BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 38

READT 062/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**CHRISTINA DAVENPORT** of Foxton, Real Estate Agent
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC20005)**
	Respondent
AND	**ALISON SHAW** of Palmerston North, Complainant
	Second respondent

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION ON PENALTY 21 May 2014

APPEARANCES

The appellant on her own behalf
Ms J MacGibbon and Ms N Copeland, counsel for the Authority
No participation on this penalty issue by the complainant

DECISION OF THE TRIBUNAL ON APPEAL AGAINST PENALTY

Introduction

[1] Christina Davenport ("the licensee") appeals against the penalty determination of Complaints Assessment Committee 20005 which found that she had engaged in unsatisfactory conduct in terms of the Real Estate Agents Act 2008 as outlined below. She holds a salesperson's licence and at the relevant time was working for Property Brokers Ltd, Foxton.

Background

[2] Alison Shaw ("the complainant") viewed a property at 21 Cook Street, Foxton with the licensee on 12 October 2012. The licensee informed the complainant that

the age of the property did not appear on the information flyer, but it seemed to be approximately 40 to 50 years old.

[3] That evening, the complainant emailed the licensee with details of an offer that she wished to make on the property. The licensee responded to the complainant the following morning by confirming receipt of her instructions to prepare an offer to purchase the property. While discussing the terms of the proposed offer with the licensee, the complainant asked for confirmation of the age of the property. The licensee informed the complainant that the property had been constructed in the 1970s.

[4] On Friday 13 October 2012, the licensee emailed the complainant an agreement for sale and purchase form with the details of the proposed offer inserted in terms of their earlier conversation. The complainant responded by asking the licensee for copies of the approved guide and the agency's complaints procedure. The licensee emailed those documents to the complainant later that day.

[5] At 12.14 pm on 13 October 2012, the complainant sent the now signed (by the complainant) offer back to the licensee. At 3.19 pm that day the licensee sent the complainant, by email, confirmation that the licensee had received the offer document.

[6] At 3.33 pm on that day, 13 October 2012, the licensee emailed the approved guide and the agency's complaints process to the vendors of the property and, at 3.40 pm that day, sent the vendors a copy of the offer document signed by the complainant.

[7] At approximately 4.00 pm on 13 October 2012, the licensee communicated acceptance of the offer (by the vendors) to the complainant who maintains that the licensee telephoned her to convey acceptance of the offer stating *"congratulations, the vendors have accepted your offer"*. The licensee claims she had then made it clear to the complainant that the vendors had only given verbal approval and that the signed paperwork would not be in the office until the following Monday (two days later).

[8] On 14 October 2012, the licensee began a one week holiday in Australia and asked a colleague to oversee any issues with her clients and customers while she was absent.

[9] On 15 October 2012, the complainant ordered a Land Information Memorandum (LIM) and commissioned a builder's report in order to fulfil conditions of the said contract to purchase the property.

[10] The complainant then contacted the licensee's colleague to obtain a copy of the signed agreement. She was informed that a copy was not available because the vendors had not yet returned a signed copy to the agency's office but that a signed copy would be secured as soon as possible and then forwarded to the complainant's solicitor.

[11] On the morning of 16 October 2012, the complainant received information from the local territorial authority indicating that the property had been constructed in 1958 and not in the 1970s as communicated by the licensee. The licensee's colleague confirmed that the date of construction for the property was the 1950s. The

complainant asked that the contract be destroyed but was informed that the signed agreement had now been sent to the respective solicitors.

[12] The complainant forthwtih cancelled the contract.

The Committee's Findings

[13] In its decision of 15 July 2013, the Committee found the licensee had engaged in unsatisfactory conduct on the basis that she was careless when providing the complainant with the date of construction for the property; and was misleading in advising the complainant that her purchase offer had been accepted, when only verbal advice had been received from the vendors.

[14] In relation to the licensee's communication with the complainant regarding acceptance of the offer the Committee was of the view that, if the licensee was correct in her assertion that only verbal advice of acceptance was passed on to the complainant, then that communication was poor at best. The Committee believed that the complainant was left in no doubt by the licensee that a contract for the sale and purchase was in place when the licensee contacted her and conveyed acceptance of her offer by the vendors. It is not clear what was that method of contact but it seems to have been by telephone.

[15] The Committee found no failings on the part of the licensee in relation to the provision of the approved guide, the agency's complaints procedure, or in regard to advising the complainant to seek independent legal advice.

