

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 88

READT 75/12

IN THE MATTER OF charges laid under s.91 of the Real Estate Agents Act 2008

BETWEEN **REAL ESTATE AGENTS AUTHORITY (CAC 20004)**

Prosecutor

AND **ASTRID CLARK**

First defendant

AND **KAREN CLARK**

Second defendant

MEMBERS OF TRIBUNAL

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

HEARD at CHRISTCHURCH on 21 May 2013 (with subsequent series of written submissions)

DATE OF SUBSTANTIVE DECISION HEREIN 23 July 2013 [2013] NZREADT 62

DATE OF THIS PENALTY DECISION (BY CONSENT ON THE PAPERS)
16 October 2013

COUNSEL

Mr L J Clancy, for the prosecution
Mr T D Rea, for defendants

PENALTY DECISION OF THE TRIBUNAL

Introduction

[1] In our 23 July 2013 ([2013] NZREADT 62) decision herein, we found that both defendants had engaged in unsatisfactory conduct by failing to comply with s.136 of the Real Estate Agents Act 2008 (about disclosure of other benefits that licensee stands to gain from transaction). We also found that the breaches were not deliberate because, at material times, the defendants were not aware of s.136. Therefore misconduct was not proved. In that 23 July 2013 decision we set out our views and findings comprehensively.

[2] We found that, as there had been no written disclosure of Karen Clark's interest in the property being marketed, both defendants had breached s.136 of the Act, and that the

defendants had been “*somewhat vague*” about the ownership of the property in communications with the purchaser, but this was “*careless ... not sinister*”.

[3] We noted that confusion had developed between the purchaser and the defendants about Karen Clark’s interest in the property but we were satisfied, on the balance of probabilities, that both defendants had orally disclosed that interest. However, we considered that a reasonably competent licensee should not have allowed the purchaser to be left in any way unclear about who she was really dealing with. We stated that a purchaser has the right to know when he or she is dealing directly with the vendor, rather than the vendor’s real estate agent, and that where breaches of s.136 are established, significant disciplinary findings may be warranted.

[4] We noted that we were considering penalty orders against each defendant of an Order for censure; and \$1,500 costs of the Authority; and \$2,500 costs of the Tribunal. However, as yet, we do not have power to award costs other than to a complainant against a licensee.

Discussion

[5] The unsatisfactory conduct proved in this case occurred in late 2010/early 2011.

[6] The Real Estate Agents Act 2008 introduced a wider and stronger range of penalties for unsatisfactory conduct significantly beyond the orders available where, prior to November 2009, similar conduct was established under the Real Estate Agents Act 1976. The latter Act, effectively, only allowed a maximum fine of \$750 and censure. Where a finding was against a salesperson or branch manager, these orders were available on a vicarious liability basis against the salespersons or branch manager’s employing agent.

[7] By contrast, the orders now available on a finding of unsatisfactory conduct under s.93 of the Act 2008 are wide ranging, including fines of up to \$10,000. Under s.93(1)(d), we may also order a licensee to undergo training or education.

[8] 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: 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 (refer s.3(1) of the Act).

[9] Section 136 is an important consumer protection provision, which helps ensure that dealings in respect of property owned by licensees are open and transparent and that consumers are not misled and therefore disadvantaged.

[10] At the time of the relevant transaction, the Act had been in force for at least a year. The defendants should have been aware of their obligations under the Act and should have complied with them. They escaped a finding of misconduct in this case by arguing that their failures were not wilful or reckless as they were unaware of s.136 at the relevant time.

[11] Mr Clancy submits for the Committee that, in this case, penalty orders with a significant deterrent element are required to mark the importance of licensees being aware of their duties under the Act where they have a personal interest in a transaction, and of strict compliance with those duties.

[12] Mr Clancy also submits that a significant fine, payable to the Authority, would be appropriate. He submitted that a fine in the middle of the available range, that is \$4,000 to \$6,000, is warranted.

[13] Mr Clancy also submits that each defendant should be censured and ordered to undergo further training or education in respect of their obligations under the Act.

[14] As Mr Rea points out for the defendants, Karen and Astrid Clark both admitted that s.136 had not been complied with as there was no written disclosure to the complainant, Teresa Lindsay, of Karen Clark's interest as a shareholder and director of the vendor company, Heatherlea Caterers Limited. However, both asserted that Karen Clark's interest had been discussed with Ms Lindsay, and the breach of s.136 was inadvertent as neither licensee was aware of this provision, which was a new requirement under the 2008 Act and had no equivalent under the Real Estate Agents Act 1976.

[15] Mr Rea advises that, in May 2012, following the relevant events, Karen Clark voluntarily re-sat and passed her Certificate in Real Estate as she was concerned that she may have missed other requirements of the new Act. In her response to the charge dated 9 November 2012 she had pleaded guilty to unsatisfactory conduct in respect of the breach of s.136 at the first available opportunity.

[16] Mr Rea points out that, on advice from counsel, Astrid Clark did not plead guilty either to misconduct or unsatisfactory conduct as she did not present a contractual document to Ms Lindsay, and (Mr Rea puts it) s.136(3) expressly provides that written disclosure is only required to be given, at the latest, at the time that the licensee provides the prospective party with contractual documents. However, that subsection must mean that disclosure requirement is ongoing and is to be made no later than the provision of such contractual documents.

[17] It is of significance that we also accepted the evidence of Karen and Astrid Clark that there had been discussion with Ms Lindsay regarding the issue of Karen Clark's interest, but we considered the advice was not sufficiently clear and that there was, therefore, confusion on this issue.

[18] We accept from Mr Rea that the following further factors are relevant in mitigation for the defendants:

- [a] Karen Clark and Astrid Clark both have previously unblemished careers and have not been subject to any other disciplinary findings against them;
- [b] The substantial stress and expense involved in the process have served as a significant penalty already;
- [c] That Karen Clark pleaded guilty to unsatisfactory conduct at the outset so, in that respect, she has been completely successful in her defence; yet has incurred significant irrecoverable costs;
- [d] Astrid Clark is the less experienced licensee and had a lesser involvement in the relevant transaction. Her knowledge of affairs and dealings concerning the operation of the vendor company was also much less than that of her mother Karen Clark;

- [e] Karen Clark has had an exemplary career and has contributed to the real estate profession, previously holding the position as President of the Canterbury/Westland District of the Real Estate Institute of New Zealand Inc;
- [f] No loss was suffered by the complainant as a result of any conduct by either defendant, and she was content to deal with the licensees in respect of a later agreement. It seems that issues were only raised by the complainant when her demands for compensation on an unrelated issue were refused by Karen Clark.

[19] The defendants agree with us that an order for censure is appropriate.

[20] Mr Rea submits that further training and education, while not strongly opposed, is not necessary. As noted above, Karen Clark voluntarily re-sat the certificate in real estate. Mr Rea puts it that both defendants will now be acutely aware of the requirements of s.136, and will be motivated to ensure that they are sufficiently knowledgeable about all requirements of the Act and Rules without the need for formal orders.

Conclusion

[21] We take into account the above factors which contain some significant mitigating features; that in the usual way there is a need for denunciation, deterrence, accountability, and for promoting responsibility among real estate agents; and that the defendants can be regarded as remorseful.

[22] Accordingly, we censure each defendant and also fine each defendant \$3,000 payable to the Registrar of the Authority at Wellington within 15 working days from the date of this decision.

[23] 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 G Denley
Member

Ms N Dangen
Member