

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 85

READT 12/14

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

BETWEEN **TONY GRINDLE (licensee)**

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20004)**

First respondent

AND **MARK AND JULIE BRACEY (complainants)**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

HEARD at WHANGAREI on 27 August 2014

DATE OF THIS DECISION 23 October 2014

APPEARANCES

Mr W McKean, counsel for appellant
Mr R M A McCoubrey, counsel for the Authority
Mr M Bracey for himself and Mrs Bracey as second respondents

DECISION OF THE TRIBUNAL

The Issue

[1] The licensee had seemed to be appealing only against the 8 January 2014 penalty decision of Complaints Assessment Committee 20004 fining him \$2,000 for unsatisfactory conduct regarding a complaint made by the second respondents, Mr and Mrs Bracey, as purchasers of the farm referred to below. However, at the hearing before us, it became clear that the licensee also wished to appeal against the 2 July 2013 decision of the Committee finding him guilty of unsatisfactory conduct. Accordingly the case proceeded before us as a general appeal.

Factual Background

[2] The licensee was the listing agent for a farm property in Dargaville which the complainants purchased in November 2011.

[3] On 21 June 2011, the vendors signed a listing agreement. They verbally provided details of milk production data which were recorded on that listing/agency agreement. The licensee requested of the vendors that they provide supporting documentation in due course. Indeed, on 14 July 2011, the licensee asked the vendors to provide, in writing, the past three years' production or milk graphs. For some reason, they were never provided to him in writing.

[4] On 1 August 2011, the licensee met with the husband vendor to discuss and confirm details relating to the sale of the property to be included in a Property Information Memorandum being prepared by the licensee. The vendors confirmed that the details were correct.

[5] On 16 September 2011, the licensee's agency commenced marketing the property, towards an auction date of 3 November 2011. Farm milk production figures for the past three years were supplied of: 52,000kg; 57,000kg; and 65,000kg respectively.

[6] It transpired (subsequent to the purchase) that these figures were wrong and were confirmed by Fonterra as being: 50,647kg; 56,732kg; and 50,987kg respectively.

[7] At auction on 3 November 2011 the complainants were the successful bidders at a price of \$1.93 million.

[8] The complainants subsequently became aware that there had been an error in the milk production figures. On 23 April 2012, the complainants' solicitor contacted the vendors' solicitor regarding the milk production figures. This was prior to formal settlement of the sale and purchase. The solicitor referred to the brochure figures which differed from the Fonterra figures. The complainants made a complaint to the Real Estate Agents Authority.

Committee Decision

[9] In its decision of 2 July 2013 the Committee noted that the licensee accepted that the milk production figures in the Property Information Memorandum were wrong but stated that this was information supplied to him by the vendor and that he regrets not being able to obtain clarity at material times.

[10] A representative from Fonterra stated that to the Committee that Fonterra is regularly approached (with written permission from vendors) by prospective purchasers seeking to obtain milk production figures prior to sale; and such information is provided.

[11] The Committee determined that the information contained in the licensee's said memorandum was misleading and they found the licensee guilty of unsatisfactory conduct. The Committee later (on 8 January 2014) imposed a fine of \$2,000 and censured the licensee.

[12] There were three aspects to the complaint of the purchasers but they only succeeded before the Committee on the one aspect that information provided to them (the purchasers) by the licensee was misleading. That relates to milk production figures contained in a Property Information Memorandum prepared by the licensee who stressed that these figures were as quoted to him by the vendors. He also emphasised that he had asked the vendors to provide details from Fonterra to confirm those figures, but they were not provided prior to the purchase. Inter alia, the Committee stated:

“4.4 The licensee states that the milk production figures in the Property Information Memorandum were published “unwillingly and unknowingly”. He regrets not having been able to obtain clarity as to the accuracy of the numbers, but emphasises the three attempts he made to have the vendors secure the information from Fonterra.

4.5 He says that had the complainants asked him to obtain copies of the Fonterra milk production figures, he would have obtained them: there was nothing that would have prevented him from obtaining the information with the consent of the vendor.

4.6 The complainant says he believed that the information supplied to him by the licensee relating to the milk production figures was factual. As a result, he did not consider that there was any requirement for him to confirm the figures directly with the vendor, who he had visited before the auction or to request confirmation of the figures prior to the auction direct from Fonterra.”

