BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 3

READT 076/12

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**DEBBIE AND DAVE TONG**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC20004)**
	First Respondent
AND	**PATRICK REGAN, MARY CURNOW, LISA HOPEWELL, WARREN EADE**
	Second Respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 22 August 2013

DATE OF SUBSTANTIVE DECISION 17 October 2013 ([2013] NZREADT 30)

DATE OF ISSUING THIS PENALTY DECISION 16 January 2014

REPRESENTATION

Mr M I S Phillipps, counsel for the appellants
Ms J F MacGibbon, counsel for the Authority
Mr P Regan on his own behalf

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In a decision dated 17 October 2013, we declined the appellants' appeal in all respects, apart from a finding against Mr Regan (the licensee) against whom we found unsatisfactory conduct proved. We directed timetabling orders for penalty submissions in relation to Mr Regan only, and we indicated that "*we consider Mr Regan's offending to be at the low end of the scale and deserving of censure or a modest fine."*

Submissions from the licensee on penalty

[2] With regard to penalty, on 15 November 2013 the licensee firstly submitted as follows:

> *"It is regrettable but the Tribunal accepted a statement which is not factually correct and as a consequence cannot be pointed to any action of myself which could be construed as misconduct.*
>
> *I Patrick Martin Regan at no point presented to or discussed with David Tong, David Perdersen or the purchaser Appleby, the offer for purchase prepared by Lisa Hopewell a Senior Sales Agent in Bayleys, Waiheke office. Appleby was insistent – motivated by the continual overture of David Tong to close the café business – that he wished purchase 100% Land, Buildings and Business outright and have no further communications with Tongs.*
>
> *Lisa Hopewell requested, as the Purchaser right as per the 'nominee' of the S & P contract, I on-sell the business and two parties were approached,*
>
> *Roselyn & Aaron at Delamore Lodge*
>
> *Kimberley and Noyan Attamer.*
>
> *Through the actions of the Attamer lawyer acting promptly, Appleby accepted Attamer as the purchaser of the business."*

[3] A little later, on 12 December 2013, Mr Regan seemed to advise that he accepted our finding of unsatisfactory conduct on the basis that it was at the lower end of the scale and deserving of a censure, and he added: *"I would like to volunteer to undertake any training so determined by the Tribunal which would cover off on the aspect of my inadequacy in the handling of this particular process."* We see that as a commendable approach.

Submissions from the appellants on penalty

[4] Mr Phillipps (counsel for the appellants) has filed detailed and thoughtful submissions for the appellants on penalty. He submits that we should take a very firm line against Mr Regan, generally to cover a refund of full commissions, substantial monetary compensation, a substantial fine, a censure, an apology, and a substantial contribution to the costs and expenses of the appellants in the proceedings before the Committee and before us. Indeed he expanded that theme as follows:

"3. The appellants submit that the appropriate penalty is as follows:

(a) Make an order censuring or reprimanding Mr Regan;

(b) Order that Mr Regan apologise in writing to the appellants;

(c) Order Mr Regan to refund in full the fees paid by the appellants to Bayleys/Mr Regan for selling the café;

(d) Order Mr Regan to refund in full the listing fees paid by the appellants to Bayleys/Mr Regan for selling the land and buildings at 29 Waikare Road;

(e) Order Mr Regan to provide relief at his own expense from the consequences of his omission in the total sum of $20,000, being:

(i) Partial relief of $15,000 for losses of $295,000 or more incurred as a result of the appellants' lost opportunity to sell the land and buildings with a secure tenant in place; and

(ii) Partial relief of $5,000 for the direct loss on the on-sale of the café of $155,000 and by way of disgorgement by Mr Regan of his wrongful gain for the commission on the on-sale;

(f) Order Mr Regan to pay a fine of $5000 to the Authority; and

(g) Order Mr Regan to pay the appellants a contribution of $9000 toward their costs and expenses in respect of the inquiry, investigation, and hearing by the Committee, along with the appeal and submissions on penalty."

[5] As part of the background, the appellants summarise the facts from their perspective as follows:

"5. The appellants, Dave and Debbie Tong, were joint directors and shareholders of Tong Trust Holdings Ltd and Ddteez Ltd.

6. Through these companies, the appellants owned 29 Waikare Road, Oneroa, Waiheke Island, which included land and a building (owned by TTHL) and the business 'Lure Café' (owned by Ddteez Ltd). The appellants decided to sell the land, building, and café.

