BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 32

READT 038/11

IN THE MATTER OF	a charge laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (CAC 10017)**
	Prosecutor
AND	**IVAN SHERBURN** Licensed Salesperson, of Hamilton
	Defendant

MEMBERS OF TRIBUNAL

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

HEARD at HAMILTON on 25 September 2013 (prior hearing of a witness at Auckland on 3 September 2013) (with subsequent typewritten submissions)

DATE OF SUBSTANTIVE DECISION 26 November 2013 [2013] NZREADT 105

DATE OF THIS DECISION ON PENALTY 1 May 2014

COUNSEL

Mr L J Clancy for the prosecution
Mr E J Hudson, barrister, for the defendant

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In our decision herein of 26 November 2013 [2013] NZREADT 105 we dismissed the charge of misconduct brought against Mr Sherburn by a Committee of the Real Estate Agents Authority. However, we found that Mr Sherburn was guilty of unsatisfactory conduct under s.72 of the Real Estate Agents Act 2008 ("the Act"). We concluded our said substantive decision regarding the conduct of Mr Sherburn, as a defendant to a charge of misconduct, as follows:

> *"[42] However, we consider that, at all material times, the defendant was acting as a real estate agent rather than as a vendor and neighbour to the Harlows. We consider that a reasonably competent real estate agent, in the circumstances described above, would not have allowed the confusion over the covenants to develop in the minds of Mr and Mrs Harlow, as it did. The*

defendant, as a real estate agent, needed to be clear and forthright about the nature of the new restrictive covenants and the procedure involved in their registration.

[43] We can understand that the defendant thought the covenants were beneficial rather than restrictive to the Harlows. We can understand that the Harlows were more concerned about other aspects of the overall farm purchase from the defendant's family and various consequences of that; and did not seem to absorb that the three clear and precise restrictive covenants were being registered against the title they were acquiring. Frankly, one would have expected the defendant's solicitor to have carefully covered the proposed registration process of the restrictive covenants with the solicitor for Mr and Mrs Harlow prior to actual registration of the new covenants and the solicitor for Mr and Mrs Harlow to have fully searched the new title on its issue.

[44] We are also conscious that, in good faith, the defendant thought Mr and Mrs Harlow were fully supportive of the new covenants and understood how beneficial they would be for their peace and harmony in the area.

[45] For all that he failed, at least technically, to maintain the standard of conduct which a reasonable member of the public is entitled to expect from a reasonably competent licensee. That means that he is guilty of unsatisfactory conduct in terms of s.72(a) of the Act and his conduct would breach other parts of the definition of "unsatisfactory conduct" in that section and is generally unacceptable.

[46] In terms of penalty, because the material events to our finding of unsatisfactory conduct happened under the jurisdiction of the Real Estate Agents Act 1976 rather than the 2008 Act, we seem to have very limited powers. Accordingly, we ask the Registrar to arrange a telephone conference of counsel with our chairperson to discuss this penalty aspect further in the reasonably near future."

Discussion and Consequence

[2] The conduct in question occurred in 2007/2008. At the relevant time, Mr Sherburn held a certificate of approval as a salesperson under the Real Estate Agents Act 1976.

[3] Mr Clancy, correctly and properly, submitted as follows:

"2.1 As the conduct in issue took place prior to the Act coming into force on 17 November 2009, s.172 of the Act applies. Under s.172, the only penalty orders open to the Tribunal are orders which could have been made against Mr Sherburn under the 1976 Act.

2.2 The Tribunal has previously held that findings of unsatisfactory conduct, as distinct from findings of misconduct, are analogous to findings made by Regional Disciplinary Sub-Committees under the old statutory framework – CAC 10024 v Downtown Apartments Limited [2010] READT 06 at [39] to [44].

2.3 The orders that could be made by Regional Disciplinary Sub-Committees (for breaches of the REINZ Rules) were a maximum fine of $750 and

censure – however, these were orders against the approved salesperson or branch manager's employing agent rather than the salesperson or branch manager personally.

2.4 Accordingly, the Tribunal has previously held that penalty orders, including fines, cannot be imposed for unsatisfactory conduct by salespersons where the unsatisfactory conduct occurred prior to the Act coming into force – see, for example, Handisides v CAC 10030 and Cruden [2011] READT 36 at [43] and [46].

2.5. No orders by way of penalty are therefore available in the present case."

[4] Mr Hudson, as counsel for Mr Sherburn, concurs with the above views. So do we. It follows that we have no penalty jurisdiction in terms of our said finding of unsatisfactory conduct against Mr Sherburn.

[5] Accordingly, we regard this matter as closed in terms of our said 26 November 2013 decision [2013] NZREADT 105 and this decision about penalty.

[6] 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 J Gaukrodger
Member

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Ms N Dangen
Member