[13] Later in that decision the Committee found:

“4.16 The information contained in the memorandum was misleading. The complainants were misled. Rule 6.4 provides that a licensee must not mislead a customer or client. The Committee finds that the licensee had breached rule 6.4. As a consequence, the conduct of the lessee in this regard is a breach of section 72(b) of the Act.

[14] Two other complaints were dismissed by the Committee so that they are not relevant for present purposes.

[15] The said penalty was imposed by the Committee after a full coverage of relevant principles. It considered that the licensee’s conduct fell into the mid-range of seriousness but took into account that he had immediately admitted his error and that the vendors had supplied him with wrong information. The Committee noted that, on 23 August 2013, another Committee had determined that the licensee had engaged in unsatisfactory conduct on another transaction between other parties. It seems to have only taken account of that with regard to the issue of publication.

Evidence from the Appellants

[16] The appellant gave evidence before us and expanded on many of the documents in the Agreed Bundle of Documents. He was also carefully cross-examined by Mr McCoubrey as counsel for the Authority.

[17] The licensee said he knew that the farm's production figures would be important to the complainants as prospective auction bidders for the farm and must be accurate, but he had sold the property previously and felt he knew the vendors and was satisfied with their word for the production figures. He admitted to Mr McCoubrey that nowhere in his brochure did he suggest that the production figures were unverified and were merely supplied by the vendor. He accepted that there is a correlation between such figures and the value of the farm although, as we note below, there are other factors in assessing value of a farm.

[18] Certainly, the licensee admits that his sales brochure was incorrect with regard to the production figures for the farm and that, perhaps, he should have realised that there would be a risk that figures supplied on the word of vendor might not be accurate; although he did not seem to think that would be a "great risk" (as he put it) in the present case.

[19] The licensee candidly admitted that, since this incident, his agency now requires that vendors of a dairy farm permit the agency and prospective purchasers to confirm production figures direct with Fonterra before the latter submit an offer or bid at an auction.

[20] In re-examination, it was covered that important factors in assessing value of a farm is the price per hectare of land in the area and the value of farm buildings.

[21] Also in re-examination, the licensee maintained that, prior to this particular transaction, there was no industry best practice in the area involving a real estate salesperson approaching Fonterra direct about milk production figures, and the practice was to accept the information provided by a vendor. The licensee emphasised that he twice asked the vendor for Fonterra production figures and he acknowledged that was because he realised there could be a risk in not having such figures accurately, but he had trusted the vendor.

[22] Mr Bracey did not seek to cross-examine the licensee appellant as he did not dispute the evidence.

General Principles

[23] In determining an appropriate penalty, decisions of industry disciplinary tribunals should emphasise the maintenance of high standards and the protection of the public (through both specific and general deterrence). While this may mean that orders made in disciplinary proceedings have a punitive effect, this is not their purpose *Z v CAC* [2009] 1 NZLR 1 at [97]. As McGrath J said for the majority of the Supreme Court in that case (Blanchard, Tipping and McGrath JJ):

"... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned."

[24] Turning to the particular statutory scheme under the Real Estate Agents Act 2008 (the Act), we summarised the position in *CAC v Walker* [2011] NZREADT 4 as follows:

"[17] Section 3(1) of the Act sets out the purpose of legislation. The principal purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate real estate agency work". One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (s.3(2)).

[18] This function has been recognised in professional disciplinary proceedings involving other professions [and] ... is reinforced by the reference in the purpose provision to the Act (s.3) to raising industry standards and the promotion of public confidence in the performance of real estate agency work.

[19] In Patel v Dentists Disciplinary Tribunal, High Court, Auckland, CIV 2007-404-1818, 13 August 2007 Lang J held that disciplinary proceedings inevitably involve issues of deterrence and penalties are designed in part to deter both the offender and other in the profession from offending in a like manner in the future."

[25] Accordingly, the purpose of disciplinary proceedings is not to punish, but to emphasise the maintenance of high standards and public protection through both specific and general deterrence.

Submissions for the Authority

[26] Mr McCoubrey noted that the licensee has submitted that the Committee was wrong to take into account the Committee's decision on another unrelated complaint against the licensee referred to above (the Davis complaint). The licensee submitted (inter alia) that the Committee decision, relating to the Davis complaint, should not have been taken into account because:

- [a] The Davis complaint was laid after the Bracey complaint; and
- [b] The licensee was yet to be sentenced on the Davis complaint when the penalty for the Bracey complaint was under consideration, and as such it should not have been used as an aggravating factor in the penalty decision for the Bracey complaint.

