

Decision No: [2015] NZREADT 26

Reference No: READT 010/14

IN THE MATTER

charges laid under s.91 of the Real Estate Agents Act 2008

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC 20002)**

AND

CHRISTOPHER GOLLINS

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport QC - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

APPEARANCES

Ms K Lawson-Bradshaw/ Mr L Clancy for the Complaints Assessment Committee
Ms N Pender for the defendant

HELD on the papers

PENALTY DECISION

[1] The Tribunal found Mr Gollins guilty of misconduct in its decision dated 15th January 2015. The facts of the misconduct are set out in the Judgment.

[2] The Tribunal called for submissions on penalty.

[3] The Tribunal must now consider the appropriate penalty for Mr Gollins. The Tribunal's powers to impose a penalty reside in s 110 Real Estate Agents Act 2008.

Principles of Sentencing

[4] The Tribunal must consider four matters when considering imposition of a penalty as set out in Real Estate Agents Authority v Lum-on [2012] NZREADT 47.

[5] A penalty must fulfil the following functions. They are:

[a] *Protecting the public*

Section 3 of the Real Estate Agents Act provides that this is one of the purposes of the Act.

[b] *Maintenance of professional standards*

This was emphasised in *Taylor v The General Medical Council*¹ and *Dentice v The Valuers Registration Board*².

[c] *Punishment*

While most cases stress that a penalty in a professional discipline case is about the maintenance of standards and protection of the public there is also an element of punishment – such as in the imposition of a fine or censure. See for example the discussion by Dowsett J in *Clyne v NSW Bar Association*³ and Lang J in *Patel v Complaints Assessment Committee*⁴).

The Tribunal recently reaffirmed that the purpose of disciplinary proceedings is not primarily to punish. It said⁵:

It is settled law that the purpose of disciplinary proceedings is not to punish the individual, but to ascertain whether the individual has met appropriate standards of conduct in the occupation concerned, and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public and the maintenance of proper professional standards (specific and general deterrence) are the key considerations. In the context of real estate agency work specifically, we agree that the purpose of the proceedings is to protect consumers and promote public confidence in the performance of real estate agency work, as stated in s.3 of the Act.

[d] *Rehabilitation of the Agent*

Where appropriate, rehabilitation of the agent must be considered – see *B v B*⁶.

¹ [1990] 2 All ER 263

² [1992] 1 NZLR 720

³ (1960) 104 CLR 186 at 201-202

⁴ HC Auckland CIV 2007-404-1818; Lang J; 13/8/07

⁵ *Complaints Assessment Committee (20003) v Fourie* [2014] NZREADT 71 at [32] (Fourie)

⁶ HC Auckland, HC 4/92 6/4/93; [1993] BCL 1093

[6] The available penalties for the Tribunal are those orders which are set out in s.110(2) of the Act.

[7] In summary the available penalties are:

- [a] Those orders available under s.93 (censure, apology, repayment of fees, rectification of an error, a fine not exceeding \$10,000 and payment of costs and expenses);
- [b] Cancellation of the licence of the licensee;
- [c] Suspension of the licence of the licensee for a period not exceeding 24 months;
- [d] Order that the licensee not perform any supervisory functions;
- [e] In the case of a licensee who is an employee or independent contractor order that any current employment or engagement of that person by a licensee be terminated and that he or she no longer be employed in connection with Real Estate Agency work;
- [f] A fine not exceeding \$15,000;
- [g] A sum by way of compensation not exceeding \$100,000.

Submissions

[8] The Complaints Assessment Committee submit that this case led to a finding of disgraceful conduct which involved dishonesty (where Mr Gollins had Mr O'Styke sign and back-dated an agency agreement) and Mr Gollins must be penalised by the Tribunal at a level commensurate with this finding of disgraceful conduct.

[9] The Complaints Assessment Committee submits that the only appropriate response to Mr Gollin's conduct is a period of suspension. They seek an order of suspension for between three and nine months.

[10] In the alternative, they seek the maximum fine of \$15,000.

