BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 72

READT 052/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**H and T X**
	Appellants
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20004)**
	First respondent
AND	**COLLEEN (VICKI) NELSON**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

HEARD at X City on 3 June 2014

DATE OF SUBSTANTIVE DECISION HEREIN 1 August 2014 [2014] NZREADT 58

DATE OF THIS DECISION ON PENALTY 18 September 2014

REPRESENTATION

Mr B D Vanderkolk, counsel for appellant
Ms K Lawson-Bradshaw, counsel for the Authority
The second respondent complainant on her own behalf

INTERIM DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Mr and Mrs X ("the licensees") appealed to us against an 11 May 2012 decision of Complaints Assessment Committee 20004 finding that they had engaged in unsatisfactory conduct. By its 23 July 2012 decision, that Committee ordered the following penalties:

[a] Censure and reprimand of the licensees;

[b] Reimbursement to the complainant of $1,164 for expenses incurred; and

[c] A fine of $750 against each licensee.

[2] The licensees had also appealed those orders to us.

[3] In a decision of 1 August 2014, we upheld the decision of the Committee finding unsatisfactory conduct, but not on all of the grounds relied on by the Committee. We agreed that the licensees should have disclosed the property's lack of the Code Compliance Certificate (CCC) at the property (A Street, Y Suburb). We did not find that the licensees had misled the complainant about the number of bedrooms but that, rather, a few mistakes had been made. We also considered that the licensees were *"a little lax"* when conveying that there was no slip problem at the property. We found that, standing back and looking at the conduct overall, there was unsatisfactory conduct, albeit to a fairly low degree.

[4] It is helpful to set out the following extract from our said substantive decision herein of 1 August 2014, namely:

> *"[60] As indicated above, there has been an extensive mixture of submissions and evidence. We agree with the Committee's unravelling of the issues and its findings. Having said that, we think that the conduct of each licensee has only been slightly inadequate with regard to the obtaining of the Code Compliance Certificate as covered above. They admit that they should not have relied on the vendors' assurances as explained above.*
>
> *[61] With regard to the advertising of the number of bedrooms in the property, there were some hiccups on the part of Mr X in particular as mentioned above and that was somewhat unsatisfactory but, on the balance of probabilities, we are not satisfied that there has been any deliberate misleading conduct by either licensee with regard to references to the number of bedrooms in the property.*
>
> *[62] We feel that the licensees, between them, were a little lax in conveying to the complainant that the slip was not a problem but, from our reading of the 21 March 2005 Geo-Tech report obtained by the developer, it seems to refer to the relevant slip and, at least, infer that a number of slips and erosion scars on the property are shallow and merely need planting in their slopes to give stability. There is reference to the need to pipe overflow water from roof tanks. Overall, the report seems to state that in 2005 there was a low risk of any instability.*
>
> *[63] However, when we stand back and absorb all the material put before us, we find that overall there has been unsatisfactory conduct by both licensees to a fairly low degree. We wonder whether, at material times, the licensees were over-busy as they seem to be in demand in their locality as experienced real estate agents. We note that the complainant and her husband seem experienced and sensible people to us and cannot be novices with regard to purchasing property. Indeed, Mrs Nelson was an impressive advocate in her cause.*
>
> *[64] We observe that with regard to the Code of Compliance Certificate issues Mrs X took it upon herself to try and sort the issues out and thought that she had, but those obligations also rested with the vendors.*

Penalty

[65] We do not think it is appropriate to award any compensation to the complainant against the licensees but, in any case, we are prevented from doing that by the effect of Quin v The Real Estate Agents Authority [2012] NZHC 3557 which we have encapsulated in recent decisions as follows, being an extract Tong v REAA and Others [2014] NZREADT 3:

> *"[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 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. …"*

[66] It seems arguable whether the reimbursement of expenses ($1,164) ordered by the Committee is barred by Quin. In any case, we invite submissions on penalty from the parties within the next 15 working days. Our current view is that the Committee's penalty orders stand except that there be no censure."

Expenses Claimed

[5] In her initial complaint, the second respondent complainant had claimed reimbursement for the following expenses:

[a]	LIM report	$409.00
[b]	Builders report	$120.00
[c]	Feature pay advertisement for B Street (Needing to be sold to fund the purchase of the Property)	$460.00
[d]	½ page advertisement for B Street (Also needing to be sold to fund the purchase of the property)	$115.00
[e]	4 x ¼ page advertisements for C Street	$460.00
[f]	Lawns at C Street for first open home	$40.00
[g]	Professional photos of B Street	$180.00

[h]	Professional photos of C Street	$115.00
Total		$1,899.00

[6] These costs were claimed on the basis that they were incurred in relation to the offer the complainant made on the A Street property and she would not have incurred them had she been aware of the various issues prior to entering the agreement.

[7] The Committee found that the complainant was entitled to reimbursement for the LIM report and the expenses relating to her B Street property but not for the builder's report (as she had no evidence of the amount paid) or the expenses relating to her investment property at C Street (as it would have been sold (it was put) regardless of whether the A Street property was purchased). The Committee considered reimbursement was appropriate as, having found that there was unsatisfactory conduct on behalf of the licensees, it was reasonable that any losses resulting from such conduct be reimbursed. Consequently, the Committee ordered that the licensees reimburse the complainant for a total of $1,164 from the above expenses. That order was prior to the High Court decision in *Quin v The Real Estate Agents Authority* [2012] NZHC 3557.

