BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 95

READT 052/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**T and H 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 and (as to penalty) on 14 November 2014

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

DATE OF INTERIM DECISION ON PENALTY 18 September 2014
[2014] NZREADT 72

DATE OF THIS DECISION ON PENALTY 28 November 2014

REPRESENTATION

Mr B D Vanderkolk, counsel for appellants
Mr C S M Henley, counsel for the Authority
The second respondent complainant by her husband

FINAL DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] As indicated in the above entitulment, we issued our substantive decision herein on 1 August 2014 and confirmed the unsatisfactory conduct findings of the Committee. However, we detailed our reasoning and explained that, while there has been unsatisfactory conduct overall by both licensees, that offending was *"to a fairly low degree"* as we put it. We also referred to the two decisions we had given in this case regarding name suppression and set out further views to conclude:

> *"[73] We have given much thought to whether we should have the medical evidence updated. However, we do not think that there is any convincing need for a non-publication or suppression order in this case, particularly, having observed the intelligent and confident way Mrs X handled matters at the hearing before us. Also, in particular, we take into account that we are merely finding unsatisfactory conduct at quite a low level.*
>
> ***Outcome***
>
> *[74] The application for non-publication is dismissed. The unsatisfactory conduct findings of the Committee are confirmed. There are to be submissions on penalty as directed above."*

[2] In our interim decision on penalty dated 18 September 2014, we summarised the stance of each party with regard to appropriate penalty in terms of our having confirmed the Committee's finding of unsatisfactory conduct (in our substantive decision herein of 1 August 2014). We noted that Mr Vanderkolk sought a hearing on penalty, rather than we deal with it on the papers as we often do, but we indicated that we then felt, subject to actually hearing Mr Vanderkolk, that a just decision would be to revoke the censure and reprimand of the licensees imposed by the Committee; and cancel the Committee's reimbursement order; but increase the fine of $750 imposed by the Committee against each licensee to $1,250.

The 14 November 2014 Hearing on Penalty

[3] The point of reconvening to deal with penalty was to enable Mr Vanderkolk to fully cover the concerns of the licensees, and we appreciate that. Each of the other parties also provided helpful submissions in response to those of Mr Vanderkolk for the licensees.

[4] Mr Vanderkolk emphasised the concerns of the licensees about their professional integrity and the stress for them since these matters developed in mid-2011. He observed that their lives have been occupied over that period by their stress at aspersions on their integrity and professionalism.

[5] They have been involved in the real estate industry for at least 15 years and this is the first complaint against them which has been accepted by the Authority. There have been two other complaints against them laid prior to 2011 which were quickly dismissed by the Authority as entirely lacking merit.

[6] Mr Vanderkolk covered a number of the complimentary remarks we have made in our previous decisions about the licensees along the lines that they are busy and successful agents, that the offending has been at a low level, and that in many ways the licensees undertook extra initiatives on behalf of the complainant and prospective purchasers in general.

[7] Mr Vanderkolk emphasised the high degree of contrition shown by the licensees and put it that these proceedings have had a very salutary and penetrating effect on each of them. They are up-to-date with their ongoing professional education and have undertaken extra educational courses in terms of the orders of the Committee.

[8] Mr Vanderkolk put it that the licensees accept that we must make findings in terms of our conclusions but again stressed that they are very sensitive about their professional reputations and their good name and are strongly motivated to clear that.

[9] Mr Vanderkolk then spent some time covering concerns that the Authority, in his submission, could have been more careful in its approach to publication of our previous decisions. He seemed to be putting it that, at a time when we had granted an interim suppression order, there was publication on the Authority's website; and he produced various screen dumps which seem to show that. He also seemed to be putting it that the crisp summaries on that website are not quite accurate.

[10] He accepted that, in terms of ss.63 to 66 of the Act, the Authority is obliged to maintain a register of licensees to include, inter alia, any action taken on a disciplinary matter regarding that licensee within the past three years. Essentially, he submits that although the licensees have appealed to the High Court seeking name suppression and/or non-publication orders, the damage has been done by the Authority following its usual publication processes. He submits that situation is penalty enough for these licensees and is a fairly severe outcome from their point of view.

