

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2014] NZREADT 68

READT 065/13

**IN THE MATTER OF** an appeal under s.111 of the Real Estate Agents Act 2008

**BETWEEN** **RODERICK ROBINSON** of Auckland, Licensee Salesperson

Appellant

**AND** **THE REAL ESTATE AGENTS AUTHORITY (CAC 20006)**

First respondent

**AND** **YVONNE WAGNER** of Auckland, Complainant Vendor

Second respondent

**MEMBERS OF TRIBUNAL**

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

**SUBSTANTIVE HEARING** at AUCKLAND on 26 May 2014

**DATE OF SUBSTANTIVE DECISION** 25 July 2014 [2014] NZREADT 57

**DATE OF THIS DECISION RE PENALTY "ON THE PAPERS"** 16 September 2014

**REPRESENTATION**

Mr T D Rea, counsel for appellant  
Mr L J Clancy and Ms K Lawson-Bradshaw, counsel for the Authority  
No participation by second respondent regarding penalty

**DECISION OF THE TRIBUNAL ON PENALTY**

***Introduction***

[1] In our decision of 25 July 2014, we held that Mr R Robinson ("the licensee") had engaged in unsatisfactory conduct and we gave our reasons in some detail. We indicated that we were minded to increase the Committee's fine (for unsatisfactory conduct) from \$500 to \$2,000 but revoke the censure finding of the Committee. Parties were instructed to file submissions should they disagree with the penalty we had indicated. The Committee had imposed a censure on the licensee and a fine of \$500.

[2] On 21 August 2014, the licensee appealed our unsatisfactory conduct finding to the High Court and is now awaiting a fixture for that appeal.

### ***Effect of High Court Appeal On our Dealing with Penalty***

[3] Counsel for the Real Estate Agents Authority submits that the filing of the licensee's appeal to the High Court should not affect our consideration of penalty.

[4] The appellant licensee has not sought to defer submissions on penalty and his counsel, Mr T D Rea, agrees that the High Court appeal does not operate as a stay of proceedings before us.

[5] The appeal process from us to the High Court provided under s.116 of the Real Estate Agents Act 2008 does not act as a stay on extant Tribunal proceedings. If it did, there would be an incentive for any licensee found to have engaged in misconduct, or unsatisfactory conduct, to appeal solely to delay the imposition of an appropriate penalty. Rule 20.10(1) of the High Court Rules provides as a general position that an appeal does not operate as a stay of proceedings.

[6] The point was addressed by us in *CAC v Kumandan* [2012] NZREADT 26. Mr Kumandan, having been found guilty of misconduct, appealed to the High Court and sought a stay of penalty proceedings in our forum. We then declined to adjourn our consideration of penalty.

[7] Notwithstanding that the licensee disputes our unsatisfactory conduct finding, he may, of course, make submissions as to what penalty orders are appropriate.

### ***Stance of the Authority***

[8] The Authority accepts that the penalty we have already indicated is appropriate and its counsel does not wish to make further submissions.

### ***Stance of the Licensee***

[9] It is submitted on behalf of the appellant that a finding of unsatisfactory conduct is sufficient penalty in itself, and no further order by way of penalty is necessary.

[10] In support of that submission, Mr Rea relies on the matters raised in the appellant's Notice of Appeal to the High Court relating to the alternative ground of appeal to the High Court, concerning the availability to us of the discretion (pursuant to ss.80(2) and 111(5) of the Act to take no further action in all of the circumstances of the case. They read as follows:

#### ***"Tribunal erred in failing to exercise discretion to take no further action (alternative ground)***

(g) *If, which is denied, there was any breach of the Act or Rules, or any other conduct by the appellant that could otherwise be capable of amounting to unsatisfactory conduct, the Tribunal erred by failing to exercise the discretion available to it pursuant to ss.80(2) and 111(5) of the Act to take no further action on the complaint, having regard to all of the circumstances of the case. Those circumstances include:*

- (i) *There was no complaint by the second respondent to the effect that Barfoot & Thompson wrongly listed the property for sale without the signature of Mr Rawnsley, and to the contrary, the second respondent maintained that she did have authority to list the property for sale without Mr Rawnsley;*
- (ii) *The second respondent gave an express written warranty of authority to the effect that she had the necessary authority to enter into the agency agreement, and she gave further assurances to this effect when queried about the matter by Barfoot & Thompson's salespeople, and this was confirmed by the second respondent's barrister;*
- (iii) *There has been no complaint made to the Real Estate Agents Authority by Mr Rawnsley;*
- (iv) *Attempts were made to contact Mr Rawnsley to confirm his agreement, but Mr Rawnsley was unable to be contacted;*
- (v) *There was urgency to commence marketing on behalf of the second respondent at the time of her listing of the property on 13 September 2011, given the requirement in the Heads of Agreement that marketing should be commenced not later than 15 September 2011;*
- (vi) *The property was only on the market for approximately 15 days, and no loss or harm was suffered by any party as a result of the marketing;*
- (vii) *The appellant immediately ceased marketing of the property upon issues being raised with him by Mr Rawnsley, pending resolution of a dispute between Mr Rawnsley and the second respondent."*

### **Our finding on Penalty**

[11] The complainant second respondent has elected not to participate in the issue of penalty.

[12] In our fairly detailed decision of 25 July 2014, we concluded as follows:

*"[59] We confirm the Committee's finding of unsatisfactory conduct, and we accept that the licensee's offending was at the low end of the scale. However, we currently consider that the Committee's fine of \$500 is rather low and should be about \$2,000 but that we should revoke the Committee's finding of a censure against the licensee ..."*

[13] Apart from the various factors set out in that decision about the appellant's conduct, we had considered whether, perhaps, no further order by way of penalty is appropriate but we decided otherwise. We are conscious that, as the Act currently stands, we do not have power to award hearing costs against a party.

[14] Having stood back and considered the submissions put to us on penalty, and in the context of our reasoning set out in our said decision herein of 25 July 2014, in place of the penalties imposed by the Committee, we now fine the appellant \$2,000.

That fine is to be paid to the Registrar of the Authority at Wellington within one calendar month from the date of this decision. It follows that the Committee's censure order is hereby revoked.

[15] 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 C Sandelin  
Member