BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 12

READT 041/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**MICHAEL TAN**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (per CAC 20005)**
	First respondent
AND	**REDVERS McCABE** of Auckland, Real Estate Agent
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION ON PENALTY 11 February 2015

REPRESENTATION

The appellant complainant on his own behalf
Ms J MacGibbon, counsel for the Authority
Mr K M Burkhart, counsel for the second respondent licensee

DECISION OF THE TRIBUNAL (ON PENALTY)

Introduction

[1] Mr Michael Tan ("the complainant") appeals against the penalty decision of Complaints Assessment Committee 20005 following its unsatisfactory conduct finding against Mr Redvers McCabe ("the licensee"). The latter holds a real estate salesperson's licence and works for Western Realty Ltd which trades as Ray White Glen Eden.

[2] The appellant seeks: an increased fine against the licensee; that the Committee's censure and reprimand of the licensee be maintained; and that a compensation order for $60,000 under s.93(1)(f) of the Real Estate Agents Act 2008 be paid by the licensee to Mr Tan, the complainant. That subsection reads:

"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:

…"

The Basic Factual Background As Put for the Authority

[3] The property at 54 Lynwood Road, New Lynn, was listed with the licensee on 3 April 2013 to be sold at auction on 23 April 2013 *"if not sold sooner"*. Online advertising for the property showed it as two dwellings. The complainant was the purchaser of the property prior to the auction.

[4] On 8 April 2013 the complainant had contacted the licensee with an expression of interest in the property. On 13 April 2013 the complainant requested a copy of the plans of the property from the licensee. That same day the complainant advised the licensee that he wished to submit a formal offer.

[5] A sale and purchase agreement was signed by the complainant on 14 April 2013 and this was accepted by the vendor but, on the following day, the complainant contacted the licensee with concerns over the status of the property.

[6] The complainant stated that the licensee misrepresented to him that the subject property comprised two legal dwellings, or structures capable of being occupied as separate dwellings. He also stated that the licensee altered certain plans provided to the complainant by adding the words *"Auckland City Council"* to those documents. The complainant also joined the licensee's principal, Thomas Hendriks, into the complaint but the Committee later decided to take no further action in respect of Mr Hendriks.

More Detailed Background from The Licensee's Perspective

[7] Mr Burkhart, as counsel for the licensee, put the background facts in more detail as follows (and they do not seem to be disputed):

"2.1 On 3 April 2013 the property at 54 Lynwood Road, New Lynn was listed with the second respondent. The property was to be sold by auction on 23 April 2013, if not sold prior. It was advertised online on 5 April 2013 followed by print advertising.

2.2 The vendor advised the second respondent that he had purchased the property approximately six months prior, that the tenant in the rear unit had been there for a number of years and that the tenant in the front unit had been there approximately three months, since the vendor had refurbished it.

2.3 Before advertising the property, in order to ensure that he complied with rule 10.7 of the Professional Conduct and Client Care Rules (i.e. the process to follow when listing and advertising a property in the absence of a LIM), the second respondent obtained from the vendor a signed listing authority which confirmed that there were no defects or unpermitted works. In the absence of a LIM report, the second respondent obtained an undertaking from the vendor to provide a LIM report from the Council. The vendor also provided to the second respondent a valuation from a registered valuer which described the property as "two self contained but attached units" and "two residential dwellings...sharing a common party wall".

2.4 The property was initially marketed with an advertisement entitled "Two Dwellings -One Large House". In the body of the advertising, the property was described as having two dwellings (but also saying "one large house with a total of 6 bedrooms plus a study").

2.5 On 8 April 2013 the appellant contacted the second respondent with an expression of interest in the property. The second respondent sent the appellant the property file and certificate of title, and advised the appellant that he was still waiting for a LIM report for the property. The appellant expressed an interest in making a conditional offer (conditional on finance, LIM, solicitor's approval of title and builder's inspection) of $490,000.

2.6 Over the course of several days, the appellant had a number of discussions with the second respondent. On 10 April 2013 the second respondent advised the appellant that the vendor may accept an unconditional offer, but suggested the appellant carried out due diligence first.

2.7 On 12 April 2013, the appellant had several discussions with the second respondent in regards to the water meter and power meters for the property. The appellant asked whether the property was two legal dwellings and income. The second respondent advised the appellant that as he understood it, the property was one dwelling with existing usage rights for two. The vendor had left a file with the second respondent that day containing council papers.

The appellant viewed this with the second respondent when he viewed the property on 12 April 2013.