[16] We note the following paragraphs of the Committee's said decision:

> *"**3. Discussion***
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> *3.1 The Complainant maintains that the construction date of the Property and others they viewed with the Licensee was an important element in their decision to purchase. The Complainant's belief was that Property constructed after the mid 1970s was more likely to be suitable for them as an investment and for resale. The Complainant maintains that this information and position was passed on to the Licensee whilst discussing various potential properties.*
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> *3.2 The Licensee has conceded to providing the Complainant with an incorrect construction date when specifically asked for that information. The Licensee maintains that the information was given in error after she referenced the wrong property detail flyer when responding to the Complainant's question about the construction date.*
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> *...*
>
> *3.11 The Complainant maintains that approximately 30 minutes after the Complainant signed and returned the agreement, the Licensee called to convey acceptance of the offer by stating 'congratulations, the vendors have accepted your offer'. The Complainant maintains that the Licensee then went on to explain that a colleague would be taking over in the Licensee's absence as the Licensee was going on holiday.*

3.12 The Licensee maintains that when relaying acceptance of the offer she made it clear that the vendors had only given verbal approval and that signed paper work would not be in the office until the following Monday (2 days later). The Licensee maintains that giving of verbal advice of acceptance is a regular practice given the remoteness of some vendors and their inability to sign contracts immediately.

3.13 The Complainant clearly undertook actions, such as ordering a LIM report and commissioning a valuation, consistent with her belief that a contract was in place.

3.14 If the Licensee is correct in her assertion that verbal acceptance only was passed on to the Complainant along with advice that the signed paper work was still to be obtained, then that communication was poor at best. The Committee believes that the Complainant was left in no doubt that a contract for sale and purchase was in place when the Licensee called to convey acceptance of her offer."

[17] In its 27 September 2013 decision on penalty, the Committee made the following Orders against the licensee pursuant to s.93(1) of the Act:

[a] That the licensee be reprimanded;

[b] That the licensee pay a fine of $1,500; and

[c] That the licensee complete a National Unit Standard course on the law of contract and the law of agency.

The Stance of the Licensee Appellant

[18] The licensee contends that she did not have the opportunity to seek resolution with the complainant prior to the complaint being made. She further states that she thought her branch manager had contacted the complainant and that the first she was aware that had not taken place was when the complaint was made.

[19] The licensee states that, given the complainant suffered no loss, and she (the licensee) did not benefit financially from her conduct, a fine and publication are disproportionate to the conduct involved and unduly harsh. She further submits that the complaint is at the low end of the spectrum in terms of disciplinary conduct.

[20] In her helpful typed final submissions to us, the licensee recorded that she accepted full responsibility for providing incorrect information on the age of the property. She had thought it was 40 to 50 years old from viewing it but, back in her office, accidentally picked up an incorrect flyer for a 1970s house and advised the complainant on the basis of that. The appellant puts it that the property is a house built in the 1950s and was in better condition and more modern than a 1970s house because of alterations which had been made to it. The appellant emphasised that the flyer produced for the property (21 Cook St, Foxton) did not record its age because the agency's branch administrator was on leave at the time and the flyer was inadequate. The appellant also emphasised that, when she became aware of this mistake while still on holiday in Australia, she immediately rang the complainant second respondent to apologise.

[21] The licensee also points to evidence that when the complainant sought to obtain a Council LIM report and retain a building inspector, the Council gratuitously provided her with building permits for the property which showed that it was constructed in 1958 with alterations in 1965, 1975, 1976 and 1985. The licensee understands that no costs were incurred by the complainant for a LIM report which would have cost $205 (and would have taken 10 days to obtain) because, on ascertaining the correct age of the property, the complainant promptly cancelled her purchase contract and also the building inspection.

[22] Inter alia, in her final submission to us the licensee appellant stated:

> *"I advised the complainant that as I was going to be leaving NZ the following morning for an overseas holiday, and that I would verbally contact the vendor, who was located in Wellington, and present the offer and that I would advise her of their response to the offer. It was clearly articulated to the complainant when contacting her that the acceptance was verbal only and that we still had to wait for the signed paperwork to come back before it could be processed. This would probably not be until Monday. I was unaware that the vendor had decided to check the offer with his solicitor before sending it back, which caused a delay in getting the contract to the complainant. ..."*

