

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2014] NZREADT 96

READT 082/13

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

**BETWEEN** **RAFAL PRIOTR PIONTECKI  
AND SYLWIA PIONTECKA** of  
Hamilton, Complainants

Appellants

**AND** **REAL ESTATE AGENTS  
AUTHORITY (CAC20003)**

First respondent

**AND** **ANGELA DAVIES** of Hamilton,  
Real Estate Agent

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr J Gaukrodger - Member  
Ms N Dangen - Member

**BY CONSENT HEARD ON THE PAPERS**

**DATE OF OUR SUBSTANTIVE DECISION** 5 August 2014 [2014]  
NZREADT 61

**DATE OF THIS DECISION ON PENALTY** 28 November 2014

**COUNSEL**

Ms J K Gilby-Todd and Mr M D Branch, for appellants  
Mr R M A McCoubrey, for the Authority  
Mr S M Hunter, for the licensee

**DECISION OF THE TRIBUNAL ON PENALTY**

***Background***

[1] The appellants appealed to us a decision of a Complaints Assessment Committee finding that the licensee had engaged in unsatisfactory conduct. The appellants sought a finding that the licensee had engaged in misconduct; but we upheld the Committee's finding of unsatisfactory conduct as at a high level.

[2] The Committee's finding followed a decision of Judge P Spiller in the Hamilton District Court to the effect that the licensee had engaged in conduct that was misleading or likely to mislead. Inter alia, Judge Spiller found various defendants (including the licensee) jointly and severally liable to pay the appellants \$35,000 together with an award of costs. The Committee did not impose any further penalty on the licensee.

[3] The appellants submitted to us that the licensee should have been found guilty of misconduct. In our decision of 5 August 2014 we concluded as follows:

*[53] This is a case where it is borderline whether or not the level of failure by the licensee reaches "misconduct" rather than "unsatisfactory conduct" as each concept is respectively defined in ss.73 and 72 of the Act ... the licensee's failures, which we have outlined above and which were comprehensively covered by Judge Spiller in the District Court, certainly fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee in terms of s.72 of the Act. Also, in terms of that section those failures contravene the above Rules, were negligent, and would reasonably be regarded by agents of good standing as being unacceptable. Accordingly, the failures are, at least, "unsatisfactory conduct" as defined in s.72 of the Act.*

*[54] However there is an issue whether those failures also, in terms of the definition of "misconduct" in s.73 of the Act, can be regarded as disgraceful, or seriously negligent, or a reckless contravention of the Act or the Rules. We accept that the licensee did not intend to mislead or under-inform the complainants but, in the context covered above, her conduct comes very close to being seriously negligent. Nevertheless, it is somewhat puzzling that the complainants did not appreciate the risk of the property from the roading project.*

*[55] The onus of proof is on the appellants but only to the standard of the balance of probabilities.*

*[56] When we stand back and consider the situation we find that the licensee has been at least negligent in not giving the same disclosure and advice to the complainants which she gave to another prospective purchaser at material times and in not outlining clearly enough to the complainants the risks they were incurring in purchasing the property. All in all, it is very arguable whether the offending level of "misconduct" has been reached. However, we prefer to find that the licensee is guilty of unsatisfactory conduct at a high level.*

*[57] Accordingly, a concerning issue is the type of penalty to be imposed on the licensee. Although the Committee, in its careful, thorough, and well reasoned decision, determined that the orders made by the District Court were sufficient, we consider that some more thought needs to be given to the appropriate penalty to be imposed on the licensee. ..."*

[4] In a memorandum dated 23 September 2014, counsel for the appellants stated that they are content to leave the decision on the appropriate sanction to us. That said, they requested a written apology from the licensee.

[5] In 10 October 2014 submissions, counsel for the licensee submits that no further penalty is required. Those submissions include a written apology from the licensee.

### ***Discussion***

[6] The stance of the Authority has been that it was open to the Committee, in the circumstances of this case, to find that the test of misconduct had not been met and that the licensee's conduct was unsatisfactory conduct; and the Committee was entitled to find that the Orders made in the District Court were a sufficient response to the licensee's unsatisfactory conduct.

[7] Mr McCoubrey then puts it, that said, it is clear that we consider that the licensee is guilty of unsatisfactory conduct at a higher level than was found by the Committee; and it is plain from the above quotation from our decision finding unsatisfactory conduct by the licensee, that we consider that the licensee's conduct bordered on misconduct. We confirm that.

