

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 97

READT 093/12

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

BETWEEN **THE REAL ESTATE AGENTS
AUTHORITY (per CAC 20006)**

Prosecutor

AND **BRUCE ENGLAND**

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

PART HEARD at AUCKLAND on 7 August 2013

DATE OF THIS DECISION 11 November 2013

COUNSEL

Mr R M A McCoubrey for the prosecution
Mr R Hern for defendant

DECISION OF THE TRIBUNAL

The Charges

[1] This matter was part-heard at Auckland on 7 August 2013 and then adjourned with Timetabling Orders for a completion fixture date later this year. However, on 23 August 2013 the defendant formally accepted, without qualification, the account of events set out in the summary of facts recorded below; and pleaded guilty to the following charges of misconduct, namely:

“1.1 Complaints Assessment Committee 20006 (Committee) charges the defendant with misconduct under s.73(a) of the Real Estate Agents Act 2008 (Act), in that his conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful, or, in the alternative, misconduct under s.73(c)(ii) of the Act in that the defendant’s conduct consisted of a wilful or reckless contravention of s.9 of the Fair Trading Act 1986 and/or rule 13.1 of the rules made under s.70 of the Real Estate Agents Act 1976:

Particulars

- (a) *On 9 April 2006 made positive representations that the property at 9B Dallinghoe Crescent (property) did not have weathertightness issues when Mr and Mrs Hamid (complainants) viewed it.*
- (b) *Disclosed the favourable CBZ Consulting Limited report while failing to disclose the earlier NS Inspections Report that recorded that the property had weathertightness issues and which recommended remedial work that he had not completed.*
- (c) *Failed to mention that the neighbouring property (part of the same development) had recently been re-clad at a significant cost due to weathertightness issues in the context of mentioning that property's sale price of \$650,000 as a comparator to the property's value."*

Agreed Summary of Facts

[2] The following is the said summary of facts which has been agreed to by both parties, namely:

- "1. *Mr England, the defendant, is a real estate agent employed by Barfoot & Thompson Limited (the agency), and was so at all relevant times. The agency was and is licensed under the Real Estate Agents Act 2008. Mr England was engaged at the agency's Milford branch under the supervision of Tony Pratt.*
- 2. *Mr England and his wife decided to sell their family home at 9B Dallinghoe Crescent, Milford (the property) in 2005. On 7 February 2006, Mr England listed the property with the agency as the sole agency until 31 March 2006. Mr England advertised the house for sale under the agency's banner until the sole agency expired, at which point Mr England marketed the property privately on the Trade Me website.*
- 3. *On 9 April 2006, the complainants in this matter, Piers and Pamela Hamid (the Hamids), viewed the property. When they arrived, the agency's "For Sale" sign was outside the property. Mr England introduced himself as the property's owner and explained that, if this was a problem the Hamids could deal with another agent at the agency. Mr Hamid did not consider this necessary.*
- 4. *The Hamids were given a flyer for the property with the agency's reference label on it and the words "Sole Agency". The Hamids were also supplied at that time with a business card from the agency containing Mr England's contact details. Mr England's subsequent email correspondence with Mr Hamid was signed off in the following way:*

BRUCE ENGLAND

Barfoot & Thompson Milford Office

Mobile:

After Hours:

5. *Mr Hamid asked about the cladding on the property and commented about the problem with leaky homes. Mr England responded with words to the effect that he was not aware of any weather-tightness issues. He provided Mr Hamid with a pre-inspection report by CBZ Consulting Limited dated 28 February 2006. That report stated:

“... the design of the dwelling is such that there are no areas that are likely to cause concern in terms of water tightness if maintained in current condition and from inspection that can only be considered to be very good.”*
6. *However, Mr England did not mention or provide Mr Hamid with a copy of a prior inspection report that Mr England had requested and obtained from NZ Inspection Services Limited in September 2004. That report had identified moisture readings at the property that were higher than the accepted standard building code, and had recommended that specific remedial action be taken (which Mr England had at best only partially had done).*
7. *In an email to Mr Hamid on 14 April 2006, Mr England mentioned that the townhouse next door at 9C Dallinghoe Crescent – a townhouse constructed in the same development as the property – was sold for over \$650,000. However, Mr England knew that the owners of that townhouse had had to re-clad it due to weather tightness issues, although did not advise the Hamids of this in the email.*
8. *Without obtaining a LIM report or searching the Council files, Mr Hamid and his wife made an offer of \$610,000 on the property on 14 April 2006. The Hamids were unaware that 9C Dallinghoe Crescent had undergone repairs due to weather tightness issues. After some negotiations, a sale and purchase agreement was signed on 19 April 2006. The sale price was \$615,000. The agreement was marked “private sale” and did not have the agency’s logo printed on it.*
9. *Possession took place on 22 June 2006. A few days later, the occupier of the property at 9C Dallinghoe Crescent visited the property and asked whether Mr England had advised the Hamids that the property at 9C had leaked and that re-cladding it had cost over \$300,000. The Hamids were reassured about the property’s weather-tightness because of the CBZ report and because of Mr England’s assurances.*
10. *However, the Hamids discovered moisture accumulating next to the stairs in February 2009. In March 2009, they commissioned two reports which both revealed that the property had serious moisture ingress problems.*

These reports were provided by Prendos Limited and Moisture Detection Company. The Prendos report of 4 June 2009 estimated that the repair bill would be around \$280,000. On 6 August 2009 the Hamids also obtained a repair estimate from Hybrid Residential Limited, the same company that had re-clad 9C Dallinghoe Crescent. It estimates the construction repair costs for the property as being \$404,444.25 (GST inclusive). Rather than work through repairs, the Hamids sold the property to a builder for \$385,000 on 24 September 2009.

11. *The Hamids commenced proceedings in the High Court against Mr England and the agency for having engaged in misleading and deceptive conduct in trade contrary to section 9 of the Fair Trading Act 1986. This went to trial in August 2011.*
12. *Whata J released the High Court's decision on 26 September 2011. The Court awarded the Hamids 75 percent of the primary loss and general damages that they had claimed from Mr England and the agency. Of this, the Court ordered Mr England to account for 80 percent, and the agency the other 20 percent. The Court held that the Hamids were to bear the remaining 25 percent, for failing to carry out their own due diligence."*

Discussion

[3] Mr England's misconduct took place in 2006. Accordingly, it took place before the coming into force of the Real Estate Agents Act 2008, and falls to be dealt with under the Real Estate Agents Act 1976.

[4] Mr England was a salesperson under the 1976 Act. In those circumstances, the following penalties were available, namely, cancellation of certificate of approval; suspension of up to three years; a monetary penalty up to \$750.

[5] For the then Real Estate Agents Licensing Board to cancel or suspend a certificate of approval, the salesperson had to be shown to be of such character that it was in the public interest that the certificate be cancelled or the person suspended. That "*character test*" under s.99(b) of the 1976 Act was a high test. It involved a two-step enquiry into the salesperson's character, including his personal traits, reputation and any aspects of his behaviour that reflect on his honesty and integrity; and whether the salesperson's character is such that suspension or cancellation is in the public interest. Traits such as dishonesty or gross incompetence may be within this category but less culpable characteristics may well not be.

[6] The prosecution accepts that the character test would not be met in this case. In other words, the Authority submits that cancellation and/or suspension are not applicable on the facts of its case against Mr England. We accept that view with some regret in terms of our concern about the seriousness of the defendant's conduct described above.

[7] It follows that the only practical penalty option available to us is a monetary penalty of \$750. Mr McCoubrey (counsel for the Authority) submits that this is the correct penalty. He emphasises that there is no concession by the prosecution that Mr England's misconduct is not serious and puts it that a number of the penalties in s.110(2) of the 2008 Act would seem appropriate and applicable.

[8] We consider the defendant's above described conduct to be disturbing. It may be thought that at least liability under our civil law has been dealt with in the High Court as referred to above. However, the defendant states that he is bankrupt.

[9] In the circumstances explained above, we find the charges proven and we fine the defendant \$750 to be paid to the Registrar of the Authority at Wellington within five working days of the date of this decision.

[10] 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

Ms N Dangen
Member