The Law on Reimbursement as a Penalty

[8] Section 93(1)(f) of the Real Estate Agents Act 2008 provides:

> ***"93 Power of Committee to make orders***
>
> *(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:*
>
> *…*
>
> *(f) order the licensee -*
>
> *(i) to rectify, at his or her or its own expense, any error or omission; or*
>
> *(ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:"*

[9] In accordance with the section above and the dicta in *Quin*, the licensees cannot be ordered to provide straight compensation to complainants when findings of unsatisfactory conduct are made. Rather, they 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, 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.

[10] Even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. For example,

an order under s.93(1)(f) cannot be made in respect of a straight monetary loss for a loss in market value.

The Authority's Submissions on Penalty

[11] The Authority notes that the Committee decision for X was decided before the High Court decision for *Quin* was released.

[12] To be entitled to the reimbursement awarded by the Committee it is for the complainant to demonstrate to us that the expenses claimed result from having done something to put right the licensees' omissions or errors.

[13] The Authority submits that, in accordance with *Quin*, the complainant is not entitled to be reimbursed for the expenses she has claimed as those expenses cannot be said to relate to actions undertaken to put right the error or omission. Rather, the claim is for compensation for expenses incurred that would not have been incurred but for the licensees' conduct. It is submitted for the Authority that such compensation is not contemplated by *Quin*. We agree.

[14] Counsel for the Authority also submits that, should the Committee's order for reimbursement be overturned, it may be appropriate to increase the fine against the two licensees so as to maintain an appropriate level of financial penalty. She noted that in *Vadke v Real Estate Agents Authority* [2014] NZREADT 50, a fine of $1,500 was imposed by us where the licensee had made a positive representation to the purchaser without having verified the vendor's information first. It is submitted for the Authority that *Vadke* is sufficiently analogous with the current case to warrant a similar fine being imposed against both licensees.

[15] The Authority also refers to *Robinson v Real Estate Agents Authority* [2014] NZREADT 57 where we indicated that a fine of $500 should be increased to $2,000 where unsatisfactory conduct was said to be at the low end of the scale.

The Complainant's Submission on Penalty

[16] First, Ms Nelson submits that we should order that the licensees repay her the sum of $1,779 which, she puts it, she incurred as a consequence of the appellant's actions regarding the property. She then continued:

> *"You will note that this amount is different from that ordered by the CAC for the following reason:*
>
> > *In their submission on penalties to the CAC (REAA BoD pp.160-161), Mr and Mrs X make the false statement that "Mrs Nelson had stated that she was selling her C Street investment property regardless of her purchase" (REAA BoD p.160). This is incorrect and has wrongly influenced the CAC decision on penalties. At no time did I make this statement. The property was listed to sell specifically for the purchase of A Street and was subsequently withdrawn. That I listed the property for sale on 4 June 2011, subsequently withdrew it, and still own the property at the time of writing this submission is evidence of this.*
> >
> > *While the REAA correctly state that I did not challenge this allegation (REAA BoD p.195), the reason for this is that I was not made aware of it until the Decision on Orders was released on 23 July 2012. Had I been*

made aware prior to the release of the decision, I would most certainly have challenged it. It is requested that this be taken into account in the Tribunals consideration of penalties."

[17] Second, the complainant submits that we should censure or reprimand both of the licensees. In that respect she referred to the statement in the CAC decision that *"once unsatisfactory conduct has been found, unless there are extraordinary and unusual reasons why a censure and reprimand should not be made, it will be made"*. However, we consider that rather over-states the position and that whether a licensee should be censured or reprimanded is entirely a matter of discretion in the particular circumstances of the case.

[18] Third, the complainant puts it that, given the unsatisfactory conduct of the licensees, it is appropriate that they be ordered to undergo training and education as directed in the CAC decision. She puts it *"so as to reduce the risk of them repeating their offending"*.

A Summary of the Penalty Submissions for the Appellants

[19] Mr Vanderkolk noted that our findings of unsatisfactory conduct on the part of the licensees were attributed to the following three issues:

[a] The way in which the licensees dealt with the matter of the Certificate of Code Compliance for the property;

[b] The way in which the licensees advertised the number of bedrooms in the property;

[c] The way in which the licensees communicated with the complainants regarding a land slip at the property.

[20] Mr Vanderkolk correctly notes that, with respect to each of those three issues, we found that the unsatisfactory conduct was at the lower end of the scale of seriousness. He refers to our comments in that vein at paragraphs [60] to [62] of our substantive decision, which are set out above, and submits that such carefully expressed findings as to culpability might warrant a determination that no penalty need be imposed but, if so, then at the lowest possible level. Mr Vanderkolk then put it:

"10. Counsel reminds the Tribunal as a matter of penalty principle that the respective culpability (at the lowest possible level, if not a mere mistake) of the two licensees must reflect. The Tribunal is reminded (adopting the words of the Tribunal) that Mr X's conduct was "somewhat unsatisfactory" reflecting "hiccups" on his part. By distinction, Mrs X's conduct was only "slightly inadequate" and "a little lax".

11. Once the respective culpability of the licensees is established, it is submitted the Tribunal must consider the totality of the penalty and ensure it reflects its description of the conduct: "somewhat unsatisfactory", "slightly inadequately" and "a little lax".

12. Any penalty imposed should therefore reflect this."

OUTCOME

[21] Having stood back and reflected on the facts as we have found them and the submissions to us on penalty, we felt we should quash the orders of the Committee and impose a fine of $1,250 on each appellant; such fines to be payable to the Registrar of the Authority at Wellington within one calendar month from the date of this decision. However, we then realised that Mr Vanderkolk has sought that there be a hearing on penalty rather than that we deal with penalty *"on the papers"* as we often do. Accordingly, we issue this penalty decision on an interim basis. If Mr Vanderkolk still seeks a hearing on penalty, the Registrar will arrange that. Otherwise, our above views can be confirmed.

[22] 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 C Sandelin
Member