[27] In addition, the licensee submits that he should not have been fined more than the licensee in *Davis & Ors v Real Estate Agents Authority* READT 102. There the licensee was sentenced to a fine of \$1,000 on facts the appellant submits are comparable. However, as we have indicated above, the Committee only took the *Davis* matter into account with regard to the publication. In any case, that matter is not relevant to the issues now before us; and we have found in a separate decision of today's date that the *Davis* complaint lacked merit.

[28] Counsel for the Authority refers us to the following two decision which, it is put, may provide some assistance when determining the appropriate fine:

- [a] *Burn v Real Estate Agents Authority* [2014] NZREADT 25 and [2014] NZREADT 56. Here, a fine of \$2,000 was considered appropriate by us for conduct that we considered to be at the lower end of unsatisfactory conduct.

- [b] *Vadke v Real Estate Agents Authority* [2014] NZREADT 40. In *Vadke* a fine of \$1,500 was ordered by us where the licensee had been found to have engaged in unsatisfactory conduct. Here the licensee had breached rule 6.4 (prohibiting misleading information to a customer or client from a licensee) by advertising the property to have a builder's warranty when it did not because he, mistakenly, had taken the vendor's word about that.

[29] With regard to penalty, it is submitted for the Authority that there was no error of law or principle by the Committee regarding this complaint from the second respondent, and that the Committee did not take into account irrelevant considerations in its decision, nor was it plainly wrong. It is also submitted by Mr McCoubrey that while a different Committee may have imposed a different set of penalty orders, the orders imposed were clearly within the legitimate range open to the Committee in exercising its discretion.

The Stance of the Licensee as Appellant

[30] Mr McKean emphasised that the licensee had always accepted that the production data he produced to the complainants proved to be incorrect. He does not dispute the facts but emphasises as follows:

- a. *The appellant and Mr Bracey did not discuss production figures. The appellant made no representations about the accuracy of production figures. Mr Bracey did not ask any question about production figures.*
- b. *The first time there was a discussion on the subject was in April (after the auction) when Bracey and the appellant discovered the figures in the sales brochure were wrong.*
- c. *The only information about production figures that was given by the appellant appeared inside the sales brochure given to Mr Bracey in the course of a farm visit.*
- d. *Mr Bracey was heavily advised before the auction in the form of advice from solicitors, accountants, Fonterra advisors and real estate personnel. There was no suggestion he was relying on the licensee for verification of all detail in the sales brochure.*
- e. *It was not regarded as best practise at the time for a licensee to verify production data.*
- f. *Mr Grindle had confirmed with the vendor on three occasions the accuracy of the production figures and he honestly believed they were accurate."*

[31] Mr McKean emphasised that the reason the appellant included those production figures in his sales brochure for the farm is because they were what the vendor had told him about such production.

[32] Mr McKean seemed to be putting it that the complainant purchasers should have taken into account that the sales brochure was a form of advertising, was not intended as a specific communication to them, was merely a starting point for information to a interested prospective purchaser, and much other information was contained in that brochure. Mr McKean seemed to be also submitting that the

purchasers could not have expected the vendors or the licensee to have verified the information in the brochure and should have understood that some of the information would have come from the vendors as unverified; and it should have been obvious that the various aspects of information in the sales brochure must have come from the vendor. He put it that, unless such information had clearly been verified, a prospective purchaser should have verified it for himself, or herself, or itself.

[33] Mr McKean submitted that, in any case, the penalty orders are manifestly excessive in the circumstances of this case. He referred to the appellant having made three separate requests for information from the vendors about farm production. He put it that the information provided by the vendors in other respects proved to be accurate; and that the licensee honestly believed the farm production figures provided by the vendor to him and to the complainants to be accurate.

[34] Mr McKean then seemed to be submitting that the Committee should not have taken account of its other decision (re Ms Davis to which we have referred above) of unsatisfactory conduct against the licensee on an entirely different transaction. However, as already explained, that only seems to have been taken into account in terms of the concept of publication of the Committee's decision. In any case, we do not take it into account for present purposes.

