BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 70

READT 019/11

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (CAC 10017)**
	Prosecutor
AND	**PAUL DAVID MILLER** (Licensed Salesperson)
	Defendant

MEMBERS OF TRIBUNAL

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

SUBSTANTIVE HEARING at QUEENSTOWN on 18 and 19 February 2013 (with subsequent written submissions)

DATE OF SUBSTANTIVE DECISION 24 April 2013 [2013] NZREADT 31

DATE OF THIS DECISION ON PENALTY 16 September 2014

COUNSEL

Messrs M J Hodge and L J Clancy for prosecutor
Mr M E Parker and Ms M R Cowan for defendant

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In our 24 April 2013 decision herein, we found misconduct proved against the defendant salesperson, Paul Miller. The matter of penalty has been delayed, primarily, because of his appeal to the High Court to which we refer below.

[2] The misconduct engaged in by Mr Miller occurred prior to the Real Estate Agents Act 2008 coming into force on 17 November 2009. Accordingly, s.172 of the 2008 Act applies. Given that s.172 allows us to impose only penalties that would have been available under the Real Estate Agents Act 1976, the penalty options available to us are limited to cancellation or suspension of Mr Miller's licence and/or a financial penalty of no more than $750.

[3] If we consider imposing orders for cancellation or suspension under s.172 of the 2008 Act, we are required to consider the *"character test"* applicable under the 1976

Act. While assessing whether or not the *"character test"* is met is a matter for us, the prosecution accepts that the threshold for cancellation or suspension under the 1976 Act was an extremely high one and that, based on the relevant authorities under the 1976 Act, on our findings the threshold has not been crossed in this case.

[4] For completeness, we note that the character test no longer has any application under the 2008 Act. One of the key purposes of the reforms leading to the enactment of the 2008 Act was to create a disciplinary process which provides greater transparency and accountability.

[5] In our decision of 24 April 2013 we detailed the factual background. Essentially, Mr Miller was selling his own property in his capacity as a licensed salesperson. He did not disclose to the purchasers of his property information detailing proposed building works at the school neighbouring the property, which would or could affect the views from the property.

[6] We held that Mr Miller's conduct in not disclosing the information was misconduct. More particularly, we held that Mr Miller's conduct amounted to misconduct under both s.73(a) (disgraceful conduct) and s.73(b) (serious negligence or serious incompetence).

[7] Mr Miller appealed to the High Court against our finding of disgraceful conduct under s.73(a), but not against the finding of serious negligence or serious incompetence under s.73(b). The Authority (i.e. the prosecution) ultimately consented to the appeal on pragmatic grounds, on the express basis that the appeal created no wider precedent, because:

[a] The Committee accepted that it had laid its charges under s.73(a) and (b) as alternative;

[b] While we were unequivocal that Mr Miller was required to make the disclosure to the purchasers, and that the failure to do so amounted to misconduct (important findings which are undisturbed by the High Court appeal), it was considered that our following findings would mean that the very high *"character test"* would not be met in this case, whether or not the finding was one under s.73(a) or (b):

> *"[85] We cannot be sure whether the defendant had any dishonest intentions to avoid proper disclosure to Mr and Mrs McAtamney. He had placed himself in a delicate position of trust by being both vendor and listing agent. In any case, we consider that his failure to disclose the development plan to the complainants, in all the circumstances of this case, was very negligent and a disturbing breach of trust. His assessment of the plan must have been coloured by self interest in that he did not want it to show a possible interference of the view from the property. He should have known that it was vital that the development plan be disclosed to Mr and Mrs McAtamney because they purchased the property. We can only regard the defendant's failure as such a bad error of judgment as to be very negligent, if not deliberate."*

[8] Accordingly, the appeal to the High Court was resolved on the basis that the finding under s.73(a) was overturned, but the finding under s.73(b) remained. As already noted, this does not affect the importance of this case as an authority from us

in favour of fair disclosure, and demonstrating that failure to provide fair disclosure may, and did in Mr Miller's case, amount to misconduct.

Relevant Principles

[9] Section 172 of the 2008 Act requires a three-step process referred below to be followed. We also covered that in our decision of 24 April 2013.

