BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 81

READT 089/12

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (CAC 20006)**
	Prosecutor
AND	**MARK WALLACE** of Auckland, Real Estate Agent
	Defendant

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 9 April 2013

DATE OF OUR SUBSTANTIVE DECISION ON THE CHARGES 4 June 2013 ([2013] NZ READT 46)

DATE OF THIS DECISION ON PENALTY 27 September 2013

By consent, Penalty dealt with "On The Papers"

COUNSEL

Mr L J Clancy and Ms J F MacGibbon, counsel for prosecution
Mr P J Napier, counsel for defendant

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In our decision of 4 June 2013, we found that the defendant was seriously negligent, in terms of s.73(b) of the Real Estate Agents Act 2008, in acting on the sale of a property at 6A Waikaremoana Place, Howick, when he told the purchaser, Dianne Kern, that the property was not a leaky home. The property was of materials and design which rendered it likely to be leaky, and the defendant must have suspected from his experience that the property may be a leaky home. We now need to address penalty.

[2] The misconduct engaged in by the defendant occurred prior to the Real Estate Agents Act 2008 coming into force on 17 November 2009 so that s.172 of that Act applies. Given that s.172 allows us to impose only penalties which would have been

available under the Real Estate Agents Act 1976, the only penalty options available to us are cancellation or suspension of the defendant's licence and/or a financial penalty of no more than $750.

[3] If considering imposing orders for cancellation or suspension under s.172 of the 2008 Act, we are required to consider the *"character test"* applicable under the 1976 Act. Whether or not the character test is met would be a matter for us. We note that counsel for the Committee accept that the threshold for cancellation or suspension under the 1976 Act was a high one and that threshold may not have been crossed in this case. In our view, it has not been - as submitted by Mr Napier for the defendant, but we explain below the scope of that character test.

Further Background

[4] By way of further background we set out paras [74] to [81] of our decision of 4 June 2013 herein:

> *[74] Mr Clancy submits that the defendant was seriously negligent in his real estate agency work in making his statement at the open home that the property had no issues with leaks. We agree. We note, of course, the defendant's evidence that he has no recollection of making any such representation (that the property is clearly not a leaky home). However, we are very satisfied from the evidence that he did make that representation.*
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> *[75] It seems to us that, at the very least, he made such a representation to Mrs Kern without any basis. It is also concerning that, in terms of his knowledge of the property, its appearance, and the well-known leaky-home-syndrome for certain types of construction, it defies common sense that he could have given such an assurance or representation to Mrs Kern on 22 March 2009 and 27 April 2009. He denies doing so before us against strong evidence to the contrary. We find that the weathertightness issue was clearly raised with him as Mrs Watkinson and Ms Nicholson have stated in their evidence which we deal with above, and we assess them as truthful witnesses.*
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> *[76] It is relevant that (as we have covered above) the condition, clause 15, added to the offer from Mrs Kern on the advice of the defendant could have protected Mrs Kern by enabling her to cancel the purchase if the vendors failed to rectify, and that the defendant did seem to endeavour to assist her take advantage of that condition. However, we are concerned with the defendant's conduct at the open homes of 22 March 2009 and 26 April 2009 when he misrepresented the situation of leaks to Mrs Kern.*
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> *[77] We have found, on the balance of probabilities, that the representation was made by the defendant to Mrs Kern as stated by the prosecution witnesses and set out above, and at that time constituted seriously negligent conduct by the defendant. We realise that careful investigation was needed by experienced builders to disclose the extent of the weathertightness problems, but there were sufficient signs of the need for investigation without those, such as, insufficient and inadequate flashings and soffits, type of material used, and type of construction applied. We consider that warning bells should have arisen in the mind of the defendant as early as January 2009 when he inspected the property prior to its renovation and that certainly, when the weathertightness question was put to him at the open home on 22*

March 2009 and again on 26 April 2009 by Mrs Kern, he was in no position to give the representation and assurance which he did that the property had no leak issues.

