

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 14

READT 76/13

IN THE MATTER OF a charge laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN **REAL ESTATE AGENTS
AUTHORITY (CAC 20002)**

Prosecution

AND **SANGEETA (ROSH) DAJI**

Defendant licensee

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at AUCKLAND on 26 August 2014

DATE OF SUBSTANTIVE DECISION 14 November 2014 [2014] NZREADT 87

DATE OF THIS DECISION ON PENALTY 17 February 2015

COUNSEL

Ms J MacGibbon for the prosecution
Mr T D Rea for the defendant

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Ms Sangeeta Daji (“the licensee”) was initially charged with misconduct. Prior to the charges hearing, she pleaded guilty to unsatisfactory conduct under s.72(b) of the Real Estate Agents Act 2008 (“the Act”) in that she breached s.6(1) of the Act in acting as a salesperson when she was not licensed. However, the Committee did not accept that this conduct was (merely) unsatisfactory and the matter proceeded to a charges hearing at Auckland, on 26 August 2014, where we dismissed the charges and accepted the licensee’s guilty plea to unsatisfactory conduct – refer *REAA v Sangeeta Daji* [2014] NZREADT 87.

Factual Background

[2] We summarised the relevant conduct in our decision as follows:

“[94] The defendant acted as a salesperson over August to early December 2012 when she was not clearly employed by an agent as an employee or as an independent contractor but, as covered above, the circumstances were confused. When she left Hub Realty in August 2012 she did not give the Registrar notice of her change in agency until December 2012. That failure breached s.67 of the Act which requires that such notice be given within 10 days after the change. Also the defendant intended and expected to be remunerated from commission paid by the said vendors of 64 Taniwha Street, Glen Innes, and rather fudged that in her said affidavit to the High Court, but in the context we covered above. However, we find nothing wilful, reckless, seriously negligent, or disgraceful in her said conduct.”

[3] We went on to say that *“our current view is that the defendant be fined \$3,000.”*

Submissions for Authority on Penalty

[4] Ms MacGibbon (as counsel for the Authority) puts it to be well-established that decisions of disciplinary Tribunals should emphasise the maintenance of high standards and the protection of the public through specific and general deterrence; and while this may result in orders having a punitive effect, this is not their purpose – refer *Z v CAC* [2009] 1 NZLR 1; *CAC v Walker* [2011] NZREADT 4.

[5] The Act was introduced specifically to better protect the interests of consumers in respect of real estate transactions. A key means of achieving that purpose was the creation of a wide range of discretionary orders available on findings of unsatisfactory conduct or misconduct against a licensee, including significant financial penalties.

[6] The orders available under s93 of the Act on a finding of unsatisfactory conduct are wide ranging, including fines of up to \$10,000 against individual licensees. Orders available to complainants assessment committees under s.93 are available to us under s.110(4).

[7] Ms MacGibbon noted that in *CAC v Spencer* [2013] NZREADT 55 we agreed in principle that penalties under s.93 should promote accountability and include a deterrent element, with financial penalties set at a level to provide an effective deterrent taking into account modern commission rates. Taking the February 2014 REINZ national median house price of \$415,000 as an example, a standard real estate agent’s commission on a residential property transaction is around \$14,150 exclusive of GST. On the sale of the property involved in the present case, the commission was calculated as being \$21,650.

[8] Ms MacGibbon submits that financial penalties must be set at a level so as to *“bite”* given the commercial reality of commission rates. Given that the maximum fine for an individual licensee found to have engaged in unsatisfactory conduct is \$10,000, Ms MacGibbon submits that, where we decide to deal with mid-level unsatisfactory conduct by way of a fine, the starting point for any such fine must be in the mid-level of the range available, namely, \$5,000-\$6,000.

[9] Further, she notes that, under s.141 of the Act, to carry out real estate agency work without being licensed or exempt, can result in a conviction and fine of up to \$40,000. She highlighted that not in justification of a higher penalty than \$5,000 to \$6,000 but, rather, to emphasise that it is a cornerstone requirement of the Act to be licensed while carrying out real estate agency work.

[10] Ms MacGibbon also submits that the licensee's role in this transaction was not minor in that she arranged the listing agreement, marketing plan, negotiated pre-auction offers, provided a business card noting her as Regional Manager, and was the key point of contact with the vendors. It is submitted that the conduct of Ms Daji in failing to reconcile her employment, led to confusion as to who was in charge of managing the marketing of the property; that it is crucial that licensee's are aware of their licensing obligations and comply with them; that this is key to effective real estate practice; and that the licensee was heavily involved in real estate work during a period when she was not licensed.

