BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 16

READT 066/13 and 068/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**EDINBURGH REALTY LTD & ORS** Appellant (READT 066/13) Second respondent (READT 068/13)
AND	**REAL ESTATE AGENTS AUTHORITY (CAC20004)** First respondent
AND	**GLENYS SCANDRETT** Second respondent (READT 066/13) Appellant (READT 068/13)

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 11 March 2014

REPRESENTATION

Mr S R Crush, counsel for Edinburgh Realty Ltd and Ors
Ms J Pridgeon, counsel for the Authority
Mr S Scandrett, for his wife Mrs G Scandrett

DECISION OF THE TRIBUNAL

The Issue

[1] Edinburgh Realty Ltd, Barclay Sievwright, Clayton Sievwright and Lane Sievwright (collectively "the licensees") appeal against unsatisfactory conduct findings made against them by Complaints Assessment Committee 20004 on 18 October 2013. The complainant, Glenys Scandrett, cross-appeals against the Committee's decision dismissing particular aspects of her complaint.

[2] The Committee has not yet determined what penalty orders, if any, should be made. Counsel for the licensees argues it should not do so now that an appeal has

been filed. The licensees do not wish to incur the expense of a penalty hearing before the Committee; nor do they want the Committee to issue a penalty decision without hearing from them on penalty. The Authority considers the Committee is free to, and should, proceed to make a determination on penalty orders. We explain below why we agree with the stance of the Authority.

Factual Background

[3] On 21 November 2009 the complainant purchased a property from the Sievwright Family Trust (the vendor). The trustees of the vendor trust included the said Messrs Barclay and Lane Sievwright. Mr Barclay Sievwright was the settlor of the vendor trust. The beneficiaries included Barclay, Lane and Clayton Sievwright and the latter are Barclay's two sons.

[4] All three Sievwrights are licensed salespersons. They all work for the agency, which sold the property on behalf of the vendor trust, namely, the said Edinburgh Realty Ltd.

[5] No listing agreement nor appraisal document was provided for the property. A Mr Matthew Shepherd (a salesperson at the agency) was the licensee who sold the property to the complainant. Lane and Clayton Sievwright were, in effect, the listing agents (despite the absence of a listing agreement). Their photographs appeared in advertisements for the property which also listed Clayton's email address and the following email address: barclay.lane@edinburghrealty.co.nz. The Committee was told that Barclay and Lane shared the same email address. The Committee found that prospective customers would view both of them as involved in the sale of the property.

[6] The complaint arose as a result of underlying property defects found after the complainant had bought the house.

The Committee's Decision

[7] The complaints to and findings of the CAC were as follows:

[a] As against all Sievwrights:

[i] That contrary to s.136 of the Real Estate Agents Act 2008 (the Act), they failed to disclose in writing that they or persons related to them may financially benefit from the transaction. The Committee found this aspect of the complaint proved.

[ii] That they knew the property was subject to underlying defects, failed to disclose these defects, and in fact concealed them. The Committee dismissed this aspect of the complaint.

[b] As against the agency:

[i] The agency failed to obtain an appraisal of the property for the vendor trust. The Committee found this aspect of the complaint proved – i.e. Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the Rules) was breached.

[ii] That contrary to s.136 of the Real Estate Agents Act 2008, the agency failed to disclose in writing that agents employed by it may

financially benefit from the transaction. The Committee found this aspect of the complaint proved.

[iii] The agency promoted and arranged a building inspector who provided a misleading building report for the property before the complainant purchased the property. In addition, that building inspector was the father and father-in-law of two agents who worked for the agency, namely, Shane and Julie Robinson. The Committee dismissed this aspect of the complaint.

[iv] The agency did not properly deal with the complainant's concerns. The Committee dismissed this aspect of the complaint.

[c] As against Matthew Shepherd:

[i] That he knew the property was subject to underlying defects. The Committee dismissed this aspect of the complaint.

[ii] That contrary to s.136, he did not disclose in writing that he or persons related to him may benefit financially from the transaction. The Committee dismissed this aspect of the complaint.

[d] As against other licensees at the agency, Shane and Julie Robinson, that the agency ought to have disclosed their relationship with the building inspector, namely, that Shane was his son and Julie his daughter-in-law. The Committee dismissed this aspect of the complaint.