[78] It also seems to us that, against the background of the question put to the defendant by Mrs Kern at the open homes, his response was very reckless. It should have been obvious to him that there was a weathertightness risk simply from the nature of construction of the home and the materials used. There was also his viewing of the state of the property in January 2009. In any case, an experienced agent would have seen some type of risk such as to not be able to give such an assurance to Mrs Kern about weathertightness.

[79] We also take the view that whatever the legislation and its regulations might have been at material times, the defendant had a duty of care to be fair and truthful to all parties with whom he dealt. We consider that he was most dismissive of the question put to him by Mrs Kern and seriously failed in skill, care, competence, and diligence to deal with the possibility of a weathertightness problem.

[80] Accordingly, we record that we have dismissed the second charge as explained above, but we find the defendant guilty of misconduct under s.73(b) of the Act in that his conduct over the leaky home issue constituted seriously negligent real estate work.

[81] In accordance with our usual practice, and as sought by counsel, we direct the Registrar to liaise with the parties and arrange a Directions Hearing to facilitate procedural orders towards a fixture for us to decide penalty. We realise that our powers over penalty are somewhat restricted because the offending occurred prior to the coming into the force of the present Act and its regulations. Mr Napier is, of course, entitled to raise the issue of non publication/name suppression but, currently, we are not much attracted to such a course. Our sentencing powers in this particular case are so restricted that it may be possible to conclude the sentencing issue without a further formal hearing."

The Character Test

[5] The leading case on the character test applicable under the 1976 Act was *Sime v Real Estate Institute of New Zealand & Anor* M73/86 HC Auckland, 30 July 1986. *Sime* established that the character test had two stages:

[a] First, an enquiry into whether the person's character, in the sense of his personal qualities, reputation and behaviour, reflected on his honesty and integrity; and

[b] Second, consideration of whether it was in the public interest that the person's certificate be cancelled or the person suspended.

[6] *Sime* set a high threshold before the test was met. The facts of *Sime* were that clients of the agency that Mr Sime worked for listed a property comprising three units with the agency for $58,000. Mr Sime showed the property to a property management company he had previous dealings with and that company immediately made an unconditional offer at the listing price, which was accepted. Within a week,

Mr Sime had acted for the property company in bringing about an on-sale of the property for $92,000.

[7] The Board held that Mr Sime had placed his objective of achieving sales above his duty to his principal, the original owner of the property. On appeal, the High Court held that this finding nevertheless fell *"far short"* of establishing the requisite negative character traits to permit orders to be made by the Board.

[8] Also relevant is the more recent decision of *Davis v The Real Estate Institute of New Zealand Inc*, HC Auckland CIV 2008-404-007408, 1 May 2009. Mrs Davis' vendor client was an elderly and, it was accepted, vulnerable woman who had no commercial experience. Her reliance on Mrs Davis' advice resulted in the sale of her property for an unjustifiably low price. The Court stated that it was *"troubled by Mrs Davis' conduct in relation to the sale of the property"*.

[9] It was found that Mrs Davis was "obliged to turn her mind to [the vendor client's] interests" and that "instead she gave [the client] advice which seems unsupportable on any analysis of the facts". Despite the Court's comments as to the troubling nature of the conduct and the adverse findings made against Mrs Davis, applying *Sime* the Court held that the character test was not met and suspension or cancellation were therefore not available. The Court stated:

> [*54] In this case, Mrs Davis has been guilty of serious negligence at a level suggesting an indifference to her obligations to Ms Thom. Negligence at this level can reflect upon a person's character and I do not doubt that in this case this conduct reflects adversely on Mrs Davis' character to some extent. But the issue is whether, by reason of that negligence, Mrs Davis has been shown to have been of such a character that it is in the public interest that her certificate of approval be cancelled or suspended. I accept counsel for Mrs Davis's submission that there is no dishonesty in her conduct, and that this is an isolated incident. No pattern of conduct has been shown. Against, this background, I cannot conclude that Mrs Davis was of such character that it was in the public interest that the certificate of approval be suspended in respect of her.*

Application of Davis to the Current Case

[10] As in Davis, we have made adverse findings against the defendant in paras [78] and [79] (set out above) of our decision herein of 4 June 2013.

