BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 56

READT 37/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PETER AND PATRICIA BURN**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**WILLI BARDOHL**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms C Sandelin - Member

SUBSTANTIVE CASE HEARD at AUCKLAND on 11 February 2014

DATE OF SUBSTANTIVE DECISION 8 April 2014 [2014] NZREADT 25

THIS PENALTY DECISION ISSUED ON THE PAPERS BY CONSENT
On 25 July 2014

APPEARANCES

The appellants on their own behalf
Ms N Copeland, counsel for the Authority
Ms J M Keating, counsel for the second respondent licensee

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In an 8 April 2014 decision, we quashed the decision of Complaints Assessment Committee 20002 to take no further action against Willi Bardohl ("the licensee"), and found him guilty of the unsatisfactory conduct referred to below which occurred in 2010. We indicated our inclination to simply fine him $2,000; refer *Burn v Real Estate Agents Authority CAC 20002 & Willi Bardohl* [2014] NZREADT 25 at [59].

[2] The essence of the complainants' case was that, before they purchased a property at 7 Hobson Heights Road, Albany (the property), the licensee failed to inform them that a large deck attached to the house had not received appropriate

Council consent for its construction. The licensee stated that he did inform the complainants of this and they, being eager to purchase the property, nevertheless signed the sale and purchase agreement dated 11 October 2010. We covered matters in some detail in our said 8 April 2014 decision and, essentially, found that in all the circumstances, the licensee has been guilty of unsatisfactory conduct at a relatively low level. We considered that the licensee should have obtained more information from the vendors about the legal status of the deck and also (despite the standard clause 6 warranties in the agreement) should have addressed it separately in the agreement with a suitably tailored condition, or referred that to the solicitor for the purchaser.

Penalty Orders

[3] It is well established that decisions of disciplinary tribunals should emphasise the maintenance of proper professional 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 NZLR 1; *CAC v Walker* [2011] NZREADT 4. It is important to remember that general deterrence is a critical consideration, even if specific deterrence is not required because we are satisfied the licensee would not repeat his or her conduct.

[4] The Real Estate Agents Act 2008 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, by a licensee.

The Stance of the Complainants

[5] The appellant complainants do not accept our recommendation that the licensee be fined $2,000 and they focus on seeking compensation *"for the considerable inconvenience, stress and substantial penalties we incurred over this unfortunate house purchase and sale experience"*. They seek damages *"in recognition of the unsatisfactory behaviour the Tribunal has identified"*. They conclude their submissions on penalty as follows:

> *"6. We realise that to be fully compensated for our losses and pain and suffering would be difficult to determine and therefore we consider as a token Mr Bardohl should be fined $10,000 payable to us in recognition of such unsatisfactory behaviour.*
>
> *7. While this payment is of a relatively small value and is not punitive in value when compared to costs incurred by ourselves, we believe it acknowledges the situation that occurred as rightly identified by the Tribunal."*

The Stance of the Licensee

[6] Counsel for the licensee submits that a reprimand would be a sufficient penalty and no fine should be imposed because we found the licensee's unsatisfactory conduct to be of a relatively low level. She notes that the complainants are seeking $10,000 compensation as she puts it *"in recognition of the losses incurred in relation to the purchase/subsequent sale of the property at 7 Hobson Heights Road, Albany"*.

[7] She emphasises our finding that the licensee has been guilty of unsatisfactory conduct at a relatively low level. She emphasises that as soon as the licensee became aware of an issue with the deck, he advised Mr Burns that compliance was yet to be issued and then displayed good practice, which we held was *"to the credit of the licensee"*, by noting this conversation in his transaction report.

[8] Ms Keating refers to our noting that there was a warranty in the standard terms of contract for the building of the deck which seemed sufficient to cover and protect the complainants.

