BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 63

READT 057/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**JOHN DARLING** of Dunedin, Company Director and Real Estate Agent
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (per CAC 20002)**
	First respondent
AND	**DAVID PENROSE**, of Queenstown, Real Estate Agent
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at QUEENSTOWN on 28 March 2014 (with subsequent series of written submissions)

DATE OF SUBSTANTIVE DECISION 24 June 2014 ([2014] NZREADT 46)

DATE OF THIS DECISION ON PENALTY 11 August 2014

COUNSEL

Mr D R Tobin, for complainant appellant
Mr L J Clancy, for the Authority
Ms J Eckford and Ms A J Nash, for second respondent licensee

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In our substantive decision herein of 24 June 2014 we confirmed the Committee's 20 June 2013; finding of unsatisfactory conduct by the licensee on two grounds of complaint, and the Committee's reasoning; but we quashed the Committee's decision to take no further action on another of the grounds of the

complainant's complaint against the licensee and found him guilty of unsatisfactory conduct in respect of that.

[2] By a further decision of 13 September 2013, the Committee determined to censure the licensee, fined him $2,000, and required him to apologise to the complainant in terms of the licensee's offer to do that.

[3] In our said 24 June 2014 decision we covered the facts and our reasoning in some detail so that we now simply focus on penalty and the subsequent submissions from the parties about that. We had recorded in paragraph [57] of our decision that penalty is now best treated as a separate issue to be handled by a series of succinct written submissions from each party. Accordingly, we summarise below the submissions from each party on penalty.

The Submissions for the Appellant Complainant

[4] Mr T R Tobin, counsel for the appellant, noted that the appellant no longer seeks orders in respect of fees because separate proceedings are being issued seeking those in another forum.

[5] Mr Tobin submits that we should make an order censuring the licensee because his failings which we identified in our decision ought not to have been made by an experienced agent.

[6] A further apology is also sought by the complainant from the licensee. Mr Tobin puts it *"While the appellant and the second respondent were in a relationship of principal and agent for the purposes of this transaction, they are both colleagues in the same industry and collegiality alone indicates that an apology should be given"*. Mr Tobin also emphasised that, from the point of view of the appellant, there has been an undercurrent or theme from the licensee that the appellant had somehow acted in the relevant sale process in a less than ethical manner.

[7] It is also submitted for the appellant that a fine is appropriate but that it is for us to fix the proper level of that.

[8] Finally, Mr Tobin emphasises that the appellant has incurred solicitor-client costs totalling $22,327.88 (inclusive of GST) in pursuing this appeal which, he observes, is a significant sum but felt to be necessary expenditure by the appellant to correct any suggestion of wrongdoing or fault on his part. Mr Tobin submits that, in terms of normal practice towards a reasonable contribution to reasonable costs, the sum of $6,500 would be appropriate.

The Submissions for the Licensee

[9] Ms Eckford (counsel for the licensee) notes, as we have covered above, that the licensee has already been subject to the following penalties from the Committee, namely, an apology, a censure, and a fine of $2,000.

[10] She submits that the breaches which led to the Committee finding unsatisfactory conduct by the licensee, as set out in its decision of 20 June 2013, were of a technical nature and did not lead to any loss by the appellant. She extends that concept to the further finding of unsatisfactory conduct contained in our said decision of 24 June 2014. Accordingly, she submits that no further penalty should be imposed by us.

[11] Ms Eckford also submitted that the licensee has already received a penalty at the higher end of the scale; and she compared the facts and outcome in a number of our decisions (some where we found unsatisfactory conduct but imposed no penalty) with the present case.

[12] Ms Eckford also referred to our ruling that there be no suppression order regarding publication of our decision. She noted that, in allowing interim suppression prior to our substantive decision herein, we accepted, that publication of the censure will be damaging to the licensee's reputation. She submits that this, in itself, is penalty enough given the circumstances of this case.

[13] Ms Eckford submits that the factors covered for the appellant's seeking of a further apology show that no penalty, including an apology (which has already been provided in relation to the strict breach of rules found in the Committee's decision of 20 June 2013) should be ordered. She noted our statement at paragraph [54] of our decision of 24 June 2014 that it was *"Frankly, difficult to regard as credible that the appellant was unaware that rent was being significantly underpaid and the reasons for this"*. Ms Eckford puts it that, in these circumstances, where there was (she puts it) clearly some liability on the part of the appellant, an apology is inappropriate.

[14] Ms Eckford submits that a considerable fine has already been imposed on the licensee and that there should not be any further fine.