7. On 22 August 2008, the appellants entered into a sole agency agreement for 29 Waikare Road with Waiheke Real Estate. The agreement expired on 31 November 2008 and thereafter became a general agency agreement. The appellants verbally cancelled this general agency agreement in December 2008.

8. *In July 2009, Kimberley Alford expressed an interest in buying or leasing the Lure Café business, and told the appellants that she had approached real estate agents in relation to her interest.*

9. *On January 2010, Lawton Valuers provided the appellants with a valuation for 29 Waikare Road at $1,450,000.*

10. *On 30 April 2010, the appellants signed sole agency agreements for 29 Waikare Road with Bayleys Waiheke and Patrick Regan as their listing agent. Those sole agency agreements expired on 20 July 2010 and thereafter became general listing agreements.*

11. *The appellants were open to the possibility of selling the café business first, given that they would be able to fetch a higher price for the land and building if they had a stable tenant on a long-term lease.*

12. *A prospective purchaser, Mr Appleford, indicated to Lisa Hopewell of Bayleys his interest in the building and land at 29 Waikare Road but not the café. After an auction was held, at which the properties were not sold, it was made clear to Mr Appleford that the vendor was adamant that only a deal including the total assets at 29 Waikare Road would be considered. This was not in fact the appellants' position.*

13. *On 25 June 2010, Patrick Regan presented the appellants with a sale and purchase agreement for the land and building at 29 Waikare Road at $1,105,000.*

14. *On 28 June 2010, an unconditional sale and purchase agreement for the land and building at 29 Waikare Road was signed at a sale price of $1,105,000.*

15. *The sale was settled on 31 August 2010 and the property was later registered in the name 'Waikare29 Ltd', which had been registered on 14 July 2010 with Stephen Appleford and Warren Eade as its two directors. Both men are also shareholders.*

16. *Patrick Regan received the listing fee and Lisa Hopewell received the sales commission. Stephen Appleford was never listed in the vendor reports from Patrick Regan as an enquirer.*

17. *Also on 28 June 2010, a sale and purchase agreement for the Lure Café business was signed with Stephen Appleford and/or nominee as purchaser at a price of $150,000.*

18. *The land and buildings sold for $1,105,000 and the café for $150,000 for a combined sale price of $1,255,000 payable to the appellants.*

19. *On 1 July 2010, a sale and purchase agreement for the Lure Café business was signed between Stephen Appleford and/or nominee as the vendor and Kimberley Alford and another as purchasers at a price of $155,000. Patrick Regan was the selling agent on this transaction, and received a $5000 commission.*

20. *On 23 October 2010, Penelope Saxton-Beer signed a sale and purchase agreement with Waikare 29 Ltd for the land and buildings at 29 Waikare Road for $1,400,000. Warren Eade handled the sale and received a commission.*

21. *Mr Eade and Mr Appleford claim that, in the 53 days between settlement and their on-sale to Ms Saxton-Beer at a $295,000 profit, they renovated the building and secured a 12-year lease with Ms Alford and Mr Atamer as the tenants. The appellants dispute the extent of the repairs. [It is apparent from the material put before the Committee that the 'renovation' solely related to some very minor sound-proofing work (replacing ceiling batons) undertaken on the residence to enable the tenants to operate a radio station, which work did not enhance or improve the value of the property.]*

22. *The land, building, and café business at 29 Waikare Road were on-sold for a total of $1,155,000.*

The Complaints Assessment Committee decision

23. *The Appellants made submissions to the Committee as complainants.*

24. *On 3 October 2012, the Complaints Assessment Committee found Warren Eade to have engaged in unsatisfactory conduct, albeit on the lower end of the scale, and censured him.*

25. *The Complaints Assessment Committee found that there was no breach of unsatisfactory conduct by Patrick Regan and no further action is required on the appellants' complaint against him."*

[6] The appellants have indicated that they have decided not to contest our findings further, but maintain that Mr Regan's actions amounted to misconduct, and then seemed to say that they will be pursuing matters in the High Court. Certainly, they dispute our comment that the licensee's offending is at the lower end of the scale. They seem to regard it as misconduct, or at least at the high end of the scale for unsatisfactory conduct. That view seems to be based on the allegation that the licensee has been negligent resulting in substantial losses for the appellants as his clients. Also they put that he deliberately withheld information from them "*with the intention of on-selling for personal gain*".

