

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 55

READT 022/12

IN THE MATTER OF

charges laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE 2006**

Prosecutor

AND

**PHILLIP SPENCER
(salesperson)**

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

HEARD at WHANGEREI on 20 November 2012

DATE OF SUBSTANTIVE DECISION 23 January 2013 [2013] NZREADT 8

DATE OF THIS DECISION ON PENALTY 4 July 2013

COUNSEL

Mr L J Clancy, for prosecution
Mr T D Rea, for defendant

BY CONSENT HEARD ON THE PAPERS

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] By our 23 January 2013 decision *CAC v Spencer* [2013] NZREADT 8, we found the defendant guilty of unsatisfactory conduct contrary to s.72 of the Real Estate Agents Act 2008 (Act); but we dismissed misconduct charges against the defendant.

[2] We found that:

- [a] The defendant did not satisfactorily communicate an offer by Beverley Callaghan and Bert Van Vliet (the complainants) for Lot 44 Alderton Park (Lot 44) to Wayne Brown its vendor.
- [b] Because of the defendant's failure to clearly communicate the complainants' offer, Mr Brown's response was "*puzzling and not certain*".

enough in terms of the importance to the complainants of being able to purchase Lot 44 before selling their house ...”.

- [c] The complainants need to purchase Lot 44 was *"pivotal"* to their sale of 15 Alderton Drive.
- [d] The defendant should not have allowed the complainants: *"... to be exposed to the consequence of having sold their property at a much lower price than they intended but being unable to recover that situation, from their point of view, by purchasing Lot 44 from Mr Brown on their particular terms."*
- [e] The defendant should have liaised with Pamela Holley (the listing agent for the Alderton Park development) to obtain a better understanding of Mr Brown's listing instructions.

[3] We indicated that we considered the defendant's unsatisfactory conduct was *"rather at the lower end of the scale"*.

Relevant Law

[4] It is settled law that decisions of disciplinary tribunals should emphasise the maintenance of high standards and the protection of the public through specific and general deterrence. However, while this may result in orders having a punitive effect, this is not their purpose; refer *Z v CAC* [2009] 1 NZLR 1; *CAC v Walker* [2011] NZREADT 4.

[5] The unsatisfactory conduct proved in this case occurred in July 2011. The 2008 Act introduced penalties for unsatisfactory conduct going significantly beyond the orders available where similar conduct was established prior to November 2009 under the Real Estate Agents Act 1976.

[6] Findings of unsatisfactory conduct, as distinct from findings of misconduct, are analogous to findings made by Regional Disciplinary Subcommittees under the old statutory framework. The orders which could be made by Regional Disciplinary Subcommittees were limited to a maximum fine of \$750 and censure. By contrast, the orders available on a finding of unsatisfactory conduct under the 2008 Act are wide ranging, and s.93 provides:

“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:*
 - (a) *make an order censuring or reprimanding the licensee:*
 - (b) *order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:*
 - (c) *order that the licensee apologise to the complainant:*
 - (d) *order that the licensee undergo training or education:*
 - (e) *order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint:*
 - (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:*
- (g) *order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company:*
- (h) *order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order:*
- (i) *order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee."*

[7] The increased penalties for unsatisfactory conduct introduced by the 2008 Act are a key part of the new disciplinary process through which the 2008 Act seeks to achieve its purpose: i.e. to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

The Stance of the Prosecution on Penalty

[8] The prosecution submits that the failures identified by us are more serious than initially indicated.

[9] It is put for the prosecutor that the defendant's employer, Barfoot & Thompson Ltd, was the complainants' agent, and was not the agent of the purchasers of 15 Alderton Drive (the Goodchilds). That, of course, is so.

[10] Under their agency agreement with Barfoot & Thompson Ltd, the complainants agreed to pay commission at 3.95% on the first \$300,000 of the sale price of their property, and 2% on the balance. Therefore, on the sale price of \$450,000 agreed with the Goodchilds for 15 Alderton Drive, the agreed commission was \$14,850.

[11] We agree with Mr Clancy that in consideration for the substantial fee/commission contemplated, the complainants were entitled to expect that the defendant would protect their interests to the extent that any reasonably competent licensee would. As we observed in our decision:

"[95] It is understandable that even mature and experienced vendors will trust their agent. It is important that the agent act in an independent and professional manner and that the overall objectives of the vendors are paramount. The agent's desire for a sale, with consequential commission to the agent, must not become influencing factors in the advice from the agent, as a fiduciary, to his or her principal."

[12] Managing transaction "*chains*", i.e. where clients' decision to buy or sell one property turns on their ability to buy or sell another, is a key aspect of real estate practice; and a reasonably competent licensee should be expected to be able to manage such situations professionally and without exposing his clients to undue risk.

[13] We found that the defendant failed to protect his clients' interests. His failure to properly communicate the complainants' offer for Lot 44, knowing that their purchase

of that section was pivotal to their decision to sell 15 Alderton Drive to the Goodchilds for \$450,000, left his clients significantly disadvantaged. That error was fundamental. As we acknowledged, had the defendant made clear that the complainants' offer for Lot 44 was \$90,000 with \$20,000 cash back, i.e. an effective sale price of \$70,000, the evidence was clear that Mr Brown would have rejected the offer out of hand with no room for confusion. Had that occurred, the evidence is that the complainants would not have agreed to sell 15 Alderton Drive to the Goodchilds for \$450,000.