[11] The Complaints Assessment Committee also submitted that Colliers, the complainant, incurred legal costs in dealing with this matter and sought compensation under s.110(2)(g) of the Act for legal fees in October 2012 (\$2,324.44) and 30 November 2012 (\$1,840) and 23 January 2014 (\$1,936.00) and that Mr Gollins should be ordered to pay these sums.

[12] In response, Ms Pender for Mr Gollins submits that this would be a completely "disproportionate response to the wrong doing and would lead to a manifest and unjust outcome". She also submitted that there was no basis for any order for compensation to Colliers. She pointed to the fact that it was an isolated incident, that Mr Gollins had experienced a significant fall from grace and he had suffered shame, reputation, harm and financial loss. Ms Pender submitted that the good

character references which have been provided to the Tribunal were testimonials in support of his good character.

The Law

[13] The Tribunal notes that it is its responsibility to impose the less punitive/restrictive penalty necessary to ensure the protection of the public and the maintenance of proper professional standards. The decision as to whether to suspend an agent is not a decision which can be taken or made without careful consideration.

[14] Some help can be obtained from other professional regulators as to the circumstances in which a suspension should or could be imposed.

[15] In *Daniels v Complaints Committee No 2*⁷ the Court has held that the underlying purpose of an order suspending a legal practitioner as follows:

[24] A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession.

[25] The consideration of whether to suspend or not requires wider consideration of all the circumstances. The real issue is whether this order for suspension was an appropriate and necessary response for the proven misconduct of the appellant having regard not only to the protection of the public from the practitioner but also to the other purposes of suspension."

Similarly:

[28]The starting point is fixed according to the gravity of the misconduct and the culpability of the practitioner for the particular breach of standards. Thereafter, a balancing exercise is required to factor in mitigating circumstances and considerations of a practitioner."

[16] The Tribunal must have regard to the public interest in maintenance of standards and protection of the public as well as the mitigating and aggravating circumstances of the case.

[17] Ms Pender identifies a number of mitigating or extenuating circumstances:

[a] The facts of the case, ie Mr Gollins had put a great deal of work into the transaction. It appeared to him that because of the change in personnel

⁷ [2011] 3 NZLR 850

at Foodstuffs that he was likely to be denied his appropriately and rightly earned commission.

- [b] Mr Gollins' actions were incapable of causing harm to Foodstuffs unless Foodstuffs had clean hands in seeking to deprive him of the commission. Foodstuffs were looking for a reason not to pay Mr Gollins, despite the work that he had done.
- [d] Mr Gollins is a man of good character as is evidenced by his testimonials.
- [e] Mr Gollins has been held accountable.
- [f] Mr Gollins would suffer irreparable financial harm if he was suspended from practice and has already been financially penalised by the publicity surrounding the case.
- [g] Mr Gollins was genuinely remorseful for his actions. He had admitted wrongdoing and just disagreed that his actions amounted to disgraceful conduct. He now accepts the finding.
- [h] Mr Gollins referred to a comment made in the decision of the Tribunal declining Mr Gollins' appeal against the decision to lay charges where Judge Barber said

*"Having said all that, it may be that the defendant's admissions established not only unsatisfactory conduct but misconduct. Currently we do not think that the revocation or even suspension of licence is required or appropriate on the particular facts on this case..."*⁸

Fine

[18] With respect to the maximum fine sought by the REAA as an alternative to suspension, Ms Pender submitted that Mr Gollins' misconduct was at the lower end of the spectrum and a fine of this magnitude (\$15,000) would be grossly disproportionate to the nature of the offending.

[19] Ms Pender added:

"Mr Gollins is an exceptionable real estate agent and an upstanding member of the community. But he did a very stupid thing. He was blindsided by Foodstuffs opportunistic attempt to welch on a two year old agreement. A significant commission that he had earned over the years of attention was in jeopardy. He reacted defensively. He tried to pass off an agency agreement as having been signed at the time of the Whitby deal rather than two years later. His actions were dishonest and the Tribunal has found them to be disgraceful. However, his actions had harmed no-one but himself. He has never posed a risk to the public and does not require rehabilitation.

⁸ The Tribunal note however that that comment by Judge Barber was made after an analysis of the facts from the papers and not after having heard the evidence. It is not of course binding on the Tribunal that heard the full hearing.

