

[2014] NZREADT 27

Reference No: READT 048/13

**IN THE MATTER OF**

of charges laid under s.91 of the Real Estate Agents Act 2008

**BETWEEN**

**REAL ESTATE AGENTS  
AUTHORITY (CAC20004)**

Prosecutor

**AND**

**DEAN LOUIS WOTHERSPOON**

Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Ms K Davenport QC – Chairperson  
Mr J Gaukrodger – Member  
Ms C Sandelin – Member

**HEARD** at AUCKLAND on 17 March 2014

**APPEARANCES**

Mr P McDonald for the Real Estate Agents Authority  
Mr T Rea for the defendant

**ORAL DECISION OF THE TRIBUNAL  
GIVEN ON 17 MARCH 2014**

[1] Mr Wotherspoon faces two charges. The charges relate to his conduct in attending an auction at 67 Stanley Point Road, Stanley Point and bidding at the auction on behalf of a Ms Gray without disclosing to the auctioneers or the vendors that he was acting on her behalf and without checking the terms and conditions of sale. The actual particulars of the charge are as follows:

***The Charges***

**Charge 1**

Following complaints by Andrew North, Kim Hamilton and Nicola Everett, Complaints Assessment Committee 20004 (CAC 20004) charges Dean Louis Wotherspoon

(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.

**Particulars:**

On or about 16 October 2011, the Defendant attended an auction for 67 Stanley Point Road, Devonport, to bid on behalf of a potential purchaser, Ms Gray. The Defendant:

- (a) Failed to make clear to the auctioneer that he was bidding as an agent for an unnamed principal.
- (b) Failed to clarify, prior to bidding, that a variation to the standard terms of sale that Ms Gray understood to be available would be incorporated into any agreement should his be the highest bid.
- (c) Failed to sign the sale of real estate by auction agreement, having entered the highest bid at the auction.

Charge 2

CAC 20004 further charges the Defendant with misconduct under s 73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent real estate agent work.

**Particulars:**

The particulars of Charge 1 above are repeated.

Unsatisfactory conduct

If the Tribunal, after hearing the charges above, is not satisfied that the Defendant is guilty of misconduct, CAC 20004 further alleges that the Defendant has engaged in unsatisfactory conduct and seeks a finding under s 110(4) of the Act.

***Discussion***

[2] Mr Wotherspoon came to the Tribunal today and indicated that he would plead guilty to unsatisfactory conduct in respect of this charge.

[3] It is for the Tribunal to determine if the charge has been established and then, if it finds that there has been some level of professional misconduct, whether this amounts to misconduct in terms of s 73 of the Real Estate Agents Act 2008 or unsatisfactory conduct under s 72. It must be a decision for the Tribunal rather than for the parties because the Tribunal has the ultimate role of setting standards and maintaining public standards. In this case, having examined the facts, the Tribunal has concluded that the plea by Mr Wotherspoon to a charge of unsatisfactory conduct is in fact appropriate, for reasons which will be set out shortly.

[4] The Complaints Assessment Committee put before the Tribunal written evidence from a Mr Ayton, a Mr North and a Ms Everett. Ms Everett was one of the owners of the property and she gave information about the previous attempts of the vendors to sell the property. She also told the Tribunal how, after the auction, when Mr Wotherspoon failed to sign the agreement for sale and purchase that there was a protracted period of a month when there were negotiations between the vendor and Ms Gray as to whether or not an agreement for sale and purchase would ultimately be signed.

[5] Mr Wotherspoon told the Tribunal that he had been an agent for Barfoot & Thompson for nine years and is presently the Branch Manager in Devonport. He had known Ms Gray for a number of years and told the Tribunal today that he had purchased a number of houses for her. Ms Gray had been interested in purchasing 67 Stanley Point Road, Stanley Point for some time. In 2010 she entered into a conditional agreement to purchase the property subject to the sale of her own property. Unfortunately her own property did not sell and the vendors brought to an end that conditional contract. The property was then listed with Harcourts and was to be auctioned. Ms Gray asked Mr Wotherspoon to attend [the auction] on her behalf and bid. Ms Gray's instructions were that she would bid up to a maximum of \$3 million (or \$3.150 million).

[6] In his oral evidence today Mr Wotherspoon said \$3 million, but his written evidence said \$3.150 million. In any event nothing turns on that. Ms Gray's instructions were that she wanted her identity to remain secret until the auction was complete and that if no one else bid at the auction then Mr Wotherspoon was not to bid. Ms Gray gave Mr Wotherspoon a cheque for \$300,000 as the deposit should he be successful. Mr Wotherspoon attended the auction at the property. He did not identify himself at the auction as bidding on behalf of Ms Gray. The evidence given by Mr Ayton and Mr North is that prior to the commencement of the auction a question was asked as to whether there were any agents present who were bidding on behalf of persons who were not present. Mr Wotherspoon's evidence is that he did not hear that. In any event he did not respond to it and at no time did he disclose to the auctioneers that he was bidding on behalf of any other person.

