BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 101

READT 036/14

IN THE MATTER OF	charges under s.91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (per CAC 20005)**
	Prosecutor
AND	**AARON DREVER** of Auckland, Real Estate Salesperson
	Defendant

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 25 November 2014

DATE OF THIS DECISION 18 December 2014

COUNSEL

Mr L J Clancy, for the prosecuting Committee
Messrs G J Foley and K P Brosnhan, for defendant

DECISION OF THE TRIBUNAL

The Amended Charge

[1] By consent the charge before us is as follows:

> *"**Charge***
>
> *Following a complaint by Joy Hedgman, Complaints Assessment Committee 20005 (Committee) charges Aaron Drever (Defendant) with misconduct under s.73(b) of the Real Estate Agents Act 2008 (Act) in that his conduct constitutes seriously negligent real estate agency work.*
>
> ***Particulars:***
>
> *Banking and holding in his personal bank account marketing monies in the sum of $15,381.30, which he believed he was owed, pending resolution of a commercial dispute between himself and Hedgman Real Estate Ltd (Agency), the usual procedure at the agency being that such monies were paid to the Agency before being credited back to the Defendant, without notifying the Agency within a reasonable time that he had taken such action.*

Summary of facts:

The Defendant worked as a real estate agent at the Agency from 2010 to 2013.

In 2013, a dispute arose between the Defendant and the Agency over the financial position between them. The Defendant engaged his accountant to undertake a financial audit to clarify the position, but due to the limited material provided by the Agency the audit was unable to clarify the financial position.

Advertising expenses were deducted by the Agency from the Defendant's monthly commissions in the first instance, and then credited back to the Defendant if and when received by the Agency from the vendors.

As a result of the concerns arising from the audit, the Defendant arranged for marketing monies to be paid to him directly, rather than being paid to the Agency in the first instance and then being credited back to the Defendant, as had been the usual course and was the expectation of the Agency. The Defendant banked and held these monies in his personal bank account. The Defendant failed to advise the Agency that he had taken such action within a reasonable timeframe"

[2] We ordered the substitution of the above charge, by consent, on 25 November 2014 and it can be regarded as laid then.

[3] The defendant agrees to the wording of the charge and accepts liability for misconduct under s.73(b) of the Real Estate Agents Act 2008 ("the Act") as now charged and on the basis of the summary of facts set out above as part of the amended charge.

[4] We had absorbed the quite detailed briefs of the proposed witnesses for each party, and the detailed and helpful opening submissions, filed prior to the change in plea. The initial charges had relied on s.73(a) of the Act rather than s.73(b) as now pleaded.

[5] Accordingly, the hearing before us focused on penalty.

The Stance of the Prosecution

[6] The complainant, Ms J Hedgman, is the proprietor of Hedgman Real Estate Ltd the agency which, at all material times, employed the defendant as a real estate salesperson. It seems that the defendant has been a busy and effective real estate agent and is currently aged 31 years.

[7] For the prosecution, Mr Clancy emphasised that, under the amended charge, the prosecution no longer alleged dishonesty on the part of the defendant but, instead, serious negligence at real estate agency work. Mr Clancy candidly put it that the prosecution did not seek cancellation or even suspension of the defendant's licence but that, in particular, we impose a significant fine.

[8] Having said that, Mr Clancy put it that the offending is of a serious nature, particularly, in the context of there having been three prior cases of unsatisfactory conduct by the defendant in recent years which were finalised at the Committee level of the Authority.

[9] The first such case involved breach of (the 2009) Rules 5.1 (to exercise skill, care, competence and diligence) and 6.1 to comply with fiduciary obligations to the client.

[10] The context was an auction process of February 2011 where the defendant failed to advise the vendor that the settlement date did not accord with the vendor's instructions. After an appeal to this Tribunal by the vendor, penalty was settled on the basis of a reimbursement payment of $1,463.15 from the defendant and a co-offender.

[11] The second previous case was about a property purchaser on 20 November 2011 misled by the defendant who also acted inappropriately in allowing the purchaser to sign a purchase agreement without first obtaining legal advice. Also, in drafting the agreement, the defendant had the wrong legal description and made no mention of the property needing to be subdivided. Nor was the purchaser provided with a copy of the Sale and Purchase Guide at the time of entering into the transaction. The defendant was censured; ordered to reimburse the complainant's legal fees of $1,035; and fined $2,500.

[12] The third such case related to the sale of a property in March 2012. A Committee found that the defendant breached s.72(a), (c) and (d) of the Act in respect of various aspects of the sale of the complainant's property including errors and omissions in respect of the preparation and signing of the agreement; and the overcharging of commission. The defendant was censured, required to complete a particular course of education; ordered to refund $2,177-29 in fees to the complainant, and fined $3,500.