[35] Counsel referred to some of our other decisions by way of comparison about an appropriate penalty, but we prefer to focus on the precise facts of a given case and only make general comparisons with other cases.

[36] Mr McKean also submitted that there was no basis to impose the penalty of censure on the appellant and that the penalties imposed on the appellant by the Committee are significantly higher than imposed by us on other licensees for similar conduct.

Discussion

[37] The essential question is whether the licensee did enough to fulfil his duties to the complainant purchasers.

[38] Although he did not give evidence to us, Mr Bracey made brief, succinct, and relevant oral submissions at the end of the hearing. He said that, as purchasers, he and his wife believed the licensee's figures to be true and correct. He felt it very important for a buyer of a farm to know its past history in terms of production and that was relevant to the price he offered. He now feels that the price paid was too high. He put it that *"We were not buying potential but the records of production. After our purchase we were entitled to obtain true production figures from Fontana and we found substantial discrepancies with what the licensee had provided to us. We had paid a much higher figure than we originally intended for the farm but we expected the agent's production figures to be correct. We have not had a satisfactory outcome with Mr Grindle."*

[39] Interestingly, the notes of Mr McCoubrey about Mr Bracey's submissions are somewhat similar to ours but cast a little differently and read: *"The crux of the case is that I believe the figures from the vendor's agent ... I used figures to come up with the purchase figure which was in our view inflated ... we weren't buying a potential, we were buying based on historic records. We bought a property based on past*

records and expected the figures to be correct ... We didn't have a satisfactory outcome as to why we had been presented with incorrect figures."

[40] It is accepted that we cannot deal with compensation in this case by virtue of *Quin v The Real Estate Agents Authority* [2012] NZHC 3557. Presumably though, the complainants would have civil court remedies against the vendors for, perhaps, innocent misrepresentation. However, we are concerned with the conduct of the licensee and whether there was any failure on his part.

[41] On the one hand, we are conscious that the licensee twice sought appropriate verified information and it could be said that the vendor failed to obtain it and the complainant purchasers failed to seek it on a verified basis. For a time one of our members felt that perhaps the licensee "*did enough enquiring*". On reflection, we all feel that the licensee should have made it more clear to the complainants that the production figures in issue were supplied to the licensee by the vendor and the licensee was merely a conduit of them to the complainants and had not verified them. Indeed, the licensee should have been more proactive in seeking verification of those production figures.

[42] Mr Grindle was aware of the importance of the production figures and knew that the figures he had been given by the vendor were unverified. He did not advise that to the complainants or to any other prospective purchaser. It was incumbent on him to do so – refer *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20. He should have made proper enquiries himself; or made it clear to any prospective purchaser that the production figures came from the vendor and needed to be independently verified by a prospective purchaser; or advise such a purchaser that there may be an issue regarding the accuracy of the production figures and that purchaser should obtain independent legal advice; – refer *Donkin v Real Estate Agents Authority* and *Morton-Jones* [2012] NZREADT 44. None of those courses was pursued by the appellant. He did not do enough for the complainants. He had duties to them as well as to the vendor.

[43] We take the view that the conduct of the licensee falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; and breaches rule 6.4; and therefore comes within the definition of unsatisfactory conduct in s.72 of the Real Estate Agents Act 2008.

[44] Appeals against penalty decisions are appeals against a discretion: refer *Kumandan v Real Estate Agents Authority* [2013] NZHC 1528. In *K v B* [2010] NZSC 112, [2011] 2 NZLR 1, our Supreme Court confirmed that appellate courts will adopt a narrower approach which is appropriate in respect of appeals against the exercise of the discretion granted to Complaints Assessment Committees in determining penalties following unsatisfactory conduct findings. Accordingly, in order to allow an appeal against penalty, the appellant will have to demonstrate that the Committee's penalty decision either: made an error of law or principle or failed to take into account a relevant consideration; or took into account irrelevant considerations; or were plainly wrong.

[45] In any case, we understand that the parties leave it to us to fix penalty if we find unsatisfactory conduct by the licensee. We take the view that the offending is at a low to mid-level in the particular circumstances of this case. Accordingly, we agree with the approach imposed by the Committee but we fine the licensee \$1,000 and

impose a censure. The fine is to be paid to the Registrar of the Authority at Wellington within 15 working days. We uphold the Committee's decision.

[46] 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

Ms N Dangen
Member

Ms C Sandelin
Member