[7] As to the impact on the appellants, Mr Phillipps sets out a submission as follows:

"41. The appellants have suffered greatly as a result of Mr Regan's failure to disclose that Kimberley Alford was interested in purchasing the café.

42. Firstly and most obviously, the appellants have suffered a direct loss of $5000 on the sale of the café. Had Mr Regan disclosed Ms Alford's interest, the café could have been sold to her for $5000 more than the appellants received from their sale to Mr Appleford.

43. Secondly, the appellants have suffered a substantial loss on the sale of the land and buildings through losing the opportunity to negotiate such a sale with Ms Alford and Mr Atamer already confirmed as long-term tenants of the café.

44. Had the appellants had the luxury of conducting the sale of the land and buildings with two tenants locked into a 12-year lease, they almost certainly would have been able to fetch a higher price than the $1,105,000 they in fact received.

45. The land and buildings were later sold for $1,400,000 with a secure tenant (Ms Alford and Mr Atamer) in place, a difference of $295,000. As such, the appellants may have suffered losses of up to $295,000 on the sale of the land and buildings as a result of Mr Regan failing to disclose Ms Alford's interest in purchasing the café together with general damages and other consequential loss.

46. The appellants have suffered a great deal of stress from discovering that they were not informed of a potential purchaser of their café, and from the ensuing proceedings. Waiheke Island is a notoriously small community, and many residents are aware of the appellants' disappointing sale returns and subsequent legal battle. The fallout from Mr Regan's non-disclosure has taken a personal toll on the appellants."

[8] Mr Phillipps then covers factors in his view (on behalf of the appellants) pointing to the need for a strong penalty being imposed on the licensee by us. He referred in detail to the Act and to various case authorities. *Inter alia,* he maintains that the licensee has demonstrated a lack of remorse. He emphasises a personal toll suffered by the appellants, allegedly, as a result of the licensee's actions.

[9] In our said substantive decision herein [2013] NZREADT 90, we took care to detail our reasoning for our findings. The appellants seem to wish to challenge these to some degree when now dealing with penalty. That is not appropriate.

Penalty Orders in general

[10] It is well established that decisions of disciplinary tribunals should emphasise the maintenance of high standards and the protection of the public through specific and general deterrence. While this may result in orders having a punitive effect, this is not their purpose. – *Z v CAC* [2009] 1 NZLR1; *CAC v Walker* [2011] NZREADT 4.

[11] The unsatisfactory conduct proved in this case occurred during 2010 so that the Real Estate Agents Act 2008 applies. That Act was introduced specifically to better protect the interests of consumers in respect of real estate transactions. A key means of achieving that purpose was the creation of a wide range of discretionary orders available on findings of unsatisfactory conduct or misconduct against a licensee.

[12] Having found that Mr Regan's conduct was unsatisfactory, s 111(5) of the Real Estate Agents Act 2008 allows us to make any of the orders that a complaints assessment committee can make under s 93 of the Act which provides:

"93 Power of Committee to make orders

(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:

(a) make an order censuring or reprimanding the licensee;

(b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint;

(c) order that the licensee apologise to the complainant;

(d) order that the licensee undergo training or education;

(e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint;

(f) order the licensee–

(i) to rectify, at his or her or its own expense, any error or omission; or

(ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:

(g) order the licensee to pay to the Authority a fine not exceeding $10,000 in the case of an individual or $20,000 in the case of a company:

(h) order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order:

(i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.

(2) Any order under this section may be made on and subject to any terms and conditions that the Committee thinks fit."

Discussion

[13] Our finding of unsatisfactory conduct means that our range of penalties is as set out in s 93 of the Act.

[14] As recorded above we identified in our decision of 17 October 2013 that we felt the licensee's breach to be at the lower end of unsatisfactory conduct. Having heard submissions on penalty, we now see the offending as at mid-level unsatisfactory conduct.

[15] The appellants seek a variety of monetary orders. A commission was taken from the sale of 29 Waikare Road (the property). However, this is taken by the agency rather than by the individual salesperson. The licensee would have been paid a portion of that commission. We may impose a fine against the licensee. The issue of compensation needs to be considered, and the matter of costs. A censure, an apology, and further particular training may be appropriate.

