

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 35

READT 020/13

IN THE MATTER OF a charge laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN **REAL ESTATE AGENTS
AUTHORITY (CAC 20004)**

Prosecutor

AND **MARGARET LINDSAY** of
Eastbourne, Real Estate Agent

Defendant

MEMBERS OF TRIBUNAL

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

HEARD at WELLINGTON on 29 October 2013

DATE OF SUBSTANTIVE DECISION 20 December 2013

DATE OF THIS PENALTY DECISION 19 May 2014 – by consent heard “on
the papers”

COUNSEL

Mr L J Clancy for the prosecution
Mr P J Napier for defendant

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] By our decision dated 20 December 2013 we dismissed allegations of misconduct against Mrs Margaret Lindsay (the licensee) brought by Complaints Assessment Committee 20004, but we found that Mrs Lindsay had engaged in unsatisfactory conduct under s.72 of the Real Estate Agents Act 2008 (“the Act”).

[2] Essentially, the conduct of the defendant which concerned us was that, when dealing with and assisting the complainant in relation to his possible tender of a property at Eastbourne, Wellington, about three days prior to tender time she and her husband became interested in acquiring that property. She competed in the tender of it against the complainant, was successful in acquiring the property, and had likely obtained information from the complainant which put her at an advantage or perceived advantage. The complainant did not learn of her intention and tendering until about half an hour prior to the expected tender time. However, we covered the

facts in detail in our substantive decision of 20 December 2013 where we also analysed the conduct of Mrs Lindsay at material times.

[3] At paragraph [87] of our decision, we stated:

“... Currently we see the offending as nearing the mid-level of unsatisfactory conduct so that censure and fine of about \$2,000 could be appropriate.”

[4] The Authority seeks to persuade us to impose a higher penalty than that which we suggested in 20 December 2013 decision.

The Submissions on Penalty

[5] It is submitted by Mr Clancy, counsel for the Authority, that the licensee’s culpability, in respect of our findings, is highlighted in the following passages of our decision on liability, namely:

“[63] ... it was not fair to withhold that information from the complainant and continue to act for him. It was unacceptable for the licensee to only disclose her interest after she had submitted her own tender, less than an hour before the tender deadline, and that put the complainant under undue and unfair pressure.

[64] ... Mr Clancy submits that the licensee’s behaviour, as a whole, was likely to bring the real estate industry into disrepute. We agree.

...

[76] ... The complainant was entitled to expect her help and advice on an objective and experienced basis and on a basis of trust and confidence. Once a conflict arose and interfered with that requirement, the conflict should have been immediately disclosed by the defendant to the complainant and his partner.

...

[84] ... it appears that she has taken advantage of her special relationship as adviser to the complainant. All the Rules referred to in the Charge have been breached by the defendant.”

[6] Mr Clancy submits that the rules referred to in the charge, and found to have been breached by the licensee, are some of the most fundamental contained in the Real Estate Agents (Professional Conduct and Client Care) Rules 2009, and include rules prohibiting conduct likely to bring the industry into disrepute, withholding information from clients and customers, and putting clients or customers under unfair pressure. Those rules read:

“6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.

6.4 *A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.*

9.2 *A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure.”*

[7] The rules breached go directly to the purpose of the Act in promoting and protecting the interests of consumers in respect of real estate transactions and prompting public confidence in real estate agency work.

[8] Mr Napier, counsel for Mrs Lindsay, submits that our suggested penalty of a censure and a fine of \$2,000 is appropriate taking into account the purpose of the new legislative regime led by the Act, and the issues of deterrence, professional standards, and Mrs Lindsay’s personal circumstances. He noted that we based our findings on Mrs Lindsay’s failure to advise the complainant of her potential interest in the property as soon as that interest arose. Mr Napier felt we summarised that in the following paragraphs of our decision, namely:

“[78] The law and the relevant rules are referred to above. Simply put, we can accept that, in the particular circumstances we have covered, there was no wilful or reckless breach of any rule so that misconduct is not proven on the balance of probabilities. The defendant did not seem to consider, at material times, that her conduct might breach professional standards.