[10] In terms of the first step, there is no question that Mr Miller's conduct could have been complained about or charged under the 1976 Act. There was a requirement under Rule 13.1 of the Rules of the Real Estate Institute of New Zealand Incorporated (REINZ) that members should always act in accordance with good agency practices and conduct themselves in a manner that reflected well on the Institute, its members, and the real estate profession.

[11] Any person could complain to REINZ about a breach of the REINZ Rules and, following investigation of a complaint REINZ, could take one of a number of steps including referring the matter to the Real Estate Agents Licensing Board.

[12] Mr Miller's actions have been found to amount to seriously negligent real estate agency work and, as such, clearly did not comply with good agency practice and could have been the subject of a complaint under the 1976 Act.

[13] The second step is to determine whether a defendant is guilty of misconduct (or unsatisfactory conduct) under the 2008 Act. We did that in our decision of 24 April 2013.

[14] The third step is the imposition of a penalty under the 2008 Act, subject to the limitation that it may only be a penalty which could have been imposed under the 1976 Act.

[15] Under s.99 of the 1976 Act, if the Board was satisfied that a salesperson had been shown to be of such a character that, in the opinion of the Board, it was in the public interest that the salesperson's certificate of approval be cancelled or that the salesperson be suspended, the board could:

[a] Cancel the salesperson's certificate of approval;

[b] Suspend the salesperson for a period not exceeding three years; and/or

[c] Impose a monetary penalty (payable to REINZ) not exceeding $750.

[16] A body of case law developed on the *"character test"* required (under s.99 of the 1976 Act) before a penalty could be imposed.

That Character Test applies under section 172 of the 2008 Act

[17] In *REAA v Kumandan* [2013] NZREADT 28, we found a salesperson guilty of misconduct for forging a solicitor's signature on a confirmation of settlement document. The misconduct occurred before the 2008 Act came into force and s.172 applied. In our first penalty decision, we did not apply the character test applicable under the 1976 Act and cancelled the defendant's licence.

[18] Mr Kumandan appealed to the High Court. While upholding our finding of misconduct, Katz J found that we erred in not considering the 1976 Act character test. The question of penalty was therefore remitted to us – *Kumandan v REAA* [2012] NZHC 3555.

[19] In our second penalty decision, *REAA v Kumandan* [2013] NZREADT 32, we applied the character test and, as a result, ordered an effective suspension of 21 Months, rather than cancellation. This decision was also appealed by Mr Kumandan and the appeal was dismissed.

The Character Test

[20] The leading case on the character test applicable under the 1976 Act was *Sime v Real Estate Institute of New Zealand & Anor*, M73/86 HC Auckland, 30 July 1986. *Sime* established that the character test had two stages:

[a] First, an enquiry into whether the person's character, in the sense of his personal qualities, reputation and behaviour, reflected on his honesty and integrity; and

[b] Second, consideration of whether it was in the public interest that the person's certificate be cancelled or the person suspended.

[21] *Sime* set a very high threshold before the test was met. The facts of *Sime* were that clients of the agency, for which Mr Sime worked, listed with the agency at $58,000 a property comprising three units. Mr Sime showed the property to a property management company he had had previous dealings with and the company immediately made an unconditional offer at the listing price, which was accepted. However, within a week Mr Sime had acted for the property company in bringing about an on-sale of the property for $92,000.

[22] The Board held that Mr Sime had placed his objective of achieving sales above his duty to his principals, the original owners of the property. Notwithstanding the seriousness of this finding, on appeal the High Court held it fell *"far short"* of establishing the requisite negative character traits to permit orders to be made by the Board.

[23] Also relevant is the more recent High Court decision of *Davis v The Real Estate Institute of New Zealand Incorporated*, HC Auckland CIV 2008-404-007408,1 May 2009. Mrs Davis' vendor client was an elderly and, it was accepted, vulnerable woman who had no commercial experience. Her reliance on Mrs Davis' advice resulted in the sale of her property for an unjustifiably low price. The Court stated that it was *"troubled by Mrs Davis'"* conduct in relation to the sale of the property. It was found that Mrs Davis was *"obliged to turn her mind to [the vendor client's] interests"* and that *"instead she gave [the vendor client] advice which seems unsupportable on any analysis of the facts"*. Despite the Court's comments as to the troubling nature of the conduct and the serious adverse findings made against Mrs Davis, applying *Sime* the Court held that the character test was not met and suspension or cancellation of licence were therefore not available. The Court stated:

> *"[54] In this case, Mrs Davis has been guilty of serious negligence at a level suggesting an indifference to her obligation to Ms Thom. Negligence at this level can reflect upon a person's character and I do not doubt that in this case*

this conduct reflects adversely on Mrs Davis' character to some extent. But the issue is whether, by reason of that negligence, Mrs Davis has been shown to have been of such a character that it is in the public interest that her certificate of approval be cancelled or suspended. I accept counsel for Mrs Davis' submissions that there is no dishonesty in her conduct, and that this is an isolated incident. No pattern of conduct has been shown. Against this, background, I cannot conclude that Mrs Davis as of such character that it was in the public interest that the certificate of approval be suspended in respect of her.

Relevant Submissions from Counsel for Defendant, Mr P D Miller

[24] We set out the following from Mr Parker's submissions, namely:

"This failure by Mr Miller is an isolated occasion of falling below professional standards, and should be set against the background of his otherwise enviable reputation, which the Tribunal noted at paragraph [17] to be:

> *"A very experienced, respected, and successful real estate salesperson in Wanaka for many years."*

This very disciplinary process, and the length of time that it has taken to dispose of it has itself been salutary for Mr Miller, as well as an unauthorised disclosure and publication which will be referred to below.

It was recognised by Mr Miller that his conduct fell below the standards required of a real estate agent by virtue of his indication prior to the hearing that he accepted that he would be found to have committed a professional offence under the Act; albeit, not at the level now found.

In addition, he had indicated an acceptance of particular (a) above prior to the hearing, namely that he should have passed on the conceptual plan to the McAtamneys of the proposed developments on Mt Aspiring College's playing fields adjoining the subject property.

The Tribunal itself, when traversing Mr Miller's evidence, noted what he said at paragraph [42] of his brief which was a frank admission and recognition of his failure:

> *"[42] I am sorry that my judgment erred in such a way as to not provide the McAtamneys with a copy of the plan when I received it."*

It is important to record that throughout the proceeding before this Tribunal, and in representations to the Complaints Assessment Committee once the charges were preferred, Mr Miller through his legal representative has maintained that a charge under s.73(a) should not have been proceeded with.

In the Tribunal's decision it traversed s.73(b) and considered the scope of misconduct in the context of negligence.

The Tribunal's finding against Mr Miller is noted at paragraph [85] of its decision. Concomitant with that, Mr Miller recognises that regardless of what might be more generally described as the "civil" litigation aspects of the factual

context, he is responsible for the professional standards under which he must operate.

It is recognised that any failures in the conveying of information to the McAtamneys by Mt Aspiring college, failure by the McAtamneys' solicitor to make inquiry in relation to the adjoining school property (which could well have been detected by the solicitor; and in any event once known to the McAtamneys, could have been passed on to that solicitor for further inquiry), and any failure by the McAtamneys to properly investigate the matter, do now have a resonance in relation to penalty. This in contrast to the position that these factors were not appropriate for consideration in determination of the level of professional offence which Mr Miller had committed.

Following on from the above, it is recognised by Mr Miller that the focus of the disciplinary provisions under the Act is primarily on his culpability by virtue of his less than acceptable professional behaviour in the first place. In Russell v Real Estate Agents Authority [2012] NZREADT 16, it was stated:

> *"Whether the representation is in fact relied on (and whether that reliance causes loss to the complainant) will often be relevant to the question of penalty, but it will not be determinative of liability."*

It is submitted by Mr Miller that it is at least some mitigation on his behalf that there is no basis for saying that the McAtamneys have suffered any loss as a result of his actions. It is understood that a valuation was obtained from a senior Wanaka valuer prior to their purchase; and there has been no information provided which established that there has been any loss subsequently to the value of the property. The valuer concerned, a Mr Goldfinch, is still present and practising in the district.

Normally this issue would not have the focus it does in these submissions, however, as noted by the Tribunal, Mrs McAtamney conceded in cross-examination, although not mentioned in her brief, that she was a very experienced member of the Central Otago District Council Planning Committee, which of itself should have alerted to her, and through her to her solicitor, to a chain of inquiry that may have averted the purchase, or enabled an informed purchase in any event.