[16] Counsel for the appellants seeks two orders under s 93(1)(f) of the Act namely:-

(a) $15,000 for the partial relief of an alleged loss of $295,000 or more incurred as a result of the appellants' lost opportunity to sell the land and buildings with a secure tenant in place; and

(b) Partial relief of $5,000 for the direct loss of the on-sale of the café for $155,000.

[17] It is not appropriate that we re-open the reasoning in our decision of 17 October 2013. It is argued by the appellants, that they incurred losses as a result of the failure of the licensee to properly advise of the various sale options. We held, *inter* alia, that: "*The injection of Mr Appleford as purchaser of the café business and then his on-sale of it to Ms Alford and Mr Attamer was confusing and unnecessary and was unsatisfactory conduct on the part of Mr Regan*". It still seems to be argued for the appellants that this did result in a loss given that the sale of the business and the freehold land together when the appellants were vendors resulted in a sum of $1.255 million, whereas the separation of the café from the freehold resulted in a total sale of both, at separate times, for $1.555 million; although that included renovation work and a 12 year lease.

[18] In any case, the amount sought by the appellants is compensation for straight market loss. This kind of monetary award was discussed in the decision of *Quin v The Real Estate Agents Authority* [2012] NZHC 3557 where the High Court (per Brewer J) held that committees (or the Tribunal on appeal) cannot order licensees to pay complainants money as compensation for errors or omission (compensatory damages) under s 93(1)(f) of the Act. Licensees can only be ordered to do something or take actions to rectify or "*put right*" an error or omission s 93(1)(f)(i). If the licensee can no longer "*put right*" the error or omission, that licensee can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission, s 93(1)(f)(ii). Any expenses incurred by the licensee as a result of doing what he/she is ordered to do must be borne by the licensee. Even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. An order under s 93(1)(f) cannot be made in respect of a straight monetary loss for a loss in market value.

[19] We referred to the reasoning of *Quin* as recently as 20 December 2013 in *Brooks V READT* and *Stephens* [2013] NZREADT 112 where we stated as follows:

> [30] *Mr Latton then referred to the decision of Brewer J in Quin v REAA & Anor [2012] NZHC 3557, 19 December 2012, Tauranga High Court, where at paragraph [58] His Honour stated: "Section 93(1)(f) does not empower a Committee to order a licensee to make payments in the nature of compensatory damages. That is a power which is given to the Tribunal under s 110, but to a limit of $100,000."*
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> …
>
> ***Compensation***
>
> *[39] One of the grounds of the appellant's appeal is that he seeks compensation for the loss of value to the property due to his loss of view. Following a finding of unsatisfactory conduct Committees can, pursuant to s 93(1)(f) of the Act, order a licensee to rectify, at his or her own expense, any error or omission; or where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequence of the error or omission. …*
>
> *[41] An order under s 93(1)(f) cannot be made in respect of a straight monetary loss, i.e. compensation for a loss in market value and potential unrealised gain, which is the case here where the appellant is seeking compensation of this kind in the sum of $101,117 (loss in value and potential unrealised gain). Following the decision in Quin, neither the potential loss in value nor the loss of potential unrealised gain can be awarded."*

[20] In *Orsborn v REAA & Collier & Anor* [2013] NZREADT 69, we dealt more fully with the *Quin* concepts and part of what we said there reads*:*

> *"**Re Compensation: The Quin Case***
>
> *[26] There was reference from all counsel to Quin v Real Estate Agents Authority [2013] NZAR 38 (per Brewer J). On the question of damages Mr Stewart submitted that the appellants do not seek 'expectation damages" but seek compensatory damages to compensate them for the wrongdoings of Mr Collier and/or of JVL Prestige Limited. He submits that the appellants are seeking an order for recovery of the actual loss suffered by the* "*misconduct*" *(as he puts it) of the second respondents and that the appellants are not seeking, as in the Quin case, compensation for a loss of opportunity or* "*expectation damages*". …
>
> *[30] With regard to the Quin case, Mr Darroch regards it as suggesting that the wording of ss 93 and 110 of the Act make it clear that only a "limited jurisdiction" is conferred on the Committee and it had no power under s 93 to order a licensee to pay compensatory damages, either by way of indemnity or for loss of expectation. He also submits that there is no power for us to award compensation under s 110 unless misconduct by the licensee has been proven and loss has been suffered as a result of that misconduct.*
>
> *[31] We agree that our power to award compensation under s 110(2)(g) is only available where we have found a licensee guilty of misconduct. Otherwise, in terms of s 110(4), if we find unsatisfactory conduct by a*

licensee we are confined to making any of the orders which a Complaints Assessment Committee may make under s 93 of the Act …

