BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 3

READT 074/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**GARY AND VICKI WALLACE**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20006)**
	First respondent
AND	**MICHAEL AND SUSAN BAKER**
	Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 23 June 2014

DATE OF OUR SUBSTANTIVE DECISION 24 August 2014 [2014] NZREADT 75

DATE OF THIS DECISION ON COMPENSATION – 16 January 2015

COUNSEL

R J Latton and A Hellaby for appellants/licensees
R M A McCoubrey for the Authority
B P Molloy and B P Kirwen-Jones for second respondent complainants

DECISION OF THE TRIBUNAL

Introduction

[1] Our decision of 24 September 2014 ([2014] NZ READT 75) confirmed the Committee's finding of unsatisfactory conduct against each of the above appellant licensees but, as we explain below, we reduced the rectification or replacement order (in terms of the complainant's loss of BoConcept wardrobes) and we imposed a fine of $500 against each licensee instead of against them jointly. We left open the possibility that we might alter our rectification or compensatory order in favour of the complainants.

[2] In terms of rectification or compensation regarding the complainants' loss of the wardrobes, the Committee ordered the licensees to supply to them the equivalent BoConcept wardrobes then estimated to cost $42,336 (GST inclusive) and to pay the cost of transport and assembly of the wardrobes. We reduced that to $10,000 but we reserved leave to apply on that issue.

[3] By way of further background, we set out paragraphs [76] – [79] inclusive of our decision as follows:

> *"[76] In terms of the reimbursement ordered by the Authority, we accept that BoConcept wardrobes are very upmarket and expensive at retail but the wardrobes now in issue were not being purchased new at retail, but are second-hand goods. We can accept that an estimated general value as about $2,500, provided to the appellants by a well-known auctioneer for the three wardrobes, is realistic for a routine auction sale of household goods; but the wardrobes in question must be marketable at a specialised furniture auction although, of course, not as antiques. Nevertheless, it would be surprising if an auction of those three wardrobes achieved more than $10,000 in total.*
>
> *[77] This is simply a case where two very experienced agents, husband and wife working as a team, overlooked clarifying whether household furniture items were to be included in the sale price of realty. It seems this came about because one may have left it to the other to clarify whether the wardrobes were fixtures or chattels and, in any case, each licensee honestly, but erroneously, thought that these wardrobes were fixtures and so passed with the structure of the house in the sale transaction.*
>
> *[78] As already indicated above, these wardrobes could not be regarded as worth their apparent retail cost price (as new) of about $42,000 when being viewed as second-hand goods. However, we think it inappropriate to regard them as household goods for a standard weekly auction sale. We would expect them to have a fair and sensible market value of about $10,000 for the three wardrobe items. As there is no proper expert evidence of their value before us, we reserve leave to apply (for one month from the date of this decision) in terms of adducing such evidence if our $10,000 figure is contested.*
>
> *[79] We consider that the Committee was correct to find the licensees guilty of unsatisfactory conduct but we reduce the replacement order to $10,000 subject to further evidence being adduced on market value of the wardrobes. We understand that the complainants have had their $100,000 sale commission liability reduced by $10,000. That is a commendable approach by the agency and the licensees."*

Further evidence (and submissions) for the complainants

[4] Since that decision the complainant, Mr M J Baker, has filed an affidavit sworn 23 October 2014 attaching an email from an employee (a sales consultant and interior stylist) at BoConcept dated 20 October 2014 stating:

> *"To replace the three units you originally bought today would cost $47,703. This is made up of two units 280cm wide, costing now $14,615 each and a unit 380cm wide, costing $18,473. This pricing does include GST, though no delivery and assembly costs have been applied.*
>
> *We estimate that your original units in good condition would be valued at approx $20,000+."*

[5] Mr Baker deposes that email is stating that the wardrobes which (as he puts it) he and his wife lost due to the appellants' conduct would be valued today at about $20,000. He then continues:

> *"[3] The valuation assumes that the wardrobes are in good condition. I state that the wardrobes were purchased in 2004. Since then, we had kept the wardrobes in excellent condition. These items were an important part of our household furniture. During our period of ownership there was nothing in our domestic circumstances that would have caused wear and tear to the wardrobes. We have had a cat in the past few years but it is an adult and does not scratch furniture. We take good care of all our household furniture."*

[6] Then, the next day on 24 October 2014, Mr Baker swore a further affidavit for these proceedings referring to our stating as set above in our para [79] of our said decision of 24 September 2014 herein, that the commission payable by the second respondents (the complainants) to the appellants (the licensees) was reduced by $10,000. He continues that there is an implication in that para [79] of ours that the $10,000 reduction was quasi compensation for the loss of the wardrobes, but points out that the appellants' invoice regarding commission was issued on 21 June 2012 whereas the issue with the wardrobes was only discovered by both parties at the 27 July 2012 pre-settlement inspection of the property by the purchasers.