2.8 Later that same day (12 April 2013) the appellant advised that he was satisfied with the property and wished to make a cash offer. The second respondent was not comfortable in presenting a cash offer without the appellant having full knowledge of the legal status of the property. While the appellant advised he would like to make a cash offer, he also advised he would like to view the property bag at the Council. An offer was drafted up containing a condition (condition 20) allowing the appellant to complete

due diligence at the Council by 4pm the following Monday, 15 April 2013. The offer was submitted to the vendor, who agreed on a final price of $491,700, but did not want to accept a conditional offer prior to the Auction. The vendor advised that he would be happy to wait for the appellant to complete due diligence by 4pm on Monday and for the appellant to then submit a cash offer at the same price, which he would accept.

2.9 On 13 April 2013, the appellant requested a copy of the sketch plan from the vendor's file of council documents. The second respondent sent this to him but prior to that advised the appellant that this document appeared to be a sketch plan only and could not be relied on as evidence of a permit. The second respondent advised the appellant again that the vendor was happy to wait until 4pm Monday so the appellant could complete due diligence at the Council and then submit an unconditional offer.

2.10 At 9.38pm, the appellant advised the second respondent that he had reviewed the sketch plan and was happy to make the offer unconditional.

2.11 On 14 April 2013, the appellant requested a meeting with the second respondent in order to sign an unconditional agreement. Prior to signing the agreement the second respondent warned the appellant of the purchaser acknowledgement contained in the new clause 20, in particular making sure that the appellant had satisfied himself as to the condition of the property and that he had received the appropriate professional advice prior to signing or waiving his right to do so. The second respondent was bound by Rule 10.10 of the Professional Conduct and Client Care Rules to present the unconditional offer. The offer was then presented to the vendor, which was accepted and the vendor signed the agreement.

2.12 The following day, the appellant contacted the second respondent as he was concerned about the status of the property based on his visit that day to Auckland Council.

2.13 On 18 April 2013, the appellant advised the second respondent that he would settle if the purchase price was reduced to $420,000 and in that case he would not pursue a misrepresentation claim against the second respondent or the vendor. The vendor was not willing to negotiate on the unconditional agreement.

2.14 On 24 April 2013, the appellant made a complaint with the Real Estate Agents Authority.

2.15 Submissions were presented by both parties and on 12 November 2013, the CAC released its determination. The CAC determined that under section 89(2)(b) of the Real Estate Agents Act ("the Act") the second respondent had engaged in unsatisfactory conduct. It commented that the key question was whether the marketing material was wrong. The CAC held that the second respondent should have done checks to ensure the information provided by the vendor was correct.

2.16 On 19 March 2014, after receiving further submissions, the CAC released its decision on penalty. The CAC considered that the unsatisfactory

conduct was in the middle range. It determined that the second respondent:

(1) should be censured and reprimanded for the unsatisfactory conduct; and

(2) be fined $4,500."

The Committee Decision of 12 November 2013

[8] The Committee stated that it was clear that the property was advertised as being two dwelling-houses. The Committee also stated that such a description was clearly wrong as the property could not be used legally as two dwellings. On this point the Committee found that the licensee had breached Rule 6.4 (of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009) which reads:

> *"6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client."*

[9] On the other issue of whether the document provided with the title *"Auckland City Council"*, when it was not official, was a misrepresentation, the Committee found that the licensee had nothing to do with the document as it came from the vendor and did not find any disciplinary issues.

[10] The final issue before the Committee was whether the licensee had attempted to persuade the complainant not to make a complaint. The Committee found the evidence on this point conflicting and was unable to make an adverse finding.

[11] As further background, we set out the following portion of the Committee's reasoning, namely:

> *"4.4 … the fundamental fact remains that with respect to a vitally important aspect, i.e. whether this house could be used as two dwellings, the marketing material was wrong and false. The complainant has said to the Authority: "the agent has not done the checks to ensure the correctness of advertisements." With this view, the Complaints Assessment Committee (the Committee) can only agree. The licensee clearly should have checked this point, i.e. the status of the property. He did not do so and that failure on his part constitutes a clear breach of rule 6.4. The submission that the licensee was merely passing on what the vendor had told him is almost a stock argument from a licensee in a situation such as this. In the light of contemporary judicial interpretation of relative statutory obligations of real estate agents, the days are now well and truly gone when such arguments can be (if they ever could be) successfully raised."*

Penalty – being the only issue before us

[12] The complainant sought a compensation order against the licensee. However, in its penalty decision of 19 March 2014 the Committee (and subsequently the licensee) noted the decision of *Quin v Real Estate Agents Authority* [2013] NZAR 38 and accepted that such an order could not be made as, in terms of *Quin*, the Committee did not have power to award compensation.

[13] The Committee determined that a fine was called for; given the substantial breach of industry standards involving a serious misrepresentation to a customer about the status of the dwelling in circumstances which could have been avoided through a straightforward check. As a matter of degree, the Committee found the licensee's offending to not be at the highest or top end but, at least, in the middle of unsatisfactory conduct. The Committee found no mitigating features other than the licensee's clean disciplinary record. Taking into account all relevant factors, the Committee found the appropriate fine to be $4,500. The Committee also directed publication of its decision. As covered above it also censured and reprimanded the licensee.