[13] Mr Clancy particularly referred to a Committee having remarked in its decision of 14 April 2014 (regarding the third prior case referred to above) that the defendant had *"a casual and unprofessional approach"* to his sale of the complainant's property. Mr Clancy submitted that is an aspect of concern in the present case in that the manner in which the defendant dealt with the funds of vendors of realty led to the risk that the payments they made into his own personal bank account might need to be paid again to Hedgman Real Estate Ltd. We also note the said Committee gave the defendant *"a severe and final warning"* after noting that his previous cases of offending *"also were of a similar nature, namely the failure to follow clients' instructions, failure to properly prepare paperwork and providing incorrect information to clients"*.

[14] As we shall explain below when dealing with the submissions for the defendant, there is a rather puzzling background to the contractual arrangements between the complainant, her company, and the defendant. Essentially, it seems that in return for the defendant taking a very high proportion of commission for sales achieved, he bore most responsibility and risk in collecting that commission and reimbursement of marketing expenditure made by the agency.

[15] It seems that the recording of expenditure and reimbursement by the agency was inadequate. This led to differences between the complainant and the defendant as to what amounts they owed each other at various times. At material times, the complainant maintains that the defendant owed her $92,000 but the defendant considers that he has been left out of the pocket by the complainant and her company, as his former employer, for a sum of about $110,000. The issues between them seem to cover whether the defendant had received all commission to which he was entitled, and whether marketing expenditure had been recovered from the

various vendors and properly accounted for as between the agency and the defendant. Presumably, there was also an issue as to whether the agency had been receiving its fair share of commission in terms of the contractual arrangements between the agency and the defendant which seemed to be oral and unclear.

[16] In any case, matters reached the stage where significant marketing reimbursement payments from vendors were not paid to the agency but were taken and banked by the defendant into an account of his own which mixed those monies with other monies of his and with monies of other clients.

[17] A submission from Mr Clancy is that the above context created a lack of clarity from the defendant towards the complainant and the various vendors to quite some extent, and that the vendor clients had paid monies to the defendant which they owed to the agency; so that the defendant was putting them at risk of being required to pay a second time to the agency.

[18] We were provided with detailed financial examples to illustrate the above issues but observe that the financial methodology between complainant and defendant was very loose. The prosecution submits that the defendant was seriously negligent in putting payments made by vendors, for reimbursement of marketing expenditure and commission, at risk of needing to be paid again by those vendors to the agency. It seemed to be accepted that the business affairs of the complainant and her company were loose in the respects we have covered.

[19] Mr Clancy emphasised that the prosecution does not claim that those activities of the defendant were dishonest but submits that they were so loose as to be seriously negligent real estate work; even though the offending may have arisen in good faith due to the defendant believing he had civil remedies against the complainant or her company, which may very well be the case.

[20] Mr Clancy puts it that *"at best for the defendant, the facts show that, as a prior CAC has said, there was continuing casualness and unprofessional conduct on the part of the defendant".* Accordingly, he submits that we should impose a substantial fine on the defendant to recognise the serious level of the offending and the potential risk to which he had placed many vendors of realty.

[21] Mr Clancy accepted that, at all material times, there seems to have been sufficient credit in the relevant bank account of the defendant to cover payment of any monies due to the complainant (or to potential complainants) even though the monies received from vendors were mixed with his own money and affairs.

The Submissions for the Defendant

[22] We received full and thorough typewritten submissions from Mr Foley (with the help of Mr Brosnhan) and detailed briefs from witnesses available for the defence.

[23] It is emphasised for the defence that there was a genuine and significant commercial dispute between the defendant and the agency as to the correct financial position between them and, so much so, that the defendant arranged for an audit which established that the agency's office procedures, accounting systems, and documentation were deficient.

[24] It also appears that the complainant did not much cooperate in providing accounting records to the auditor.

[25] It is also submitted for the defendant that there was no contractual provision between the agency and the defendant as to how vendor marketing repayments must be treated. Accordingly, it was put that there can have been no breach of contractual obligations on the part of the defendant in personally banking and holding these funds obtained by the defendant from various vendors. As we have observed, there may well have been firm contractual provisions in terms of oral agreements or practice or by inference, but that is not our concern.

[26] Mr Foley also submitted that the agency's practice of charging the defendant in the first instance for marketing costs, and then crediting these costs back to the defendant, if and when the vendor paid the costs to the agency, had never been agreed to by the defendant. It was put that, over the year audited, the defendant had been made liable for some $110,000 of unrecovered marketing costs which were not substantiated by source documents. Also, it seemed that the defendant may have been charged such marketing costs in cases where other agents in his team would receive part of the commission for the relevant sale. Mr Foley continued:

> *"In the above circumstances, the defendant was in effect being charged by Hedgman Real Estate "up-front" for the marketing costs and liable for these costs if unpaid by vendors, and the defendant held genuine concerns around both the process and the substantiation of the amounts charged. There was nothing improper about the defendant banking the vendor payments personally pending financial reconciliation in these circumstances: he was personally banking and holding the amounts he had already been charged by Hedgman Real Estate. The defendant had no statutory or contractual obligation to pay the monies to the agency; and the fact that Ms Hedgman considering that this was required did not make it so.*
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> *In general terms, the practice of an agent personally banking vendor advertising funds in circumstances where the RE/MAX agency has already deducted the amount of the expense from the agent is proper and commonly encountered: in these circumstances the debt of advertising is to the agent, not to the agency. The existence of a listing contract between the vendor and the agency doesn't change this position, nor somehow mandate that advertising funds must always be paid to the agency."*

[27] However, in final submissions the defendant accepts that it was a significant error by him to fail to tell the complainant that he had banked those advertising monies into his own bank account. It is put that the defendant's intention was to hold those monies pending financial reconciliation between himself and the complainant and he had an audit carried out by his experienced accountant suggesting that the arrangements between the defendant and the complainant were *"very much to Mr Drever's detriment"*. Mr Foley then concluded his submissions as follows:

> *"8. The essence of the difficulties over marketing monies was that Mr Drever was being charged, without his agreement, in the first instance for almost all advertising costs incurred by Hedgman Real Estate without appropriate apportionment.*
>
> *9. If and when vendors later paid marketing costs Hedgman Real Estate would make a credit back to Mr Drever. However, Mr Drever was dismayed to learn that almost half of marketing costs he was charged, an amount of approximately $110,000, were never recovered. It was*

Mr Drever's understanding that Ms Hedgman's firm took responsibility for ensuring these monies were recovered.

10. *Mr Drever and his accountant had sought, on a number of occasions, original source documentation to allow the correct financial position between the parties to be properly ascertained, particularly in respect of advertising costs over which he was concerned.*

11. *In these circumstances Mr Drever took the action he, at the time, considered necessary to preserve his position. He accepts that it was an error to do so without advising Ms Hedgman.*

12. *There was no risk or loss to vendors. The marketing ordered was provided and paid for by Hedgman Real Estate in advance by deduction from Mr Drever's earlier commissions."*

[28] Mr Foley also emphasised that the defendant has now joined the Ray White Real Estate group and is supervised by an experienced agent, Mr Lyn Beere.

[29] We took the opportunity to satisfy ourselves, by some questions put by us to Mr Beere, that the defendant is now being properly supervised in terms of s.50 of the Act, understands his duties and obligations as a real estate agent, and has good attitude in terms of compliance with such supervision. It does seem that such supervision was lacking at material times when the defendant was employed by the complainant's agency company. However the latter company is not on trial before us and, no doubt, has its own perspective about matters covered above. Presumably, the complainant was conscious of her duty to report perceived offending in terms of the requirements of the Act and its regulations e.g. Rules 7.1 and/or 7.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 which respectively read:

"7.1 A licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct' may make a report to the Authority.

7.2 A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct must make a report to the Authority."

[30] Mr Foley emphasised that the defendant is *"31 years of age only and bright and intelligent"* and that there may have been some personality conflict between the defendant and the complainant at material times. However, the defendant accepts that he had seriously erred as covered above, particularly, in that he did not inform the complainant or her agency or the various vendors that he was banking vendor monies into a general bank account of his own.

[31] Inter alia Mr Foley put it that, perhaps at material times, the defendant had been somewhat immature, over busy, and lacking in support from his employer with an outcome, as perceived by the defendant, that he is approximately $110,000 out of pocket from his contractual arrangements with the agency.

[32] We realise that there is a strong insistence on the part of the defendant that vendors' monies were never at risk. However, we stress that they were at risk, as is obvious from the facts covered above, in that vendors could have been held to account for marketing costs to the agency which had incurred them pursuant to

contract with the relevant vendor, but reimbursement from vendors had been banked by the defendant. It may be arguable that the defendant received those monies as agent for Hedgman Real Estate Ltd.

Outcome

[33] Towards the end of the hearing we took an adjournment to consider the position with a view to then outlining our sentence or penalty to the parties, and we did that.

[34] We confirm our penalty orders of 25 November 2012 that the defendant is fined $5,000 to be paid to the Registrar of the Authority at Wellington within one calendar month from the date of this decision; and ordered to pay $2,000 as a contribution to costs (to be paid to the Ministry of Justice, c/o Tribunals Unit, 86 Customhouse Quay, Wellington) within that one calendar month; and is ordered to undertake a suitable refresher educational course on the basis of at least 10 hours over about three months to focus on general office practice in handling clients' and customers' money, such course to be selected by the Registrar of the Authority and then approved by our Chairman as soon as reasonably convenient.

[35] We record our polite warning to the defendant that, if he appears before us again with offending of any concern, his licence will very likely be at serious risk of suspension or revocation.

[36] 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 G Denley
Member

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Ms N Dangen
Member