[7] Importantly, Mr Wotherspoon had been told by Ms Gray that the settlement date was 1 March 2012. The auction itself was to take place on 16 October 2011 and so the settlement date was some 3½ months in the future. Mr Wotherspoon did not obtain a copy of the terms and conditions of auction at the auction or any time prior to that. Ms Gray did not give him a copy but did tell him that was when the settlement was to be. Mr Wotherspoon bid on behalf of Ms Gray and during the course of discussions with her over the telephone she agreed to purchase the property at \$3.21 million. Mr Wotherspoon then went to sign the contract on her behalf and discovered that the settlement date on the agreement was not 1 March as he had been told. He drew this to the attention of the auctioneer who went away to confer with the vendors. He subsequently advised Mr Wotherspoon that the settlement date had not been agreed at 1 March 2012 and that Mr Wotherspoon was required to sign the contract with the 30 working day settlement clause. Mr Wotherspoon discussed the matter with Ms Gray. Ms Gray had some discussions with the auctioneers but in the event Mr Wotherspoon did not sign the contract and left the property. There followed a period of negotiations between the

solicitors for Ms Gray and the vendors which eventually concluded in Ms Gray agreeing to pay a slightly higher price in return for a settlement date of 1 March 2012. These facts gave rise to the charge which was laid against Mr Wotherspoon.

[8] The Tribunal has to determine whether the actions of Mr Wotherspoon were below those reasonably to be expected of an agent of good standing. Section 72 defines unsatisfactory conduct as “*conduct that falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee*” or s 72(c) is “*incompetent or negligent*” or s 72(d) “*would reasonably be regarded by agents of good standing as being unacceptable*”.

[9] Having considered this matter, the Tribunal is satisfied that the conduct set out above and encapsulated in the charges show that Mr Wotherspoon has been guilty of unsatisfactory conduct and it would be conduct which would contravene s 72(a) and 72(c) insofar as the conduct was negligent.

[10] Our conclusion is that Mr Wotherspoon was negligent because he appears to have been lulled into concluding that he did not need to disclose that he was acting as an agent for an undisclosed principal, nor did he consider that he should have checked the terms and conditions to make sure that his instructions and authority in fact correlated with what was on the auction terms. These are fundamental errors that an agent of his experience would not have been expected to have made. His analysis of the situation in his role at the auction also appears to have been flawed in that he appears to have considered that his only obligation was to Ms Gray and did not fully consider the implications of the auction and entering into a binding contract when he was not certain of a pretty fundamental term. We therefore conclude that the charge has been established but not as misconduct, rather as unsatisfactory pursuant to s 72.

### **Penalty**

[11] We now consider the appropriate penalty to impose upon Mr Wotherspoon. The penalty must satisfy a number of objectives: it must punish to some extent the practitioner, but that is not its primary importance. Its primary importance is to maintain good professional standards amongst real estate agents and to ensure that members of the public are protected from agents whose conduct falls short of that to be expected. For these reasons we consider that a penalty which fines Mr Wotherspoon, which censures his conduct and which also contains an element of training to ensure that this does not happen again, and that Mr Wotherspoon is alert and alive to the issues which he should have been alive to in October 2012, would meet these objectives.

[12] Accordingly the Tribunal imposes the following penalty upon Mr Wotherspoon pursuant to s 93 of the Real Estate Agents Act 2008. The penalties that we impose are:

- (a) That Mr Wotherspoon is censured pursuant to s 93(1)(a);
- (b) That Mr Wotherspoon pay a fine of \$4,000 to the Authority pursuant to s 93(1)(g);

- (c) That Mr Wotherspoon apologise to the vendors of the property pursuant to s 93(1)(c); and
- (d) That Mr Wotherspoon takes training as set out below under s 93(1)(d).

[13] Mr McDonald has helpfully provided to us a list of New Zealand QA unit standards for agents and for those who manage real estate agent businesses. Part of the Branch Manager Certificate certification is unit number 23132 which is a unit designed to “*identify, evaluate and manage risk in a real estate context*”. We consider that this unit standard which is pitched at Level 6, which we assume is commensurate with those who have been in the industry for a while, would identify and highlight for Mr Wotherspoon potential areas of risk in managing contracts both for himself and for those members of the team at Barfoot & Thompson which he supervises. Accordingly, we require Mr Wotherspoon to undertake this unit and to report upon completion of the standard to the Real Estate Agents Authority.

[14] The Tribunal draws the parties’ attention to s 116 of the Real Estate Agents Act 2008.

**DATED** at AUCKLAND this 15<sup>th</sup> day of April 2014

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Ms K Davenport QC  
Chairperson

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Mr J Gaukrodger  
Member

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Ms C Sandelin  
Member