[11] In all the circumstances it is submitted for the Authority that a combination of a censure and a fine in the range \$5,000-\$6,000 would be appropriate.

Submissions for the Defendant Licensee on Penalty

[12] On Ms Daji's behalf, it is submitted by Mr Rea that the relevant conduct was very much at the lower end of the scale of unsatisfactory conduct and that there are significant mitigating factors.

Technical Nature of Non-Compliance with Licensing Requirements

[13] Mr Rea puts it that Ms Daji's non-compliance with the Act was minor and technical, lasting for a brief period only, and resulted in no harm to any party. He refers to our noting at paragraph [92] of our decision that the episode "*lasted less than three months with no harm to the vendors, whatever they themselves may think*".

[14] Mr Rea also puts it that Ms Daji did not understand all the nuances of the licensing requirements of the Act but she can be excused for this, particularly, where the Committee and its legal advisers were also confused about the relevant provisions, resulting in a mis-formulation of the charge against Ms Daji. As Mr Rea records, we accepted at paragraph [93] of our decision that s.6(1) of the Act was the relevant provision breached, not ss.49 or 51, as charged; refer paragraphs [93] and [94] of our decision set out also below.

[15] Section 6 reads:

"6 Persons may not carry out real estate agency work unless licensed or exempt

(1) A person must not carry out any real estate agency work unless the person—

(a) is licensed under this Act and acts within the scope of that licence; or

- (b) *is exempt from the licensing requirement under any of sections 7to9 or under another enactment.*
- (2) *No person may hold himself or herself out to the public as ready to carry out any agency work if that person is not licensed under this Act or exempt from the licensing requirement under any of sections 7to9 or under another enactment.*
- (3) *For the purposes of this section, it is immaterial whether or not a person carries out any agency work as a business in its own right or as part of, or in connection with, any other business.”*

[16] Mr Rea observes that:

“Mr Redward, a licensee of 40 years’ experience and witness for the Committee, had also misunderstood the licensing requirements, understanding incorrectly that a licensed real estate agent could legitimately enter into and carry on a joint venture or partnership arrangement in respect of a real estate agency business with a licensed salesperson, and failing to have put in place either an employment or independent contractor’s agreement with Ms Daji as a salesperson”.

[17] Mr Rea repeated from his opening for Ms Daji, that while she did not have an employment contract or independent contractor’s agreement at the relevant time with James Law Realty Ltd, at material times she was still working within the real estate agency business, albeit as an assistant for another licensed salesperson within the business; so that the work done by Ms Daji was therefore, at least indirectly, on behalf of an agent. He puts it that the circumstances contrast with the situation of an unlicensed real estate agency business operating without the involvement of any licensed real estate agent; and that, equally, the situation differs from a person without any real estate qualification purporting to perform real estate agency work as a personal assistant to a licensed salesperson. Mr Rea stressed that Ms Daji held a licence at all material times, was well qualified to do the work that she performed; and that this was not a case of unlicensed trading.

Mitigating Factors

[18] We accept that the non-compliance with the Act by Ms Daji was inadvertent, and arose as a result of arrangements not working out as they had been intended between Ms Daji and Tanya Kwasza, for whom Ms Daji was to work as a personal assistant while working through her issues and litigation with Mr Redward and Hub Realty. We have recognised that Ms Daji had been *“let down”* by Ms Kwasza in this regard.

[19] The volume of real estate agency work undertaken by Ms Daji during the relevant period was minimal in comparison with the levels of work undertaken by Ms Daji previously or since.

[20] The non-compliance lasted only a short period of less than three months, and the arrangement was *“regularised”* by Ms Daji on her own initiative, without any prompting by any complaint or investigation.

[21] As has already been noted, there was no loss suffered by any member of the public. Accordingly, Mr Rea submits that the reference in the submissions for the Committee to the effect that the penalty need to have a “bite” with reference to the level of commission earned on the transaction is, therefore, misconceived because there was nothing wrong with the work done on the transaction.

[22] We understand that Ms Daji has no previous disciplinary finding against her, so this is her “first offence”.

[23] We can accept that Ms Daji has undoubtedly learned a valuable lesson from this experience and is very unlikely to be at risk of re-offending in the future.

[24] Ms Daji pleaded guilty to unsatisfactory conduct, yet the Committee proceeded with misconduct charges which failed. We accept that Ms Daji has already been significantly penalised by the stress and cost of the process.