However, the importance of this aspect of these submissions is to underline the lack of financial loss to the McAtamneys; although as earlier indicated, Mr Miller acknowledges the impact that this whole process will have had on the McAtamneys.

It is appropriate to note, however, that they do not appear to have made any attempt to sell the property.

In relation to Mr Miller's reputation and standing, we refer you to his Brief of Evidence dated 20 November 2012, particularly in relation to paragraph [17] thereof in relation to his previous experience and in particular the attachments thereto which comprise the annexures under "A". They relate to a number of persons who have relied upon his expertise over a number of years, and a number of transactions. The repetition of such laudatory comments as are contained in those letters of support, should be of comfort to the Tribunal that what has occurred in relation to this matter is not representative of how

Mr Miller conducts himself or conducted himself prior to 2008/2009, and that he is otherwise a suitable member of this profession."

DISCUSSION

[25] As noted above, the finding of serious negligence or serious incompetence against Mr Miller remains. Accordingly, he has been found guilty of misconduct for his non-disclosure of important information to the purchasers of his property.

[26] Irrespective of the ground of misconduct found proved, the prosecution accepts that, on our own findings, we could not be satisfied that Mr Miller had any dishonest intention. We did not go so far as to attribute wrongdoing to Mr Miller. Ultimately, we found instead that he was *"very negligent"*.

[27] Given those findings and, as explained above, the very high threshold under the law which applied under the 1976 Act, the prosecution acknowledges that the threshold for the character test is not crossed in this case. This acknowledgement is made having regard to cases such as *Sime* and *Davis*, which also involved (at best for those licensees) *"very bad negligence"*, but in which the Court held that the *"character test"* threshold had not been met (indeed, was very far short of being met in the case of Mr Sime). For completeness, we also note that the *"character test"* no longer has any relevance or application in cases under the 2008 Act where the conduct occurred on or after 17 November 2009. Had Mr Miller's conduct occurred on or after 17 November 2009, we would not have been fettered in our ability to make appropriate orders under s.110 of the 2008 Act, and the prosecution would have been in a position to seek orders accordingly.

[28] There are character references provided in support of Mr Miller.

[29] We note that the complainants, understandably, feel very aggrieved by Mr Miller's conduct and consider they have suffered loss as a result. However, even without the application of the *"character test"*, there was no jurisdiction under the 1976 Act to award any compensation, so that issue does not arise.

[30] As explained above, in this case we are confined by the statute to a penalty of a fine which may not exceed $750. We fine Mr Miller $750 to be paid to the Registrar of the Authority at Wellington within 7 working days of the date of this decision.

Name Suppression

[31] Mr Parker seeks name suppression for Mr Miller on the basis that his conduct was not disgraceful but there has already been publication in a local newspaper to the detriment of the defendant *"because it was premature and inaccurate"* as Mr Parker puts it. The Authority submits that there is no basis for an order prohibiting publication of Mr Miller's name. Although we said at paragraph [90] of our decision herein of 24 April 2013 that *"we are unlikely to contemplate any type of suppression order in his [the defendant's] favour",* we have, of course, looked afresh at that issue of suppression.

[32] There are now numerous decisions from us dealing with name suppression issues, which apply the relevant principles of open justice.

[33] We must always examine the particular circumstances of each case. We note that in the context of the general policy reflected by the public register provisions of the Act (ss.63 to 66 in particular), there should be freedom of information and informed consumer choice through the recording on the public register of any disciplinary action against a licensee within the past three years.

[34] That public policy would be defeated in a case such as the present if Mr Miller is granted name suppression. In circumstances where a misconduct finding has been made against a licensee, we are normally very hesitant take the step of suppressing the licensee's name.

[35] In the present case, it is submitted by Mr Hodge (for the Authority) that no substantive grounds have been advanced other than reference to an earlier publication. Mr Hodge puts it there are three points to note about this, namely:

[a] given the fact that publication has occurred, there is little to be achieved in ordering non-publication at this late stage. Indeed, publication now would show that the finding which stands against Mr Miller is one of serious negligence, and not one of disgraceful conduct;

[b] the submission on Mr Miller's behalf that there should have been no publication is misconceived. Our proceedings are heard in public. It was for Mr Miller to advance a non-publication application and seek orders accordingly. It is wrong to suggest, in the context of public proceedings which could be reported on freely, that there should have been no publication in circumstances where there was not a non-publication order in force;

[c] even if publication should not have occurred, the appropriate response is not to suppress publication now. Name suppression is not a remedy to be awarded when a person feels aggrieved about a previous publication. Among other things, that approach would ignore the policy of the Act that there should be information available to consumers to allow informed choice.