[15] Ms Eckford disputes that the licensee should make any contribution to the appellant's costs in circumstances where (she puts it) the appellant was entirely responsible for his own misfortune so that (she also puts it) the licensee's actions or inactions had no causative effect and cannot be contended to have resulted in the appellant's alleged loss of sale price. Ms Eckford then covers *"additional factors"* as follows:

> *"[14] Additional factors which should be taken into consideration by the Tribunal in its determination on penalty are:*
>
> *(a) that there is no indication that there was any deliberacy in the Second Respondent's actions nor did he obtain any personal gain from the disclosure;*
>
> *(b) credit should be given for the Second Respondent's good intentions and desire to ensure compliance with Rule 6.4 (and others) by disclosing the relevant information to the purchaser. Further, the failure to disclose such information to the purchaser would likely have had far more significant legal repercussions for both the Appellant and Second Respondent in the event that the sale had completed without issue as it would have exposed them both to the risk of legal action by the purchaser.*
>
> *(c) the fact that had the Second Respondent not referred the information about the reduced rental figure to the purchaser's lawyer, he [the latter] would have become apprised of the situation in the event upon contacting the tenant to advise of change of ownership. Again, with the result that the Second Respondent's conduct cannot be said to have caused the Appellant's alleged loss; and*
>
> *(d) the Second Respondent's previous good conduct."*

A Summary of the Submission for the Authority

[16] Counsel for the Authority, Ms N Copeland, helpfully records that it is well established that decisions of disciplinary tribunals should emphasise the maintenance of proper professional standards in the protection of the public through specific and general deterrence; and while this may result in orders having a punitive effects, this is not their purpose. She referred to the Real Estate Agents Act 2008 having been introduced specifically to better protect the interests of consumers in relation to real estate transactions and noted that a key means of achieving that was the creation of a wide range of discretionary orders available on findings of unsatisfactory conduct or misconduct against a licensee. Where a licensee's conduct is found to be unsatisfactory we have (as does the Committee) a discretion to make any of the various orders listed under s.93 of the Act.

[17] As indicated above, the Committee ordered that the licensee be censured and pay a fine of $2,000 because it found that the licensee had engaged in unsatisfactory conduct for his failure to have an agency agreement in place prior to beginning the selling process, and for failing to provide a marketing appraisal. The Committee also accepted the licensee's offer to apologise to the complainants.

[18] Ms Copeland submits that those penalties were appropriate for the unsatisfactory conduct found by the Committee but now puts it that, to reflect our recent decision finding that the licensee was also guilty of unsatisfactory conduct for failing to raise the content of the tenant's telephone call with the appellant (as we covered in some detail in our said substantive decision), an uplift from us to the fine imposed by the Committee would be appropriate. However, she suggests that, given our wide discretion as to the level of financial penalty to be imposed, the level or uplift is a matter for us in terms of our regard to the seriousness of the licensee's conduct.

Our Decision

[19] In our substantive decision herein of 24 June 2014 ([2014] NZREADT 46) we set out detailed reasoning but, in our paragraph [56], stated our overall view as follows:

> *"[56] When we stand back and look objectively at the facts of this case, we conclude that the CAC was correct to find unsatisfactory conduct by the licensee for the reasons it gave; and that it was also unsatisfactory conduct by the licensee to fail to promptly raise the content of the tenant's telephone call with Mr Darling. We emphasise that the licensee did not knowingly give any false information to the purchaser's solicitor. He was unaware of the correct rental position and that the rental had been misrepresented to the purchaser. He could not have known whether the tenant's advice to him by phone was correct or not. Accordingly, he should have promptly clarified the position with Mr Darling as his instructing client rather than passing on the tenant's information to the purchaser's solicitor and leaving that solicitor to sort out the rental issue but with Mr Darling unaware of that."*

Outcome

[20] We do not think that any further apology is called for. Nor do we think there should be any further censure than that which the Committee has imposed. If we

had power to do so, we would order the licensee to contribute to the costs of this Tribunal. We expect to be given such power reasonably soon.

[21] We agree with the submission for the appellant and the Authority that there should be an uplift in the $2,000 fine fixed by the Committee because of our further finding of unsatisfactory conduct. In the particular circumstances of this case, we do not think it appropriate that the licensee makes a contribution to the costs of the appellant as sought by Mr Tobin.

[22] Accordingly, we confirm the findings of the Committee that there be an order of censure against the licensee and an order that he apologise to the complainant. The fine is increased to a total of $5,000 to be paid within 20 working days of this decision to the Registrar of the Authority at Wellington.

[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.

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Judge P F Barber
Chairperson

_____
Mr G Denley
Member

_____
Ms N Dangen
Member