[11] As in Davis, the misconduct found proved does reflect adversely on the defendant's character to some extent. A question for us is whether or not it is in the public interest that Mr Wallace's licence be cancelled or suspended.

[12] The defendant tenders evidence of his good character, including his lack of criminal convictions or of any previous disciplinary finding, and his involvement with various charities, particularly the Howick Volunteer Coastguard.

[13] Because we take the view that the character test is not made out against the defendant in this case, the only penalty we can impose is a fine of no more than $750.

[14] The Committee have asked that, if we decide not to impose cancellation or suspension in this case, we make clear that our decision should not be taken as

indicative of our likely approach to penalty in similar cases where the misconduct occurred after the 2008 Act came into force. Of course, in cases occurring after November 2009, no character test is applicable and it may well be that a significant penalty order (including significant financial awards) would be appropriate in those cases.

Further Evidence of Defendant on Penalty

[15] In a short affidavit sworn 27 August 2013, the defendant deposed that he has never had a criminal conviction in his life nor any previous enquiries about him to the Real Estate Agents Authority prior to that which initiated the present case.

[16] He considers himself a law-abiding citizen with a commitment to the wider community. He supports many charities including Auckland Rescue Helicopter Service, Riding for Disabled Children, Daffodil Day, Guide Dogs for the Blind, Haemophilia Foundation of NZ Inc., and others.

[17] He is an active member of Howick Volunteer Coastguard and has been for the last seven years or so. He is regularly called to assist fellow mariners for search and rescue operations including late at night and early morning.

[18] The defendant has provided us with various testimonials. We can accept that there many satisfied vendors and purchasers alike who have been serviced by him as a Real Estate Agent and they regard him as dedicated and well thought of. We can accept that he is well regarded in the Real Estate Industry.

Discussion

[19] We have set out above the views of the prosecution. Mr P J Napier, counsel for the defendant, largely agrees with those. In his final submission to us he has, helpfully, covered the *Sime* case which he also regards as the leading case on suspension or cancellation of a certificate of approval under the 1976 Act. He also covered for us the *Davis* case.

[20] Inter alia, Mr Napier submits that the present case is much like the *Davis* case in that there is no suggestion of dishonesty, there has been an isolated offence by the defendant, and there is no pattern of such conduct or any concerning conduct. In terms of the affidavit evidence from the defendant to which we have referred above, Mr Napier submits that he is not of such a character that it is in the public interest that his certificate of approval be suspended or cancelled. We agree.

[21] We are concerned that the defendant failed in his duty of care to the purchaser. We did not find his denials credible. We explained in our decision of 4 June 2013 that his conduct was concerningly negligent and careless, if not reckless. The state of the property in early 2009 and its construction materials and design should have alerted the defendant to a likely weathertightness problem. He was asked by the purchaser if the property had any leak problems and he dismissively answered in the negative. We have found that he must have known such a problem was likely.

[22] As outlined above, because the offending conduct took place prior to the Real Estate Agents Act 2008 coming into force on 17 November 2009, our penalty powers are very limited and barely existent, because we have accepted that the threshold for cancellation or suspension of licence has not been met in this particular case.

[23] The maximum fine we can impose is $750, which is now a very modest sum to be imposed as a fine in relation to the misconduct we have found in this case on the part of the defendant. However, matters should be looked at in the context of the law at the time of the offending. In some respects, it could have been a fairly near run thing whether or not the defendant have his licence cancelled or suspended. We regard the offending as at a concerning level as we explained in our substantive decision of 4 June 2013 but we are not satisfied that the defendant's offending was based on dishonesty.

[24] Accordingly, in all the circumstances we fine the defendant $750 to be paid within 10 working days to the Registrar of the Authority at Wellington.

[25] This case should not be taken as indicative of our likely approach for penalty for similar offending where the misconduct occurs after the 2008 Act came into force. If we had the power to do so in the present case, our penalty would be much more severe. We note that in cases occurring after November 2009, no character test is applicable and we have power to make significant financial reimbursement to affected parties.

[26] 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 J Gaukrodger
Member

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Mr G Denley
Member