[9] Ms Keating further noted that, at paragraph [56] of our decision, we said that it *"would have been good practice"* for the licensee to have inserted a condition in the offer on the property from the complainants to cover completion of the deck prior to settlement and that, overall, despite the existing warranty, the licensee should have obtained more information from the vendors about the legal status of the deck.

[10] Ms Keating again noted that we felt the licensee's conduct involved a low level of unsatisfactory conduct and she emphasised the licensee's disappointment that his conduct in relation to the sale of the property has been held to be unsatisfactory. She referred to his clean disciplinary record since entering the industry in 1994 and to him having won *"numerous awards throughout his career"*. She submits that the complaints process has had a significant impact on the licensee and the overall experience before the Committee and us *"has already had a punitive effect"*. She noted that process has run over a period of about 18 months.

[11] Ms Keating addressed the question of the compensation of $10,000 sought from the licensee by the complainants believing that would acknowledge the situation that has occurred for them during the purchase and resale of the property. Ms Keating submits that *Quin v Real Estate Agents Authority* [2013] NZAR 38; [2012] NZHC 3577 makes it clear that monetary compensation cannot be ordered for loss resulting from a real estate transaction where the licensee acted below the standard expected. Ms Keating puts it that we may order the licensee to take steps to provide, at his or her own expense, relief from the consequences of any error or omission, but that any order for reimbursement under s.93(f)(ii) must flow from the complainant having done something to put right the error or omission. She submits this is not a situation to which that provision relates and that the complainants' losses were the direct result of their inability to sell their Castor Bay home before purchasing 7 Hobson Heights Road, Albany; so that an order for compensation under s.93(f)(ii) is not available. She notes the Authority's submission based on *Quin* (which we refer to below) that, whatever penalty is imposed, the complainants are not entitled to compensation of the nature sought; and she endorses that submission.

DISCUSSION

[12] We have already identified that we see the breach as at the lower end of unsatisfactory conduct. As such, it is submitted for the Authority that our suggested fine in the range of $2,000 would be an appropriate penalty.

[13] The appellants seek reimbursement for the penalty interest payments they were forced to pay the vendor (because they had not sold their Castor Bay property) and the loss incurred when they on-sold the property at 7 Hobson Heights Road. However, it seems that the appellants were forced to delay settlement and incur penalty interest to the vendor because of their own financing issues rather than by virtue of conduct attributable to the licensee. In terms of the loss incurred due to the

re-selling of the 7 Hobson Heights Road property, we accept that the agreed re-sale price was $948,000, which was $32,000 below the price the appellants had paid for the property. The appellants attribute this loss to the fact that the deck permit had still not been issued when they went to on-sell the property. However, they acknowledge that they sold the property at a time when the market was low and that this also affected their sale price.

[14] As Ms Copeland points out for the Authority, if the appellants were to seek reimbursement of the re-sale loss, they would be seeking compensation for straight market loss. This kind of monetary award was discussed in the decision of *Quin* (supra) where the High Court held that Committees (or this 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. Instead, licensees can only be ordered to do something or take actions to rectify or *"put right"* an error or omission in terms of s.93(1)(f)(i) of the Act. If licensees can no longer *"put right"* the error or omission, they 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. However, the appellants' claim for compensation is not convincing and is somewhat vague.

[15] 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.

[16] As such, the Authority submits that an order under s.93(1)(f) cannot be made. We agree. Indeed, in *Tong v REAA* and *Regan & Others* [2014] NZREADT 3 we stated:

> *"[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 …"*

[17] Ms Copeland adds that there are a variety of orders that we may see as appropriate for the conduct in question, such as censure, training, and/or a fine. She submitted that, in terms of the $10,000 monetary compensation, apparently sought by the appellants under s.93(f) of the Act, *Quin* prohibits such an order being imposed by us.

[18] Accordingly, we fine the licensee $2,000 to be paid to the Registrar of the Authority at Wellington within 10 working days of the issue of this decision.

[19] 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 C Sandelin
Member