[36] We think that those submissions of Mr Hodge are sound.

[37] Mr Parker puts it that the effect of the existing publication of proceedings in this case has been to affect Mr Miller's reputation to an extent that is not now warranted by the outcome of these proceedings, and the appeal process undertaken by him, the outcome of which, he puts it, has vindicated undertaking that process. Mr Parker emphasises that detrimental impact has already occurred to the defendant from such publication.

[38] Mr Parker submits that further publication is unwarranted and would constitute a double impact upon Mr Miller.

[39] Mr Parker also submits that: *"In this highly unusual circumstance where a wrongful and inaccurate publication has occurred, but where the usual end result of warning the public has already been achieved, further publication would have an effect upon Mr Miller which at this stage removed from the events is inappropriate; and would simply revive the matter again when the purpose of publication has already been exhausted in an illegitimate way. To order publication in these circumstances would be punitive."*

[40] Proceedings before us are generally open to the public and may be reported on. Under s.108 of the Act we may, however, make orders restricting publication of, among other things, the names of persons involved in proceedings.

[41] We considered the principles relevant to applications under s.108 in *An Agent v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 02. There we held that we had the power to make non-publication orders on appeals from decisions of Complaints Assessment Committees and we set out the principles to consider when determining whether to make such orders. Relevantly, we relied on *Lewis v Wilson & Horton Ltd* where Her Honour Elias CJ said at paragraph [41]:

> *"In R v Liddell … the Court of Appeal declined to lay down any code to govern the exercise of a discretion conferred by Parliament in terms which are unfettered by legislative prescription. But it recognised that the starting point must always be the importance of freedom of speech recognised by s.14 of the New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report Court proceedings: What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness."*
>
> [citations omitted]

[42] We went on to consider whether those principles were applicable to disciplinary proceedings. In doing so, we referred to the purposes of the Act, which focus on consumer protection, as well as other decisions referring to principles applicable to disciplinary tribunals and non-publication orders *Director of Proceedings v I* [2004] NZAR 635 (HC); *F v Medical Practitioner's Disciplinary Tribunal* HC Auckland AP 21-SW01, 5 December 2001; and *S v Wellington District Law Society* [2001] NZAR 465 (HC). In those decisions, the courts accepted that the principles referred to in *Lewis* were applicable to disciplinary tribunals.

[43] More recently, in *W v The Real Estate Agents Authority* (CAC 20004) [2014] NZREADT 9 at [17] we accepted that the starting point must always be publication because this reflects Parliament's intention in passing the Act.

[44] As regards the nature of any potential media reporting of proceedings, in *Ryan v REAA and Skinner* [2013] NZREADT 51, we confirmed that at paragraph [10]:

> *"… we are not in a position to make non-publication orders based on concerns about how matters "might" be reported in the media, or understood by "impressionistic" readers. Any concerns about unfair or unbalanced reporting must be dealt with by the regulatory authorities which govern the media."*

[45] There is a public interest in openness in judicial proceedings, whatever the facts of the particular case, and that interest is not outweighed by any agreement between the parties as to restricting publication. Where parties bring disputes before Complaints Assessment Committees and/or us, that must be on the basis that they are engaging in a public and open process and their names may be reported subject to good reasons for an order restricting that.

[46] It cannot be that a mere fear that publication might impact a licensee's business is enough to rebut the presumption in favour of openness. If that was the case, virtually all licensees appearing before us would be granted an order prohibiting publication of their name.

[47] In the present case, we consider that the concerns of the defendant licensee do not outweigh the public interest in open justice.

[48] There are no sufficient grounds in this case for abrogating from the principle of open justice. The appellant's application for name suppression is dismissed.

[49] 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

_____
Mr J Gaukrodger
Member

_____
Ms C Sandelin
Member