[8] Mr McCoubrey now submits that, having made that finding, we should consider whether any further orders under s.93(1) of the Act ought to follow. He noted that, by her said written apology, the licensee has apologised to the appellants in terms of s.93(1)(c) but submits that, having found that the licensee is guilty of *"unsatisfactory conduct at a high level"*, we ought to give thought to penalty orders to reflect that finding. He puts it available orders on the facts of this case are a censure or reprimand; training or education; and a fine.

[9] Having submitted that it was open for the Committee to conclude as it did, Mr McCoubrey puts it that the Authority is prepared to leave the precise nature of any further orders to us. However, the Authority's submission is that, overall, any penalty orders ought to be an appropriate response to conduct which is unsatisfactory conduct at a high level bordering on misconduct.

[10] As indicated above, the appellants are content to leave it to us to decide on appropriate penalty against Ms Davies and sought a written apology which has since been given. As Mr Branch put it for the appellants, that apology was needed *"for not having given the same disclosure and advice to the appellants which she gave to another prospective purchaser at material times and not outlining clearly enough to the appellants the risk they were incurring in purchasing the property."* Mr Branch noted that the concern and distress of the appellants is that, until the apology, the licensee did not appear to accept that she had offended. He feels that the apology will give the appellants final closure.

[11] We also received helpful submissions from Ms Hunter on behalf of the licensee.

[12] In setting out the licensee's apology, Ms Hunter added that the licensee considers herself a diligent person who has always acted ethically and honestly in her career as a real estate agent. She stresses that this case, and its associated publicity, have had an enormous impact on the licensee and her family.

[13] Ms Hunter then submits that the purposes of the current disciplinary regime for real estate agents, namely, the promotion and protection of the interests of consumers and the public generally and the maintenance of professional standards, are met in this case by the finding of unsatisfactory conduct and by the licensee's apology. Ms Hunter notes that we recognised that the licensee acted in good faith

believing she had made adequate disclosure to the appellants and emphasises that this is not a case of deliberate non-disclosure or misleading conduct but rather a “*case of cross communication*”; as Ms Hunter put it. She submits that the licensee has been deeply affected by these proceedings and the associated publicity and should not be punished further.

[14] Ms Hunter then took us through a number of seeming precedent cases of ours from recent times in terms of penalty which might apply in this case. That led her to submit again that it is not appropriate that we impose any additional penalty on Ms Davies and that to do so would be out of proportion to the conduct in question and would treat the licensee more harshly than other licensees found guilty of similar or more serious conduct.

[15] Finally, Ms Hunter submitted as follows:

***“Apology – confidentiality***

11. *Ms Davies requests that the Tribunal make an order prohibiting publication of the details of her apology. Ms Davies does not object to publication of the fact that she has apologised, but respectfully requests that the contents of her apology be suppressed due to the personal and sensitive nature of the matters therein.”*

[16] As it happens, we do not find it necessary or appropriate to set out the fulsome terms of the licensee’s apology; but we now order that there be no publication of its details, and only that it has been given in writing, addressed to the appellant complainants, and signed by the licensee.

[17] While we find it helpful to be referred to previous cases of our imposition of penalties, we tend to focus mainly on the precise facts and circumstances of the case before us. The above extract from our decision of 5 August 2014 sets out our concerns but, in particular, the case is encapsulated by the ultimate finding of Judge Spiller which we covered in our paragraph [2] as follows:

*“[2] The Committee’s finding followed a 15 May 2013 decision of His Honour Judge P R Spiller in the District Court at Hamilton that the licensee had engaged in conduct which was misleading or was likely to mislead; Piontecki & Ors v Davies and Ors DC Ham CIV-2012-019-000406. The ultimate finding of Judge Spiller was as follows:*

*“I find that Ms Davies did not properly advise Mr and Mrs Piontecki of the risk that the property would be materially affected by the roading project known as the Southern Links By-Pass, and/or the affect that risk had on the value of the property. I find that Mr and Mrs Piontecki were misled by Ms Davies as to the risk of the roading project in relation to the property purchased. I further find that a reasonable person in the situation of Mr and Mrs Piontecki – that is with the characteristics known to Ms Davies or of which she ought to have been aware – would likely have been misled.”*

[18] It seems just to us, at this point, to accept that Judge Spiller has dealt with financial penalty; so that we censure the licensee, and order that she undergo appropriate training or education to be fixed by the Registrar of the Authority in consultation with our Chairperson, and we also fine the licensee \$1,500 (to be paid to

the Registrar within one calendar month of this decision) which we regard as a contribution to the costs of the Authority.

[19] 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 N Dangen  
Member