[23] The appellant submits that the penalties imposed on her by the Committee are unduly harsh and out of proportion to her offending. She accepts that she made the initial mistake of advising the wrong age of the property but puts it that others in the agency's office failed to assist the complainant in her concerns while the licensee was in Australia so that the complainant became very angry. The licensee emphasises that, as soon as she was made aware of the mistake she had made about the age of the property, she sent an apologising email to the complainant but got no response. The licensee also seemed to be stating that another licensee, acting on behalf of the appellant in her absence, infuriated the complainant by unnecessarily raising issues with the complainant's lawyer and incurring further legal costs for the complainant. The licensee/appellant feels that the complainant was upset by the licensee's agency being slow to react in the absence of the licensee in Australia. The licensee then summarised her position as follows:

> *"**Summary***
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> *Accept fully that I did make a mistake in quoting the incorrect year of the property in question to the complainant, and as such I should be held accountable for those actions. However it was a genuine mistake and was not meant to be misleading in any way to the complainant. I also believe however that I have been let down terribly by the licensee acting on my behalf in my absence, by my branch manager and also by the company I represent who have advised me throughout that it's not a big issue we will get it sorted, and not to worry.*
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> *The lack of action and response to the situation on their part has clearly angered the complainant and has left me in a very difficult situation of carrying the entire responsibility and pending penalties. Had I been in the country at the time and been in a position to deal with it personally, this situation could have been resolved to the satisfaction of the complainant and the complaint might not have been made to the REAA. ...*

> *Finally I wish to state that I have been incredibly stressed by this complaint and that I have spent the last fifteen months worrying about the outcome and how it might impact on my career in real estate. I pride myself on being a professional, honest, responsive and reliable agent to my client and will accept the outcome of this appeal and be optimistic that it is a one off and does not accurately reflect my performance in the industry. This is proven in the attached feedback reports from clients."*

[24] The appellant also notes that the complainant was very quick to make her complaint to the Authority and did so within 24 hours of finding out the correct age of the property. She had obtained that information herself from the Council on Tuesday, 16 October 2012 and made the complaint on Wednesday, 17 October 2012 and this was even before she had cancelled the purchase contract. The appellant feels that she and/or her agency should have been given an opportunity to discuss and try and resolve the situation with the complainant. It seems that the appellant did not learn about the complaint until 13 November 2012. It also seems that the appellant's agency was willing from the outset to reimburse the complainant her costs due to the misadvice from the appellant about the age of the property.

Relevant General Principles

[25] Decisions of industry disciplinary tribunals should emphasise the maintenance of high standards and the protection of the public (through both specific and general deterrence). While this may mean that orders made in disciplinary proceedings have a punitive effect, this is not their purpose, *Z v CAC* [2009] 1 NZLR 1 at [97]. As McGrath J said for the majority of the Supreme Court (Blanchard, Tipping and McGrath JJ) in that case at para [97]:

> *"... 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 appropriate standards of conduct are maintained in the occupation concerned."*

[26] In *CAC v Walker* [2011] NZREADT 4, we said as follows:

> *"[17] Section 3(1) of the Act sets out the purpose of legislation. The principal purpose of the Act is "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". One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (s.3(2)).*
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> *[18] This function has been recognised in professional disciplinary proceedings involving other professions [and] ... is reinforced by the reference in the purpose provision to the Act (s.3) to raising industry standards and the promotion of public confidence in the performance of real estate agency work.*
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> *[19] In Patel v Dentists Disciplinary Tribunal, High Court, Auckland, CIV 2007-404-1818, 13 August 2007, Lang J held that disciplinary proceedings inevitably involve issues of deterrence and penalties are designed in part to deter both the offender and other in the profession from offending in a like manner in the future."*

Appeals against Penalty

[27] Penalty decisions are discretionary in nature. In *K v B* [2010] NZSC 11, [2011] 2 NZLR 1, our Supreme Court confirmed that appellate Courts will adopt a different approach on appeals from discretionary decisions to that taken on general appeals:

> *"[32] ... for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with an the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary."*

[28] It is submitted for the Authority, and we agree, that the narrower approach described in *K v B*, is appropriate in respect of appeals against the exercise of the discretion granted to complaints assessment committees in determining penalty following unsatisfactory conduct findings. Thus, in order to allow the appeal, the licensee will have to demonstrate that the Committee made an error of law or principle; or failed to take into account a relevant consideration; or took into account irrelevant considerations; or was plainly wrong.