[79] However we find, and the defendant and her husband have admitted that, with hindsight, the complainant should have been told much earlier of the defendant’s competitive interest in tendering for the property. That disclosure should have probably been made, they admit, on the evening of 7 May 2012 when she and her husband had viewed the property and begun considering in earnest their making a tender. Probably, the defendant hoped that the complainant would decide not to tender; so that the interest of her and her husband in acquiring the property would be academic in terms of her conduct as a real estate agent. That failure to disclose is unsatisfactory conduct under s.72 of the Act as we explain further below.”

[9] Although it has not been the Tribunal’s practice to date to fix an explicit starting point for financial penalties before allowing any discount appropriate due to the personal circumstances of the licensee, Mr Clancy, as counsel for the Committee, suggested that such a practice, as is standard in criminal proceedings, may assist in us promoting consistency in decisions on penalty. This would involve us identifying a starting point with reference to the seriousness of the conduct proved, before allowing discounts (if any) due to factors personal to the licensee such as remorse or impecuniosity.

[10] We also appreciate both counsel referring to a number of case authorities dealing with penalty and relating the approach in those cases to this present issue with the defendant Mrs Lindsay. We have absorbed those cases but, for present purposes, prefer to focus on the relevant detail of Mrs Lindsay’s conduct.

[11] We agree with Mr Napier that we ought to take into account the nature of the breach of the Rules by Mrs Lindsay; any resulting harm; her personal circumstances; and the broader issues of deterrence and maintenance of professional standards.

[12] In terms of the detail of our substantive decision herein, Mr Napier noted that the essence of the breach by Mrs Lindsay is that the complainant was not advised at an earlier stage that Mr and Mrs Lindsay were potentially interested in tendering for the property and that caused the complainant "*much shock and stress*" and, as we put it, he felt "*gazumped or out manoeuvred*". Mr Napier submits that the complainant suffered no actual harm and had stated that he would not have paid \$1,000,000 for the property from which as we put it in our said decision "*it follows that the vendor would, most likely, never have sold to him*". Mr Napier also noted that the complainant was, in part, the author of his own misfortune in not replying to messages from Mrs Lindsay during the week of 7 May 2012 nor having advised Mrs Lindsay of his intention to submit a tender until an hour before tenders were due to close.

[13] Mr Napier referred to Mrs Lindsay having accepted at the hearing that, in retrospect, it would have been preferable for her to have disclosed her potential interest in the property to the complainant when that interest arose on 7 May 2012 with regard to tenders being due to close by 12 noon Thursday 10 May 2012.

[14] Mr Napier noted that Mrs Lindsay was also clear in her evidence that:

- [a] Based on the complainant's conduct, she honestly believed that the complainant was not interested in submitting a tender for the property;
- [b] She herself formed no intention to submit a tender until the morning of the tender deadline; and
- [c] She never had any intention to cause disadvantage to the complainant and did her best at the time to act appropriately.

[15] He submitted that Mrs Lindsay should be given some credit for the action she did take once she learned of the complainant's intention to submit a tender, i.e. advising the complainant of her interest, finding another agent to assist the complainant, advising her sales manager, and withdrawing from the process. He puts it to be clear that Mrs Lindsay was sufficiently aware of her obligations to understand that she could not assist the complainant with his tender when she had submitted a tender herself.

[16] He also submits that the broader circumstances of how the breach of the Rules came about as outlined above, and the minimal harm that arose from such breach, place Mrs Lindsay's unsatisfactory conduct at the lower end of the scale.

[17] Mr Napier also submitted that Mrs Lindsay should be given credit for her acceptance that she could have handled matters better by advising the complainant of her potential interest sooner. He puts it that the following factors should be taken into account in considering an appropriate penalty:

- [a] Mrs Lindsay apologised to the complainant in her evidence-in-chief;
- [b] Mrs Lindsay has found the disciplinary process "*extremely distressing*", going so far as to have suggested that she should resign;

[c] Mrs Lindsay has an excellent reputation and has been described as a dedicated salesperson. Her sales manager vouches for her honesty and integrity.