The Submission to us for the Authority

[14] Counsel for the Authority (Ms MacGibbon) notes that the appellant complainant accepts that censure and reprimand were appropriate so that the only issues for us on this appeal by the complainant against penalty are whether the fine imposed was appropriate and whether there should be a monetary award against the licensee as compensation to the complainant.

[15] An order under s.93 of the Real Estate Agents Act 2008 may be made on and subject to any terms and conditions that the Committee thinks fit. Of course, those discretions are vested in us (refer s.110(4) of the Act).

The Fine

[16] Ms MacGibbon records that the complainant appeals against the fine imposed of $4,500 and he submits that the fine should be higher. As noted above, the Committee found the licensee's conduct to be mid-level unsatisfactory conduct. It is also noted that the maximum fine able to be imposed is $10,000, which would make the fine imposed just under the middle of the range.

[17] Counsel for the Authority (Ms MacGibbon) submits that while a higher fine could have been imposed, given the seriousness of the unsatisfactory conduct, the fine was within the range open to the Committee. We agree.

The Issue of a Monetary Compensatory Award

[18] The complainant states that he suffered a loss as a result of the fact that the property was not legally two dwellings. The complainant seeks the amount of $10,000 in compensation to convert the property from a two unit dwelling to one legal unit and a further $50,000 as compensation for loss of income, which is put as the lost rental income from not having a legal two-dwelling property to let.

[19] 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 held that, in a case of unsatisfactory conduct (as distinct from our powers if we find misconduct), Committees (or our 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. If the licensee can no longer *"put right"* the error or omission, the licensee can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission. Any

expenses incurred by the licensee as a result of doing what he/she is ordered to do must be borne by the licensee.

[20] 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.

[21] We refer further below to the effect of *Quin*.

[22] In the present case, the Committee considered whether converting the house from two dwellings to one dwelling was rectification of an error. The Committee found that the relevant error of the licensee was the incorrect advertising and that the cost of converting the property to one dwelling is not rectification of the licensee's error. Further, it held that the loss of rental income for the period claimed is compensatory damages and, as such, not covered by the Act in respect of unsatisfactory conduct by a licensee.

[23] The Authority submits that the Committee's reasoning on this issue was open to it and that order under s.93(1)(f) is not appropriate. In terms of *Quin*, we are obliged to agree.

The Submissions for the Licensee

[24] Relevant extracts from Mr Burkhart's submissions for the licensee read as follows:

> *"Fine*
>
> *…*
>
> *4.4 The appellant has submitted that the CAC description of a substantial breach, involving a serious misrepresentation is not the middle of the range. The second respondent disagrees. While it was found that a misrepresentation had been made in the advertising, the second respondent followed Rule 10.7(a) and (b) of the Professional Conduct and Client Care Rules, by taking the steps described in paragraph 2.3 above [see our para [7] above]. The second respondent took the appropriate steps to advise the appellant to complete due diligence and to ensure that the appellant was aware of the consequences of condition 20 in the unconditional agreement.*
>
> *…*
>
> *4.7 The second respondent submits that … the appellant did not realise that the property was not two dwellings until after the agreement was unconditional. While the second respondent accepts that this makes his conduct more serious, it is still appropriate for his conduct to be considered as being in the middle of the range.*
>
> *4.8 In this instance, the second respondent made a representation, which while incorrect, was unintentional. He used the information which the vendor had given him without having independently verified it. Accordingly,*

in keeping with the above cases, it is submitted that the fine of $4,500 was appropriate.

Censure or reprimand

4.9 In his submissions of 13 December 2013 the second respondent submitted that a censure or reprimand was not appropriate in the circumstances. The CAC disagreed and ordered censure and reprimand of the second respondent. The second respondent accepts the CAC's decision in this regard.

Rectify any error or omission

4.10 Mr Tan seeks compensation of $60,000 under section 93(1)(f) of the Act as follows:

(1) $10,000 to convert the property from a two unit dwelling to one legal unit dwelling;

(2) $50,000 for the loss of income if the property is rented out as one unit.

4.11 Section 93(1)(f)(ii) of the Act provides that the CAC may order a licensee, where it is not practicable to rectify an error or omission, to take steps to provide, at his or her expense, relief, in whole or in part, from the consequences of the error or omission.

4.12 The appellant is seeking compensatory damages for the cost of converting the two units dwelling into a one unit dwelling, as well as loss of income.

4.13 The CAC considered whether converting the house from two dwellings to one dwelling was rectification of the second respondent's error. It concluded that the second respondent's error was the misdescription of the property as being capable of being used as two dwellings. The CAC determined that the cost of converting the house to one dwelling is not rectification of the second respondent's error. The CAC also accepted it did not have the jurisdiction to award the compensation for loss of income.