[14] The defendant accepted in evidence that he was aware that the complainants were only prepared to accept the Goodchilds' offer of \$450,000 on the basis that they could purchase Lot 44 for \$90,000 plus \$20,000 cash back i.e. for a net \$70,000.

[15] Mr Clancy submits for the prosecution that any penalty imposed must promote accountability and should include a deterrent element and that, given the commission charged (\$14,850), any financial penalty must be set at a level to provide an effective deterrent. We agree in principle.

[16] Mr Clancy also submits that our penalty indication of a \$1,250 fine, in our said substantive decision, is too low; and given that the maximum fine was increased under the 2008 Act from \$750 to \$10,000, a financial penalty in the range \$5,000 to \$8,000 would be more appropriate. That is a logical point.

[17] Following publication of our decision, the Real Estate Agents Authority contacted the complainants to offer them the opportunity to submit information as to any costs or expenses incurred in respect of the inquiry, investigation, or hearing. The complainants state that the licensee's error cost them an additional \$15,000 on the purchase of Lot 44 and seek that sum in compensation. However, given the fairly recent decision of Brewer J in *Quin v REAA and Barras and Knaption*, HC Tauranga, 19/12/12, [2012] NZHC 3557, the prosecution accepts that compensatory damages are not available under s 93(1)(f). It would be open to us to order that the defendant refund part of the commission he received in respect of the sale of 15 Alderton Drive.

[18] In all the circumstances, the prosecution submits that a combination of the following orders would be appropriate, namely:

- [a] Censure or reprimand;
- [b] An order that the defendant apologise to the complainants;
- [c] An order that the defendant refund some or all of the fee charged for the real estate agency work performed;
- [d] A fine in the range \$5,000 to \$8,000.

The Stance for the Defendant on Penalty

[19] Mr Rea supports our sentencing indication at paragraph [93] of our said substantive decision of January this year which reads:

"[93] All in all, in terms of the overall facts covered above, we consider that the defendant is guilty of unsatisfactory conduct but at rather the lower end of the scale so to speak. Presently, we would contemplate simply that he be fined \$1250 to be payable to the Authority within one calendar month. However, the parties are entitled to make submissions about penalty so that we direct the

Registrar to arrange a fixture for that in the usual way. It would be sufficient if succinct typed submissions are tendered from each party on the day and responded to orally. However, if our current sentencing indication is acceptable to both parties and there is a joint memo to that effect from counsel, the matter can be concluded accordingly on the papers.”

[20] Mr Rea puts it that a fine of \$1,250 is appropriate in the light of our reasoning in our said substantive decision herein. He adds that the defendant would consent to an order for apology to the complainants and to being reprimanded by us. He also submits that the penalty of \$5,000 to \$8,000 sought by the prosecution is disproportionate to our actual findings and does not reflect the nuances of our reasoning in our substantive decision herein. Mr Rea also puts it that counsel for the prosecution has over-simplified matters and not taken into account (as Mr Rea put it) *“significant findings that are favourable to Mr Spencer, and which are [now] glossed over by the Authority”*.

[21] Mr Rea then put forward the following analysis of findings from the defendant's point of view, namely:

“Tribunal’s decision on liability – Analysis of findings

5 *The crux of the Tribunal’s decision on liability was its finding that the terms of Ms Callaghan’s offer were not, as a matter of fact, fully and accurately conveyed to Mr Brown during the telephone call from Mr Spencer on 28 July 2011. The Tribunal recognised, however, that the context was all-important, observing in respect of the Authority’s submission for alleged misconduct, that:*

“We think that the context is not so simple.”

It is undoubtedly the overall context which has been appreciated by the Tribunal that caused it to express the view in its liability decision that, while there was unsatisfactory conduct, it was “at rather the lower end of the scale so to speak”.

6 *There are a number of further findings recorded in the Tribunal’s liability decision which are relevant to its assessment of the conduct as being at the lower end of the scale, to which no reference is made in the submissions for the Authority.*

7 *Particularly, the Tribunal recognised that a significant factor that led to the misunderstanding in the conversation with Mr Brown was the fact that Mr Spencer was unaware of Mr Brown’s advice communicated to Ms Holley that he would accept no less than \$20,000 beneath the full asking price for any section. The Tribunal, therefore, recorded that:*

“Had he known Mr Brown’s clear price expectations, [Mr Spencer] would have been likely to carefully explain that the offer was at an effective level of \$70,000 and considerably below Mr Brown’s bottom line.”

8 *The Tribunal was also no doubt mindful of the evidence given by Ms Holley that a vendor’s “bottom line” is something she would never communicate to other salespeople, without express authority, and the submissions previously made on behalf of Mr Spencer that such*

information would be contrary to the interests of a vendor to be made known, as it would have potential to create a “benchmark” rather than bottom line, particularly given the fixed fee commission agreed.