[e] As against Peter Wilson:

[i] That as the principal officer of the agency at the time of the transaction, he failed to properly deal with the complaints. The Committee dismissed this aspect of the complaint.

[ii] That he failed to carry out disclosure obligations under s.136 of the Act. The Committee dismissed this aspect of the complaint.

[8] Also, the Committee found that the agency, the Sievwrights, and Matthew Shepherd breached Rule 9.15 of the Rules by actively marketing the property without holding an agency agreement signed on behalf of the vendor trust.

[9] Accordingly, the Committee found unsatisfactory conduct proved against the agency, all the Sievwrights, and Matthew Shepherd.

The Stance of the Appellants

[10] Counsel for the licensees, Mr Crush, raises procedural concerns, namely that:

[a] Despite finding the licensees guilty of unsatisfactory conduct, the Committee has not released a penalty decision. He submits that the Committee has erred by failing to include its penalty decision in its liability decision, which he argues is required by s.94(2)(b) of the Act.

[b] The Committee has asked the licensees to make penalty submissions. However, because the licensees have appealed, Mr Crush puts it that we have jurisdiction over the matter, with the consequence that the

proceedings before the Committee are stayed. He wishes to avoid his clients *"wasting expenditure"* (as he put it) on making penalty submissions to the Committee when they have appealed to us.

[11] More particularly, in the course of his submissions Mr Crush set out the following:

"2.2. The determination of the CAC did not contain any reference to penalty.

Section 94 of the Act provides:

> ***"94 Notice of determination***
>
> *(1) When a Committee makes a determination under section 89, the Committee must promptly give written notice of that determination to the complainant and to the licensee.*
>
> *(2) The notice must—*
>
> *(a) state the determination and the reasons for it; and*
>
> *(b) specify any orders made under section 93 and be accompanied by copies of those orders; and*
>
> *(c) describe the right of appeal conferred by section 111."*

Section 93 provides the penalties which the CAC may impose. Section 94 is clearly mandatory and a CAC making a determination under section 89 must include any penalty it proposes to impose as part of that determination. On this occasion the determination makes no reference to penalty.

2.3 Notwithstanding the filing of appeals by the parties, the CAC has expressed the intention to proceed with the hearing of submissions on the issue of penalty with the intention of delivering a separate decision on this aspect. That is not a process which is authorised by the Act.

2.4 Counsel for the Authority has submitted that the CAC is entitled to adopt its intended process and relies for that submission upon the provisions of section 84(3) of the Act which provides:

> ***84 Procedure of Committee***
> *(3) The Committee may regulate its procedure in any manner that it thinks fit as long as it is consistent with this Act and any regulations made under it.*

Counsel for the Authority has not given appropriate weight to the qualification that any regulation of procedure by the CAC is authorised "as long as it is consistent with this Act and any regulations made under it".

2.5 As stated above section 94 of the Act is mandatory and does not permit a CAC to make separate determinations on liability and penalty. It is not

therefore open to the CAC to now make a further and separate determination on the issue of penalty. It is also not open to the CAC to maintain that the determination it has made is not a determination for the purposes of section 89. The determination which has been issued by the CAC falls squarely within the description of a determination contained in section 89(2)(b). This is further reinforced by the notice of rights of appeal contained in that determination. The consequence of the approach which the CAC seeks to adopt would be for both the CAC and the Tribunal to be concurrently exercising jurisdiction in the same matter. This would not be a procedure authorised by the Act.

2.6 While there may appear to be merit in the procedure for which counsel for the Authority advocates, it is not the procedure for which the legislature has provided. If there is to be any change to that procedure, then given the mandatory nature of the provisions of the Act such change is a matter for the legislature not a CAC. It may well be that the legislature intended the process before the CAC to be a quick and efficient process to deal with complaints without delay. For that reason the legislature may have wanted both liability and penalty dealt with simultaneously rather than a drawn out two step process.

2.7 Counsel submits that the appeals should proceed in the Tribunal with no further steps being taken by the CAC. Given that the Tribunal will consider the matter de novo, this will no way compromise the rights of any party as it would be for the Tribunal to determine any issue of penalty irrespective of any decision of the CAC.