The Stance of the Authority

[29] It is submitted by counsel for the Authority that there was no error of law or principle by the Committee, and no failure to take into account relevant considerations in the Committee's decision; further, the decision did not take into account irrelevant considerations, nor was it plainly wrong; and, while a different Committee may have imposed a different set of penalty orders, the orders imposed were clearly within the legitimate range open to the Committee in exercising its discretion.

[30] It is emphasised that the Committee acknowledged that the licensee was careless rather than dishonest when providing the complainant with the specific information sought. It is clear that the Committee also carefully considered the principles underpinning disciplinary orders.

Publication

[31] Counsel for the Authority have helpfully made submissions on the issue of publication in terms of a non-publication order of the licensee's name or any identifying details regarding her. The licensee has not made any formal application for non-publication but mentioned her concerns about publication. Accordingly, we deal with that issue much as it has been put to us by counsel for the Authority, because we agree with the Authority's approach.

[32] The licensee has submitted that publication is disproportionate to the conduct involved. It is correctly submitted for the Authority that the Act requires the Registrar

to maintain a public register of those holding licences under the Act and this includes a mandatory requirement to include information about any action taken on the disciplinary matter in respect of a licensee in the past three years – ss.63-66 of the Act.

[33] The effect of the provisions is that a Complaints Assessment Committee finding of unsatisfactory conduct, and any consequent orders made, must be recorded on the public register in relation to the licensee concerned if the finding and orders were made within the past three years. This reflects a clear policy decision by Parliament to promote consumer information and choice in accordance with the purposes of the Act.

[34] Mandatory publication is subject only to our making an order for non-publication. Section 108 of the Act grants us power to make orders prohibiting, among other things, publication of the names (and identifying details) of parties to proceedings before us. The licensee has made no application for an order under s.108. Mr Clancy submits that no such order would be justified and that proceedings before us under the Act are generally public and decisions are available to the public. Section 107 of the Act provides for hearings to be held in public.

[35] We have considered the principles relevant to applications under s.108 in such cases as *An Agent v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 02 and *Graves v Real Estate Agents Authority (CAC 20003) & Langdon* [2012] NZREADT 41 and more recently in *W v REAA & Anor* [2014] NZREADT 9. We have affirmed that we have a discretion under s.108 of the Act to make non-publication orders provided that it is *"proper to do so"* and that discretion extends to both interim and final orders prohibiting publication.

[36] Mr Clancy submits that, in the present case, no particular factors in favour of an order for non-publication are advanced beyond the general submission that publication was unduly harsh given the nature of the conduct and an unsubstantiated assertion that publication could have a detrimental effect on the licensee's business. However, as discussed above, publication is mandatory in terms of the public register and it is put that we should only intervene by way of an order under s.108 where there are clear grounds that it would be proper to do so. The Authority submits that there are no such grounds in the present case and that the Committee's decision to publish should not be disturbed. We agree.

Our General Views

[37] We have the concern that there are some conflicts in evidence as between the complainant and the appellant e.g. whether or not the licensee made it clear to the complainant that the vendors had only given their verbal approval to the complainant's offer and that the signed paperwork would not be available in the agency's office for two more days upon the following Monday. On that point the Committee stated in its 15 July 2013 decision that, in terms of that advice of the approval of the vendors, the complainant undertook various actions such as ordering a LIM report and commissioning a valuation and then the Committee continued as in its para 3.14 set out above.

[38] We are conscious that the Committee has given careful consideration to the issues and provided detailed and sound reasoning for its findings. At the very least, the licensee seems to have been careless in not making it clear to the complainant, at 4.00 pm on 13 October 2012, that a binding contract had not yet been created at

that material time. On the other hand, it seems that, due to the main error in issue in this case, namely, the misadvice by the licensee to the complainant as to the age of the property, the complainant was able to withdraw from the purchase contract without incurring costs for a LIM report or for a valuation, although she must have incurred some modest legal fees.

[39] Although there are issues of credibility, the parties have made it clear that we are to decide penalty on the papers and we are focused merely on penalty.

Our Penalty Orders

[40] We do not think that the Committee's penalty decision issued on 27 September 2013 is harsh or disproportionate to the offending. However, at this stage, in terms of the further costs which have been incurred and the lessons which have now clearly been absorbed by the licensee, we revoke the imposition of a censure/reprimand and the further education provision, but we increase the said fine to $2,500. We order accordingly. The fine is to be paid to the Registrar of the Authority at Wellington within one calendar month of this decision. In other words, the penalty imposed on the appellant licensee is a fine of $2,500.

[41] 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

_____
Ms N Dangen
Member