[20] Ms Pender concluded by submitting that censure was the most appropriate penalty.

Aggravating Features

[21] The Complaints Assessment Committee filed a brief memorandum in reply which referred to a report in the media published by the Dominion Post (also online at stuff.co.nz) where Mr Gollins is reported to have said:

“What I did was dumb, not dodgy. Two former Foodstuffs executives gave evidence that every dollar claimed was correctly owed to me and should have been paid after more than four years work earning it. Most fair-minded people won’t miss the absurdity of Foodstuffs, New Zealand’s second largest company benefiting from regulations designed to protect consumers who seek”.

[22] The Complaints Assessment Committee noted that this comment was not in accordance with the licensee’s submissions to the Tribunal.

[23] The Committee also submitted that it was appropriate that costs identified by the complainant were paid because they were incurred as a result of the licensee’s misconduct.

Discussion

[24] The starting point for any penalty assessment must be the principles which have been articulated in paragraph 5 above.

[25] The Tribunal must impose a penalty which maintains standards in the profession and protects the public as well as recognising a need to rehabilitate Mr Gollins. In this case, Mr Gollins does not pose a threat to the public so maintenance of standards is the most important issue – put simply an agent who is found guilty of disgraceful conduct involving fraud must be seen to be receiving a penalty which reflects the abhorrence of the Real Estate profession to such behaviour.

[26] We have considered carefully all the submissions of counsel. We do not consider that cancellation of Mr Gollins’ registration is appropriate in this case as all parties seem to acknowledge.

[27] We have considered carefully whether a period of suspension is an appropriate penalty for Mr Gollins in this case. We are mindful that we must impose the least punitive penalty commensurate with the gravity of the offence. In this case, based on the facts we have heard and our own assessment of the appropriate penalty we consider that suspension is not required in this case. This was a finely balanced decision as Mr Gollins’ behaviour has certainly fallen well short of that expected of an agent and suspension would have allowed Mr Gollins a period of reflection to recognise that what he did not was just “dumb” (to use his reported words) but also dishonest. However for the reasons set out below we have concluded that in this case a period of suspension would be unduly punitive to Mr Gollins. Our reasons are:

- [a] It would cause Mr Gollins significant financial hardship given that he is self-employed and that Foodstuffs has not paid the commission on the Whitby sale.
- [b] Mr Gollins has previously enjoyed an excellent reputation as an agent.
- [c] Mr Gollins did accept that his conduct was wrong from an early date and the only issue was whether the conduct was misconduct or unsatisfactory conduct. Some credit must be given for this acknowledgement.
- [d] Further, the facts illustrate that these actions were reactive, ie only occurred when it appeared that he would not be paid what was (in his mind) rightfully his commission. The facts also show that once the back-dating had been discovered, Mr Gollins made no attempt to dissemble. He admitted what he had done immediately. This must be weighed in his favour as must his previously unblemished character.
- [e] A large fine would be sufficient penalty for this error.

[28] We consider that a fine in the vicinity of \$10,000 is appropriate. We do not agree with Ms Pender's submission that censure would be sufficient. The conduct was serious and the fine must reflect this.

[29] The fine is payable to the Registrar of the Real Estate Agents Authority at Wellington within 20 working days of the date of this decision.

[30] We censure Mr Gollins.

[31] We do not order any payment of compensation in this case. We have considered all of the matters advanced by the Complaints Assessment Committee concerning Collier's loss as the complainant. However, we do not consider that in all of the circumstances of the case that it would be appropriate to order any compensation to Colliers. Colliers have not taken steps to attempt to obtain the commission for Mr Gollins and it appeared from the factual situation that we heard that the inter agent rivalry within Colliers may have contributed to Mr Gollins feeling that he could not discuss the issues which led him to back-date the agreement with his manager. Colliers appropriately took legal advice as to their obligations but this cost should fall on them.

[32] The Tribunal draw the parties' attention the right of appeal to the High Court contained in s.116 Real Estate Agents Act.

DATED at AUCKLAND this 16th day of April 2015

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member