2.8 For the matter to be removed to the Tribunal in its entirety at this time would also provide the opportunity to address the breaches of natural justice which have occurred before the CAC. As recorded in the notice of appeal filed on behalf of its own initiative made determinations on matters which had not been complained of. Consequently those matters were not the subject of any submission or evidence on the part of the appellant. It is not appropriate for the appellants to be called upon to make submissions on penalty on matters where they have not previously had the opportunity to make submissions on liability. The de novo hearing before the Tribunal would resolve those difficulties."

The Stance of the Authority

[12] Ms Pridgeon submits that Mr Crush's submissions are misconceived because:

[a] Like us, the Committee has power to regulate its procedure as it sees fit, provided that it is consistent with the Act and any regulations made under it, s.84(3). In addition, the Committee must exercise its powers and perform its duties and functions consistently with the rules of natural justice, s.84(1). As a matter of good process and fairness, it is appropriate for the Committee to decide whether a licensee is liable before imposing penalties or, indeed, requiring licensees to make submissions on penalty.

[b] It is appropriate for licensees to be provided reasons for a liability decision against them before they are required to make submissions on what, if any, penalty orders are to be made. Contrary to Mr Crush's submissions, even aside from fairness issues, it would cause unnecessary expense to

licensees if all licensees against whom complaints were made were required to make penalty submissions before they knew whether they were liable. They would be required to do so not knowing the grounds upon which a Committee has found them guilty. It is practical for Committees to first decide on liability, and provide reasons for the decision, before requiring penalty submissions to be made. This approach allows licensees to make focused penalty submissions.

[c] Section 94 does not inhibit the approach the Committee takes because the Committee's determination is in two parts or stages: the liability decision and the penalty decision. Together, they make the Committee's determination. This is why (Ms Pridgeon puts it) the 20 working day period for appeals against Committee decision does not start until the Committee has released its penalty decision. She submits that the two stage process is not inconsistent with the Act.

[13] It is also submitted for the Authority that the licensees' appeal is premature and that once the Committee makes its penalty decision, the licensees can then appeal the Committee's determination.

[14] Ms Pridgeon further submits that while an appeal to the Tribunal takes place by way of rehearing, there must still be a Committee decision or determination from which the licensees can appeal. She puts it that the Committee's decision-making process is not yet complete because there is no penalty decision to appeal against; and the proceedings before the Committee should therefore not be stayed; and this appeal should be adjourned pending the release of the Committee's penalty decision, and after the penalty decision has been released, this appeal can proceed.

The Stance of Mrs G Scandrett

[15] In the course of written submissions for Mrs Scandrett (the complainant), it was put as follows:

*"**Procedure***

3.2 With respect, Mr Crush's submissions are misconceived because:

While the Committee has power to regulate its procedure as it sees fit consistent with the Act, the Committee has a duty to exercise its powers consistently with the rules of the natural justice. It is appropriate for committees to discharge their responsibilities.

It is appropriate for licensees to be provided reasons for a liability decision against them before they are required to make submissions on what, if any, penalty orders are to be made. Contrary to Mr Crush's submissions, even aside from fairness issues, it would cause unnecessary expense to licensees if all licensees against whom complaints were made were required to make penalty submissions before they knew whether they were liable. They would be required to do so not knowing the grounds upon which a Committee has found them guilty. It is practical for Committees to first decide on liability, and provide reasons for the decision, before requiring penalty submissions to be made. This approach allows licensees to make focused penalty submissions.

Stay of Committee Proceedings

3.3 The second respondent submits that the licensees' appeal is premature; and that only after the Committee has made its penalty decision, should there be an appeal of the Committee's decision.

3.4 While an appeal to the Tribunal takes place by way of rehearing, there must still be a Committee decision or determination from which the licensees can appeal. The Committee's decision making process is not yet complete because there is no penalty decision to appeal against. The proceedings before the Committee should therefore not be stayed.

3.5 To the contrary, the respondent submits that this appeal should be adjourned pending the release of the Committee's penalty decision. After the penalty decision has been released, this appeal can be brought back on and the timetable below be directed. Dependent on penalties there may be no need to appeal the Committee's other decision."

