March 2013:

“SECOND RESPONDENT’S MEMORANDUM AS TO COSTS

1. *The Second Respondent’s position is that there should not be an order of costs in this case.*
2. *The Appellant was pursuing this appeal for his own purposes and not as a result of having suffered any significant loss.*
3. *Until invited by the Tribunal, all that the Appellant was seeking was reimbursement of legal costs incurred of \$1,694.71 in obtaining advice upon entitlement to commission.*

4. *Given the criticism by the Complaints Assessment Committee of the issuing of proceedings against the vendor of the house for the commission, it is submitted that such advice and the ensuing proceedings were both unnecessary and unwarranted.*
5. *Originally the Tribunal had suggested that it was contemplating fining the Second Respondent \$1,000.00 and ordering him to pay \$1,000.00 towards the Tribunal's costs. In the judgment the Tribunal stated "if the parties were to agree, we could confirm that ..."*
6. *Other than the claim for the reimbursement of legal fees, the parties recorded that they did not object to such an order.*
7. *The only thing that has happened since the parties recorded that they did not object to the proposed order (except for the claim for reimbursement of legal fees relating to the commission) is that the Second Respondent has filed an appeal of the Tribunal's decision.*
8. *If an unsought order of costs was to be provided by the Tribunal, following the filing of an appeal, it would appear (rightly or wrongly) that the Second Respondent is being punished for filing an appeal.*
9. *It is submitted that in the circumstances an award of \$5,000.00 costs should not be made."*

Discussion

[7] It needs to be recorded that until Mr Napier's above memo came to hand with its para 8, we did not know that an appeal had been filed against our decision of 13 February 2013 so that our views on costs could hardly have been punishment of the second respondent for lodging that appeal.

[8] We do not think that it is particularly relevant that the appellant seems to have been pursuing the appeal "*for his own purposes and not as a result of having suffered any significant loss*". Either there is a loss which should be compensated for in terms of the Act or there is not. The \$1,694.71 sum sought for reimbursement of legal costs seems to have a sufficient nexus with the conduct of the second respondent; although, as Mr Napier points out, it seems a reasonable criticism by the Complaints Assessment Committee that the appellant's issuing of proceedings against the vendor of the house for commission was both unnecessary and unwarranted prior to serious attempts by the parties for resolution.

[9] Having said all that; when we reflect on the situation of costs, we note that our powers to award compensation under s.110 of the Act are not available in this case because we have not found the second respondent guilty of misconduct but only of unsatisfactory conduct. Accordingly, we are confined to the powers set out under s.93 of the Act and these are rather limited regarding costs and read in s.93(1)(i) that we may: "*order the licensee to pay the complainant any costs or expenses incurred in respect of the enquiry, investigation, or hearing by the Committee*".

[10] We consider that we do not have power to reimburse the appellant for the said sum of \$1,694.71 nor to award a contribution towards the costs he incurred from his counsel in this case.

Outcome

[11] Taking into account all factors as they now stand, we order as follows:

- [a] The second respondent licensee is hereby censured; and
- [b] The second respondent licensee is hereby fined \$1,000 to be paid to the Registrar of the Authority within 15 working days from this decision; and
- [c] The second respondent licensee is ordered to pay a further \$1,000 towards the costs of this Tribunal to the Tribunals Unit, Ministry of Justice, 86 Customhouse Quay, Wellington, also within the said 15 working days; and

[12] 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.

Judge P F Barber
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member