[11] We agree with Mr Vanderkolk that all persons, including the Authority, must scrupulously comply with any suppression orders we have made. However, we do not have the precise detail on his allegation that the Authority's said publication was somehow out of line, nor do we know what information had been transmitted by our Registry to the Authority about non-publication at material times, or whether the Authority knew that our finding on name suppression has apparently been appealed to the High Court. We do not seem to have been aware of that until 14 November 2014. We accept that it is unfortunate that there has been disclosure of the appellants' names in the context of an appeal and that is very distressing to them.

[12] We realise that it is likely that any adverse reference to a real estate agent on one website (e.g. such as the Authority's) may very soon be taken up by Google and quite widely circulated in the ordinary course to both the real estate industry and in general, and with a number of consequent links.

[13] Mr Vanderkolk then submitted that the licensees' unsatisfactory conduct offending, as we have portrayed it, does not warrant any fine at all, nor any penalty. He then dealt with various of our decisions, as did Messrs Nelson and Henley, in terms of whether our proposed penalty is consistent with other cases. As we have said on previous occasions, we much prefer to focus on the precise facts of the case before us.

[14] Mr Vanderkolk accepted that it is settled law that a fine in a disciplinary case is to be a punishment but put it that, in many ways, the licensees were more successful before us than they had been before the Committee, and yet we propose to increase the Committee's fine level. However, we also propose to quash all the other orders made by the Committee.

[15] He took us over the favourable remarks we had made in our substantive decision about the licensees. He submitted that they should be given credit for having endeavoured to sort out the issues leading to the complaints and for the corrective steps they endeavoured to make. He also put it that the advertising errors

were merely due to a slip with the key of a typewriter. He emphasised that Mrs X had herself endeavoured to sort out the lack of a Code of Compliance Certificate and to trace the content of a geotechnical report when it was not her duty to take such initiatives, but that shows she is conscientious and honest.

[16] Mr Vanderkolk accepts that punishment is about correction and deterrence both personal and in general, but put it that this process has been so salutary to the licensees and the impact of its publication so distressing and unable to be now be corrected, that they have been punished enough. Accordingly, Mr Vanderkolk asks that we approach this matter of penalty afresh. He then raised the new concept that we should distinguish between the precise conduct of each licensee rather than treat them as a business partnership.

The Stance of the Authority

[17] Prior to the hearing on 14 November 2014, Mr Henley was unaware of the extent of Mr Vanderkolk's and the licensees' concern about publication having taken place, apparently, back in August this year. Nor was he aware that it was only with some difficulty that Mr Vanderkolk had the internet publication removed from the Authority's site for the time being.

[18] Mr Henley dealt with various of our sentencing cases to submit that our proposal of a fine of $1,250 against each licensee is appropriate in the view of the Authority.

[19] Mr Henley accepted that the mere finding of unsatisfactory conduct for these licensees carried much sting, and is in a context of fairly minor offending, and created much stress upon them, but submitted that there is a need for deterrence. Also, he respectfully approved our process of issuing an interim decision on penalty as covered above where, in his submission, only a modest fine should be the issue.

The Stance of the Complainant

[20] On behalf of Mrs Nelson, Mr Nelson made further helpful and coherent oral submissions additional to those previously provided by him for us in writing. He also dealt with some of our sentencing cases which he felt had some similarity to the present. He covered such matters as that, in his view, the incorrect advertising of the number of bedrooms could not have been merely due to the slip of a typewriter key as it lasted for some time. However, he seemed to agree with our findings on the issues as we had set them out in our decision of 1 August 2014 over paragraphs [59] to [64] in particular. On behalf of Mrs Nelson he submitted that that we should be considering a minimum fine of $2,000 against each licensee.

Outcome

[21] We very much appreciate the thoughtful submissions we have received about penalty from all parties and, in particular, the wide coverage and experienced views of Mr Vanderkolk. We do not wish to appear dismissive in any way. We have re-thought matters de novo. Nevertheless, we feel that the indication we gave in our 18 September 2014 interim decision on penalty is fair and just overall.

[22] Accordingly, we 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.

[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

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Mr G Denley
Member

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Ms C Sandelin
Member