[7] Accordingly, it is put by Mr Baker that the $10,000 discount provided by the appellants was not compensation for the wardrobes as the issue had not been discovered by the time the appellants issued their invoice for commission; and that, to the extent that we reduced the valuation of the wardrobes in this case due to this discount, we were incorrect.

The current stance of the licensees on compensation in respect of the wardrobes

[8] It is submitted by Mr Latton (counsel for the licensees) that the said email from the employee of BoConcepts is not sufficient evidence, nor evidence at all, to justify us changing the compensation figure for the wardrobes we suggested in our 24 September 2014 decision. Of course, we have wide powers of admissibility of evidence.

[9] Mr Latton also noted for the licensees that we had decided not to follow the evidence about valuation of the wardrobes at material times which the Authority had obtained. That was evidence from Mr Dunbar Sloane as an expert auctioneer and valuer of second-hand furniture (and indeed of art, antique furniture, and jewellery). We are now told that Mr Sloane's opinion was that the value of the wardrobes for

present purposes was about $2,300 as distinct from our previous understanding of $2,500. We observe that evidence was not formally adduced to us nor tested by cross-examination as to the context put to Mr Sloane.

[10] Mr Latton puts it that the further and subsequent evidence now tendered to us by the complainants has no greater status than that from Mr Sloane; and, indeed, is not given by someone who has followed the code of conduct of an expert witness; and there is no information as to the instructions given to the person at BoConcepts, nor evidence to show that he may be qualified as an expert in used furniture as opposed to new BoConcept furniture.

[11] Accordingly, Mr Latton submits that we have no evidence before us other than that from Mr Sloane to give us sufficient confidence to change the view we expressed in our decision.

[12] Mr Latton also puts it that the evidence of Mr Sloane was sought by the Authority and we should assume a degree of neutrality and expertise with it, but that there is nothing in the said email tendered to us by the complainants to allow us to take the same view of its contents about the views of the employee at BoConcept.

[13] Accordingly, Mr Latton submits that there is no reason why we should change our view of the value of the wardrobes for compensation purposes as set out in our 24 September 2014 decision (i.e. our figure of $10,000) and we should let it stand.

Outcome

[14] The Authority does not wish to respond further to the content of the above affidavits.

[15] We certainly accept that the evidence of Mr Dunbar Sloane is neutral and from an expert. We understand that he was asked to value the wardrobes as household goods when they seem to be of better quality than that.

[16] As it happens, we did not fix upon a $10,000 compensation sum by taking into account that the licensees had reduced their real estate commission to the complainants by $10,000. Nevertheless, we can understand Mr Baker seeing that implication from the way we cast the paragraphs we have set out above. We accept his submission that there is no connection between reduction of commission and the offending of the licensees regarding the wardrobes.

[17] It may well be that we should be reducing the reimbursement order further to the $2,300 opined by Mr Sloane. We note that counsel for the payer of that compensation (i.e. Mr Latton for the licensees) seems satisfied on behalf of the licensees with the $10,000 sum we imposed in our said decision of 24 September 2014, presumably, as part of our sentencing package in that decision.

[18] The complainant, Mr Baker, seems to be seeking that we increase the compensation order to $20,000. We are not prepared to do that.

[19] We confirm the penalties which we imposed on the licensees in para [83] of our said decision of 24 September 2014 and also order that the Committee's replacement order for the wardrobes be reduced to $10,000 as we were contemplating in para [79] of that decision. Technically, the Committee had made a

replacement order; but it seems more workable and practical that we substitute an order that the licensees jointly and severally pay the complainants the sum of $10,000. If either party feels that course is blocked by the current effect of *Quin v Real Estate Agents Authority* [2012] NZHC 7557 we reserve leave to apply on that issue. An alternative is litigation on that issue in a civil Court.

[20] Accordingly, we confirm the Committee's finding of unsatisfactory conduct against each licensee but we substitute for its penalty that each licensee be fined $500 (as we have already imposed in our said decision of 24 September 2014) and we order that the licensees jointly and severally reimburse the complainants, Mr and Mrs Baker, the sum of $10,000. All such sums are to be paid within three calendar months of this decision. The $10,000 is to be paid to Mr Latton's trust account and the fines to the Registrar of the Authority at Wellington.

[21] 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