4.14 Section 93(1)(f) was considered by the High Court in Quin v Real Estate Agents Authority. The Court held that the primary focus of the Act is not to provide a forum in which complaints seek monetary compensation.

4.15 In Quin, the agent had informed the purchaser that the relevant boundary of the property was defined by a wire fence, where as it was in fact some eight metres inside of the fence line. The purchaser wanted heavy vehicle access along that side to the back of the property. When they discovered the issue, they elected to affirm the contract, constructed a new access way from a different approach, and then claimed the costs of the new access way, including the resource consent, from the agent.

4.16 The High Court held that the Act does not give a CAC the power to order a licensee to pay compensatory damages, either by way of indemnity or for loss of expectation. This is exactly what the appellant is seeking here. His

claim for loss of income is clearly a claim for loss of expectation, and so must fail.

4.17 In Quin, the agent mistakenly (although innocently) misrepresented the boundary. Here, the second respondent mistakenly, although innocently, represented that the property could be used as two dwellings. This case is clearly similar to Quin. In each case, there was an innocent misrepresentation where the complainant incurred costs.

4.18 The consequence of the second respondent's error/omission, as in Quin, is that the appellant was denied the opportunity to elect not to offer to purchase the property or purchase it at a different price.

4.19 While the second respondent made an error, this error was not the cause of the loss which the appellant is now claiming. The appellant had the opportunity to confirm the status of the property before making an unconditional offer to purchase, and was encouraged to do so by the second respondent. Further, the appellant had the option of on selling the property after discovering it could not be used as two dwellings.

4.20 The only remedy available to the appellant is damages representing the difference between the purchase price and the actual market value of the property at the time of sale. This is not a remedy that is available to the CAC to order under section 93 of the Act.

…

[25] Overall, on the issue of compensation Mr Burkhart submits that we do not have jurisdiction to exercise any powers other than those that the CAC could have exercised; so that we do not have jurisdiction in this case to award the compensatory damages sought by the appellant. Further (he puts it) the appellant has not produced any evidence to substantiate his claim."

The Stance of the Appellant/Complainant

[26] The appellant has not appealed the substantive decision of the finding of unsatisfactory conduct by the licensee.

[27] The complainant took an active role before the Committee but, in terms of his appeal to us on penalty, has left it to respective counsel for the Authority and for the licensee to make detailed submissions.

[28] Essentially, the complainant appellant seeks that the fine of $4,500 be increased; that the censure and reprimand be maintained; and that he receive a compensation payment of $60,000 under s.93(1)(f).

Outcome

[29] As indicated above, we consider that the quantum of the fine imposed by the Committee, $4,500, was and is appropriate in terms of the Committee's findings and reasoning and we decline to increase it. There is no issue over the censure and reprimand which we consider appropriate.

[30] There has been the separate issue of Mr Tan's claim for compensation which has the obstacle of the principles enunciated by Brewer J in *Quin*. We agree with the submissions on *Quin* from both counsel as we have covered them above. In previous cases we have summarised our views on *Quin* along the lines we set out below and noting that our power to award compensation under s.110(2)(g) is only available where we have found a licensee guilty of misconduct as distinct from the lower level of offending termed *"unsatisfactory conduct"* which is accepted as applying to the licensee in this case.

[31] The amounts sought by the appellant are compensation for market loss and loss of income. As already covered above, 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 i.e. in the context of unsatisfactory conduct by the licensee as distinct from misconduct.

[32] Justice Brewer held that, under s.93(1)(f)(i), licensees can only be ordered to do something or take actions to rectify or put right an error or omission and that, 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 in part) from the consequences of the error or omission by virtue of s.93(1)(f)(ii). Any expenses incurred by the licensee, as a result of doing what he or she is ordered to do, must be borne by the licensee. He put it that even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. He also held that an order under s.93(1)(f) cannot be made in respect of a straight monetary loss for a drop in market value of a property.

[33] Essentially, in *Quin* the High Court held that, where a licensee is guilty of unsatisfactory conduct, committees cannot order that licensee to pay complainants money as compensation for errors or omission in respect of pure market or economic loss (i.e. compensatory damages).

[34] When sentencing a licensee for unsatisfactory conduct, we are limited to the same penalty powers as are Committees of the Authority.

[35] Of course, we accept, as Brewer J pointed out, that the primary focus of the Act is not on the provision of a forum in which complainants can seek monetary compensation, but on the regulation of the real estate industry so as to promote and protect the interests of consumers. His Honour also added *"This includes conferring on regulators powers to grant consumers relief from harm, resulting from the licensees acting contrary to the standards required of them"*.

[36] Accordingly, this appeal against penalty is dismissed.

[37] 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 J Gaukrodger
Member

_____
Mr G Denley
Member