[25] Mr Rea submits that our initial indication of penalty of a fine of \$3,000 would be slightly on the heavy side if it only took into account where the relevant conduct falls on the scale of unsatisfactory conduct; and, that to reflect a finding toward the lower end of the scale, a level of between \$1,500 to \$2,000 would be more appropriate.

[26] Mr Rea notes that, as recently as 20 January 2015, we issued a decision *Real Estate Agents Authority v Li & Ors* [2015] NZREADT 6 imposing a penalty of \$4,000 for misconduct (on a Ms Wang) and \$1,500 for conduct (by a Mr Swann) which we had described in our substantive decision as being unsatisfactory conduct at a “reasonably significant level” and that it was a “near run thing” whether it was misconduct.

[27] Mr Rea submits that, in all the circumstances, and having regard to the importance of reputation to licensees, the unsatisfactory conduct finding (and resulting notation on the public register) is sufficient penalty in itself and no further orders under s.93 of the Act are necessary or appropriate in this case.

Discussion and Outcome

[28] We feel that our 14 November 2014 decision covered all relevant aspects of this case fairly fully and that counsel have referred to all salient issues with regard to penalty as covered above.

[29] By way of further background we also set out paras [77], and [88] of our said substantive decision, namely:

“[77] As counsel for the defendant, Mr Rea made it clear from the outset that the defendant, having now received his advice, accepts that she engaged in unsatisfactory conduct by performing work outside the scope of her real estate salesperson’s licence. Nevertheless she denies that she engaged in misconduct in any respect.

...

[88] Mr Rea submits that we stand back and absorb all the evidence, accept that the defendant has not followed proper procedures and has breached the Act, but that the breach was not wilful or reckless and, rather, caused by her

personal confusion at material times; and that, over those times, she was in reality not earning money in the usual way and, in terms of her affidavit to the High Court, she was a person who did not know whether or not she was earning money or, if so, what amount.”

[30] We also set out reasoning which we expressed in our substantive decision herein under the heading of “*Discussion*” as follows:

“Discussion

[89] *We observe that the principals of the two agencies in question ought to have ensured that, at all material times, there were proper employment contracts between them and the defendant. It might be helpful if the Act required employer agencies to advise the Registrar of the Authority whenever agents move to other agencies.*

[90] *We can understand that, at material times, the defendant was under stress in terms of her High Court litigation with Mr Redward and his company and was consumed by endeavouring to have that settled day by day. She had a very extensive real estate practice at Hub Realty and needed to be able to sort out whether that was to be transferred to James Law Realty or not. It seems that she had at least 900 listings and 11 staff under what she thought was a joint venture with Hub Realty.*

[91] *However, she did not apply herself to complying with the requirements of the Act as we have covered above and added to below.*

[92] *We take into account that in those respects she was not properly supervised by her principal. We also take into account that Ms Kwasza let her down in practical terms. We note that the whole unsatisfactory episode lasted less than three months with no harm to the vendors, whatever they themselves might think.*

[93] *The licensee has not breached the wording of ss.49 and 51 of the Act but she has breached s.6(1) and s.72. As covered above she admits to unsatisfactory conduct. Broadly we agree with Mr Rea’s submissions on behalf of the defendant. We find that misconduct is not proven against the defendant.*

[94] *The defendant acted as a salesperson over August to early December 2012 when she was not clearly employed by an agent as an employee or as an independent contractor but as covered above, the circumstances were confused. When she left Hub Realty in August 2012 she did not give the Registrar notice of her change in agency until December 2012. That failure breached s.67 of the Act which requires that such notice be given within 10 days after the change. Also the defendant intended and expected to be remunerated from commission paid by the said vendors of 64 Taniwha Street, Glen Innes, and rather fudged that in her said affidavit to the High Court, but in the context we have covered above. However, we find nothing wilful, reckless, seriously negligent, or disgraceful in her said conduct.*

[95] *In all the circumstances, we dismiss all the charges but we find the defendant guilty of unsatisfactory conduct. Indeed, she herself has pleaded guilty to that through her experienced counsel, Mr Rea.”*

[31] We have decided not to censure the defendant, which is a concept we have thought about again since our said sentencing indication, but we fine the defendant \$2000, to be paid to the Registrar of the Authority at Wellington within 20 working days of this decision.

[32] 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

Mr G Denley
Member

Ms N Dangen
Member