[18] Mr Napier noted that a licensee's overriding duty is to her client but put it that the complainant did not suffer real prejudice as a result of breaches of fiduciary duty by the licensee.

[19] He submits that, in terms of deterrence and maintaining professional standards, the penalty to be applied by us in this case needs only be sufficient to remind the profession at large of the importance of acting fairly towards customers.

[20] He asserts it to be evident that Mrs Lindsay has taken this matter to heart and has been extremely distressed by it; and there is no need to impress upon her further the importance of ensuring that she complies with the Rules; and, further still, a similar situation is very unlikely to arise for Mrs Lindsay.

[21] Mr Napier submits that the fine range sought by the prosecution of \$4,000-\$6,000 goes beyond what is necessary to meet the purpose of the Act and promote the obligations of licensees to customers and that such a fine would be overly punitive and excessive in the light of our practice on penalty decisions in recent years. He particularly submits that additional training or education is unnecessary with regard to Mrs Lindsay who, he asserts, is aware of her obligations under the Rules and is clearly aware of where she went wrong in this case.

[22] We cover below more of Mr Clancy's submissions for the Authority

Discussion

[23] As Mr Clancy noted, we have held that penalties applied under the Act ought to be informed by the purpose of the Act, which is contained in s.3(1) as follows:

"... to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work."

[24] Counsel identified the intention of penalty orders, as the maintenance of professional standards and protection of the public but put it that penalties should not be applied with the purpose of punishing a licensee. In *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC), at [97], McGrath J stated:

"It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned."

[25] 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 D CAC* (supra); *CAC v Walker* [2011] NZREADT 4.

[26] The 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, including significant financial penalties.

[27] The penalties available under the Act for unsatisfactory conduct go far beyond the orders available where similar conduct was established, prior to November 2009, under the Real Estate Agents Act 1976 (effectively a maximum fine of \$750 and censure). By contrast, the orders available on a finding of unsatisfactory conduct under s.93 of the Act are wide ranging, including orders for refunding fees charged for real estate agency work subject of the complaint, and fines of up to \$10,000 against individual licensees.

[28] Mr Clancy submitted that a starting point of a fine in the range of \$4,000-\$6,000 would be appropriate in light of the licensee's conduct found proved and that there need be little or no discount for factors personal to the licensee. He noted that we have no information to suggest that Ms Lindsay is unable to meet a financial penalty in this range.

[29] Ms Lindsay's defence to the allegation that her breach of the Rules was wilful or reckless was that, at the relevant time, she honestly did not consider that her conduct might breach any Rules. It is submitted by Mr Clancy that where such a defence succeeds, orders for further education and training should generally follow. That submission has logic.

[30] In all the circumstances, the Committee submits that a combination of the following orders would be appropriate: censure; apology; a fine in the range of \$4,000-\$6,000; and an order that the licensee undergo further training or education as to her obligations under the Rules.

[31] The complainant, Richard Finn, has confirmed he has no costs which could be reimbursed under s.93(1)(i).

Outcome

[32] We are, of course, well aware of the practice, indeed expectation, in criminal sentencing of fixing a starting point. That practice does not always seem to us to be particularly helpful in dealing with the conduct of real estate agents because we find that almost every case is rather unique.

[33] We are particularly conscious of the concerns we expressed in paras [63] and [76] of our said 20 December 2013 decision herein as set out in para [5] above.

[34] When we stand back and review this situation overall, we consider a just sentence comprises the following and we so order: the defendant (Mrs Lindsay) is to be censured; she is to provide a formal written apology to the complainant within two weeks from the date of this decision; she is fined \$4,000 to be paid to the Registrar of the Authority at Wellington within one calendar month of the date of this decision; and she must undergo a fairly short and basic course in business ethics to be determined by the Registrar, and approved as appropriate by our Chairperson, just as soon as that can be conveniently arranged.

[35] 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

Ms N Dangen
Member

Ms C Sandelin
Member