Discussion

[16] Ms Pridgeon submits for the Authority that the proceedings before the Committee are still on foot and should not be stayed; and this appeal should be adjourned until the Committee's decision-making process is complete. She further submits that the Committee be advised to proceed to determine penalty; and it is a matter for Mr Crush's clients whether or not they make penalty submissions to the Committee. The second respondent supports those submissions.

[17] Having enquired into matters, a Committee may deal with complaints or allegations on the papers or after conducting a hearing.

[18] It seems to us that s.94 of the Act (set out above) could have been drafted more clearly. Essentially, it states that when a Committee makes a determination under s.89, the Committee must promptly give written notice of that to the complainant and to the licensee. Section 89 provides, inter alia, that the Committee may make a determination that the complaint or allegation be considered by us; or that it has been proved on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct; or to take no further action. The said notice of determination under s.94 must not only state the determination of the Committee and the reasons for it but also *"specify any orders made under s.93 ..."* and also describe the right of appeal conferred by s.111 on any person affected by the Committee's determination. Inter alia, s.111 requires that any such appeal against a determination of the Committee be made within 20 working days of the notice required under s.94 (or s.81 – where the decision is to take no action on a complaint). Section 93 empowers the Committee to make various penalty orders if it has made a determination of unsatisfactory conduct by a licensee in terms of s.89(2)(b).

[19] In terms of the Committee giving notice of its determination under s.94, it seems to us that the words in s.94(2)(b) that the notice must *"specify any orders made under s.93"* could be taken to mean specifying penalty orders if any, or could be inferring that there should be such orders or the addressing of penalty before there can be a notice of determination. We prefer the latter interpretation. As we have already said, it is only a determination of a Committee which can be appealed to us.

[20] Accordingly, the issue is whether, for the purposes of s.94, there has been a determination if penalty has not been addressed; as is the position in the present case. It seems to us that until penalty has been dealt with there has not been such a determination.

[21] We realise that Mr Crush submits to the contrary and goes so far as to further submit that s.94 of the Act does not permit a Committee to make separate determinations on liability and penalty. That cannot be correct.

[22] Inter alia, Mr Crush submits that the present appeals should proceed before us and, of course, be dealt with de novo; and it will be for us to consider penalty; and there is no need for the Committee to proceed to deal with penalty as it would in the usual way.

[23] It is elementary that the Committee needs to deal with liability before it can deal with penalties. Ms Pridgeon submits, inter alia, that the parties cannot be expected to make submissions about penalty until the liability issue has been determined. While it is common practice for penalty to be dealt with separately and, often, some time subsequent to guilt or liability, there is no reason (other than natural justice in all the circumstances) why a Committee may not deal with penalty immediately upon dealing with liability, and without requiring further submissions about penalty, if it feels that the relevant ground has been fully covered before it in terms of penalty; but that is not normally so. The usual procedure in terms of natural justice is for licensees to be provided with reasons for a determination as to their liability before they are required or expected to make submissions on the issue of penalty.

[24] There has been much reference to the aspect of expense in terms of such procedures, but that is only a factor for the relevant Tribunal to take into account in applying proper procedures in terms of natural justice.

[25] As Ms Pridgeon put it, generally speaking the licensee needs to know the grounds upon which a Committee has found the licensee guilty so that it is practical for a Committee to first decide on liability, and provide reasons for that decision, before requiring penalty submissions to be made at a later date if a party wishes to make them. Generally then, the hearing before the Committee will involve two stages, namely, the liability hearing and decision and, later, the penalty hearing and decision and, together, they constitute the Committee's determination for the purposes of s.94.

[26] We take the view that, until penalty has been dealt with, there has not been a determination as meant in the Act. It follows that the present appeal is premature. The Committee's decision-making process is not complete because there is no penalty decision yet.

[27] Accordingly, we adjourn the present proceedings sine die (but to resume upon four weeks notice to the parties from our Registrar) to enable the Committee to complete its decision-making process by dealing with penalty in its usual manner. If the appellant parties then still wish to proceed with these appeals, the Registrar will arrange a timetabling conference with our chairperson towards a substantive fixture before us in the usual way. In other words, after the Committee has dealt with and released its penalty decision in the usual way, this appeal can proceed.

[28] 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

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member