- 9 *Therefore, whilst Mr Spencer did not convey Ms Callaghan’s offer to Mr Brown as clearly as he may otherwise have done, he did not have the benefit of knowledge of Mr Brown’s bottom line (nor could he reasonably have been expected to have such knowledge). If he had had this knowledge, then he would have acted differently. This is a significant mitigating factor concerning Mr Spencer’s conduct.*

- 10 *The Tribunal found Mr Spencer to be an “impressive” witness and had “no reason to doubt his credibility”. It dismissed the Authority’s allegation that there was any undue pressure exerted by Mr Spencer on the complainant. Consequent on these findings, the Tribunal accepted that Mr Spencer would have been willing to insert a clause making the agreement for sale of Ms Callaghan’s property conditional on the purchase of the section from Mr Brown, but the complainants elected to sign the agreement accepting the Goodchilds’ offer without such a condition included. The Tribunal also took into account that Mr van Vliet’s alteration to the written offer so as to purport to require the \$20,000 to be held in trust was “anathema” to Mr Brown. The complainants also chose not to follow Mr Spencer’s advice to contact Mr Brown or Ms Holley directly, despite Mr Spencer making clear to them that he was not comfortable with the response and position of Mr Brown.*

- 11 *This is the background to the Tribunal’s assessment of Mr Spencer’s conduct being at the “lower end of the scale” of unsatisfactory conduct. Whilst counsel for the Authority submits that the failures identified by the Tribunal are more serious than initially indicated, counsel respectfully adopts the observation of the Tribunal, and agrees that the context is not so simple.”*

[22] Mr Rea emphasised that the allegations made against the defendant were serious and put as charges of misconduct, which we did not find proven except that they resulted in one finding of unsatisfactory conduct which, Mr Rea puts it, as *“at the lower end of the scale, following a concession to that effect made in submissions on behalf of Mr Spencer”*.

[23] Mr Rea also emphasises that the defendant has had misconduct charges, and the threat of potential cancellation of his licence hanging over his head for a year or so and submits that, in itself, has been a significant penalty which he has already endured.

[24] It is also put by Mr Rea, on behalf of the defendant, that the defendant has not previously appeared before us, nor ever been the subject of any other complaint at any level, and has a completely unblemished career apart from this matter. Mr Rea referred to the glowing endorsements of the defendant given in evidence by Mr and Mrs Goodchild.

[25] Mr Rea then submitted as follows:

“Order under s.93(1)(e)

- 15 *Section 93(1)(e) provides for orders that a licensee “reduce, cancel or refund fees charged for work”. It is submitted that this provision, on its correct interpretation, can have no application to salespeople licensee and may only apply to licensed real estate agents.*
- 16 *There is no direct agency or contractual relationship between a salesperson and a vendor, and it is the agency which charges fees. It is, therefore, not within the power of a salesperson to “reduce or cancel” fees charged by his or her employer. Similarly, a “refund” of fees, on its ordinary meaning, would only involve the real estate agent to whom fees were actually paid. Applying the “noscitur a sociis” rule of statutory interpretation, the inability of a salesperson to cancel or reduce fees of his or her employing agent lends further support to the interpretation of an order for “refund” being available only against a licensed real estate agent.*
- 17 *In any event, it is submitted that this case would be inappropriate for an order for refund of fees, even if such an order were available against a salesperson licensee (which is denied). The circumstances outlined above would provide grounds for defence of any claim in respect of commission based upon lack of causation, volenti non fit injuria and/or contributory negligence by the complainants”*

Our Views on Penalty and Outcome

[26] Broadly speaking, we agree with the submissions of Mr Rea on penalty in this case. We do not think that overall justice requires that the licensee refund any of his commission share or fees, but we consider that we have power under s.93(1)(e) to do that had we thought it appropriate.

[27] However, having stood back and absorbed the submissions put to us as covered above, we agree with Mr Clancy that the viewpoint we had at para [93] of the substantive decision of January 2013 is a little light, particularly in terms of the need for accountability from the defendant and deterrence in general. Accordingly, we sentence the defendant for the offence of unsatisfactory conduct as follows:

- [a] He is censured in terms of s.93(1)(a) of the Act; and
- [b] We order that he apologise to the complainant in terms of s.93(1)(c); and
- [c] He is fined \$2,000 to be paid to the Registrar of the Authority in Wellington within three weeks from the date of this decision; and
- [d] On account of the costs of this Disciplinary Tribunal, he is ordered to pay \$2,000 within six weeks from the date of this decision to the Tribunals Unit of the Ministry of Justice, 86 Customhouse Quay, Wellington.

[28] We emphasise that we gave quite some thought to whether there should also be an order that the defendant refund some or all of the fee or commission which he received for the real estate agency work performed; but, as already indicated, we do not consider such an order to be appropriate in this particular case; and one of the

factors for that is we are not convinced that the complainants are particularly out of pocket because of the conduct of the defendant.

[29] 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

Ms J Robson
Member

Mr J Gaukrodger
Member