[32] In Quin, the High Court held that committees cannot order licensees to pay complainants money as compensation for errors or omission for pure market or economic loss (compensatory damages). …

[33] However, an order under s 93(1)(f) cannot be made in respect of a straight monetary loss, i.e. compensation for an alleged loss in market value, which is the case here. The present appellants are seeking compensation of that kind in the sum of $49,385. In terms of Quin, this cannot be awarded. This is not to say that monetary orders cannot be made under s 93(1)(f) in certain circumstances. However, when there is no possible way of rectifying the error other than paying damages for the difference in value, then the Quin decision precludes payment of monetary compensation.

[34] *In Quin, Brewer J pointed out that the primary focus of the Act is not on the provision of a forum in which complainants can seek monetary compensation, but on the regulation of the real estate industry so as to promote and protect the interests of consumers. He added "This includes conferring on regulators powers to grant consumers relief from harm, resulting from licensees acting contrary to the standards required of them" – para [44]. A little later, at his para [51], Brewer J notes that the only provision in the Act which provides specifically for the payment of monetary compensation is s 110(2)(g) which relates to where a person has suffered loss by reason of a licensee's misconduct*.

[35] *The offending in the present case is of "unsatisfactory conduct" rather than misconduct, so that our powers to make orders under 110 do not apply and we are confined to the powers which the Committee had under s 93 of the Act. In that respect Brewer J stated:*

"[58] In my view, the wording of ss 93 and 110 makes it clear that a limited jurisdiction is conferred. Section 93(1)(f) does not empower a Committee to order a licensee to make payments in the nature of compensatory damages. That is a power which is given to the Tribunal under s 110, but to a limit of $100,000.

[59] Section 93(1)(f)(i) empowers a Committee to make orders directed at the taking of actions. So, a Committee may order a licensee 'to rectify, at his or its her own expense, any error or omission'. Rectify means to put right or to correct. That is the focus of the provision. It is, in my view, a power to order a licensee to do something to put right or correct an error or omission by the licensee, at the licensee's expense.

[60] Similarly, s 93(1)(f)(ii) is focused on the taking of action to provide relief from the consequences of an error or omission where rectification is not practicable. This is clear from the framing of the power to order a licensee 'to take steps to provide' relief 'in whole or in part'. This inclusion in the power of the ability to order that this be done at the licensee's expense is a necessary incident of the power to direct the taking of steps."

[36] *In his paragraphs [65] and [66] Brewer J concluded:*

"[65] I conclude that the 2008 Act gives a Committee the power to order a licensee to rectify an error or omission, or to take steps to provide relief from its consequences, where the error or omission resulted from the licensee's unsatisfactory conduct. Whatever is ordered would be at the licensee's expense. In situations where a complainant has already done what was necessary to rectify the error or omission, or to provide relief from its consequences, the power would extend to requiring a licensee to reimburse the complainant.

[66] However, the 2008 Act does not give a Committee the power to order a licensee to pay compensatory damages, either by way of indemnity or for loss of expectation. The 2008 Act does give the Tribunal the power to award compensation for loss where there is a finding of misconduct against a licensee …"

[37] At para [75] of his decision Brewer J stated:

"[75] If I am wrong in my view that s 93(1)(f) does not empower a *Committee to order compensatory damages, I would nevertheless accept the appellant's submission that the power does not extend to expectation damages. …"*

Conclusion

[21] There are a variety of orders that may be seen as in our discretion to be appropriate for the conduct in question. In terms of the monetary compensation sought by the appellants under s 93(1)(f) of the Act, *Quin* prohibits such an order being imposed. We consider that further training is appropriate given our findings. The unit standard 23150, which is in relation to preparing sale and purchase agreements for complex situations relating to residential property, needs to be undertaken by the licensee.

[22] Accordingly, we order as follows:-

1. The licensee is to undertake and complete the Unit Standard 23150 to the reasonable satisfaction of the Registrar of the Authority.

2. The licensee is fined $2,500 to be paid to the Registrar of the Authority at Wellington within 20 working days of the decisions.

3. The licensee is to pay Mr and Mrs Tong, jointly as complainants, $2,500 on account of costs they have incurred in these proceedings before the Committee and before us.

[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 J Gaukrodger
Member

_____
Ms N Dangen
Member