

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 40

READT 097/14

IN THE MATTER OF

an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN

**NEVILLE OWEN VUCICH AND
DIANNE MERLE VUCICH** on behalf of
Coastal Paradise Trust

Appellants

AND

**REAL ESTATE AGENTS AUTHORITY
(per CAC 306)**

First respondent

AND

**GRAEME McLEOD
ANNE-LOUISE JAMES
HELENSVILLE REALTY LTD**

Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION ON PENALTY 22 May 2015

REPRESENTATION

The appellants on their own behalf
Ms K Lawson-Bradshaw, counsel for the Authority
Mr P J Napier, counsel for the licensees

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Neville Vucich and Dianne Vucich on behalf of Coastal Paradise Trust (“the vendor complainants”) appeal the 1 October 2014 penalty determination of Complaints Assessment Committee 306 for unsatisfactory conduct imposed against the (second respondents) licensees Graeme McLeod and Anne-Louise James, and Helensville Realty Ltd (“the agency”). They consider that the second respondents should be ordered to pay the (complainants) \$35,000 and some of the complainants’ costs as explained below.

[2] The penalties imposed by the Committee are:

Mr McLeod was fined \$3,000 and censured.

Ms James was fined \$1,000, censured, and ordered to undertake further education relating to Council zoning and building law.

Helensville Realty Ltd was required to refund the complainants 30% of the gross commission (i.e. a refund of \$10,453.50) and was also censured.

Factual Background

[3] At the time of listing their property with Ms James, the complainants informed her that the kitchen was non-compliant, and that would affect the rentability of the property by a purchaser. Despite this knowledge, Ms James advertised the property as a "Home and Income". This advertisement was not proofed by Mr McLeod, the principal of the agency and Ms James' supervisor.

[4] While viewing the property, the purchasers were told that the kitchen was non-compliant but the ramifications of this were not explained to them.

[5] Knowing that the kitchen was non-compliant, Mr McLeod intentionally chose not to include in the sale and purchase agreement a clause whereby the purchasers accepted that the kitchen was non-compliant. His reasons for doing so were because he considered that it would not have helped the complainant or the purchasers; may have caused problems for the purchasers in raising finance and (so it is put) he would have had to advise them to seek legal advice before signing; and would have led to the purchasers not signing the agreement.

[6] Once the purchasers became aware of the non-compliant kitchen and the ramifications from that, they negotiated a \$50,000 reduction in sale price with the complainant vendors.

The Committee's Decisions

[7] In its decision of 7 August 2014 the Committee found all three appellants guilty of unsatisfactory conduct and, on 1 October 2014, imposed penalties.

[8] It recorded that Mr McLeod's conduct was at the highest level of unsatisfactory conduct, almost bordering on reckless and wilful. He was fined \$3,000 and censured.

In its 7 August 2014 decision the Committee stated in general:

"In the Committee's view the licensees were intentionally protecting their own interests and had an obligation to advise both the complainant and the purchasers to seek advice and should not have remained silent. In doing so, they have breached Rule 6.3 of the Rules."

[9] That Rule provides that a licensee must not engage in any conduct likely to bring the industry into disrepute.

[10] Having determined that Ms James had failed to exercise skill, care and competence when carrying out real estate agency work for having advertised the property as "Home

and Income” after being alerted by the complainants that the kitchen was not compliant, in its penalty decision the committee censured Ms James, ordered her to undergo further training, and fined her \$1,000.

[11] Having found the agency guilty of unsatisfactory conduct for failing to adequately supervise Ms James (who was still in her probationary period), the Committee ordered the agency to refund the complainants 30% (being \$10,453.50) of the commission received which must have been \$34,511.60. It also stated: *“The view of the Committee is that licensee 1 (Mr McLeod) was sloppy in the supervision and management of licensee 2. Because she was still within her probationary period he needed to be more vigilant and have monitored her conduct more closely. Members of the public are entitled to have confidence when they are dealing with the licensee that the licensee is reasonably competent.”*

[12] In its 7 August 2014 decision finding unsatisfactory conduct against the second respondents, the Committee provided clear and detailed reasoning and in its later penalty decision of 1 October 2014 it, very helpfully, encapsulated its views as follows:

“3.3 There are a number of aggravating factors in this case.

Licensee 1:

3.4 Licensee 1 [Mr McLeod] by knowingly omitting the clause from the agreement regarding the kitchen so that the purchasers could obtain finance was deceptive. Such intentional conduct is considered by the Committee to be at the higher level of unsatisfactory conduct almost bordering or reckless and wilful. Not only did it smack of blatant self interest, it placed the complainants unknowingly in the position of being a party to the deception. This is not the conduct of a competent licensee protecting the interests of clients and consumers in relation to real estate transactions.

3.4 Furthermore, licensee 1 acknowledges by not advising the purchasers of the ramifications of the non-compliant kitchen, was not the right course of action either. He stated he did it to avoid the purchaser’s need to seek legal advice which would have given the purchaser’s lender grounds to decline their loan application. The Committee is of view this conduct falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee.

3.6 The Committee’s view is that licensee 1 knew or should have known this conduct was unsatisfactory and as such failed to protect the complainants and also failed the purchasers from being able to make an informed decision. By not advising both the complainants and the purchasers to seek legal advice prior to entering into an agreement is an obligation that all licensees have and for licensee 1 to disregard this is disappointing. Although licensee 1 has acknowledged his conduct in relation to omitting the clause from the agreement and not advising the purchasers and the complainants to seek legal advice was woeful the Committee regards this conduct falls short of the standard of a competent licensee.

3.7 The Committee is of the view that as part of the process of accountability a fine is appropriate and should be imposed. The Committee has the power to impose fines up to a level of \$10,000.00. In the circumstances of the case the Committee considers the conduct to be in the middle to high range and taking all factors into consideration believes an appropriate fine is one of \$3,000.00.

Accordingly, pursuant to section 93(1)(g) licensee 1 is fined \$3,000.00 to be paid within 21 working days of the date of the decision. Furthermore, because of the circumstances the Committee orders licensee 1 be censured and accordingly makes an order censuring licensee 1 pursuant to section 93(1)(a).

Licensee 2:

- 3.8 When licensee 2 [Ms James] listed the complainant's property she was alerted by the complainants the kitchen was non-compliant. Once this disclosure was made licensee 2 was on notice to carry out due diligence to ascertain all relevant matters concerning the property.
- 3.9 The property should never have been advertised as a "Home and Income" and licensee 2 should have sought direction from licensee 1 before placing such an advertisement. Licensee 2 stated when she subsequently realised she could not advertise the property this way she tried to rectify the mistake as soon as possible. However it was too late to cancel the advertisement and the purchaser has already responded to it.
- 3.10 The Committee views the conduct of licensee 2 as unacceptable by not undertaking due diligence on a matter she had been alerted to and proceeded to advertise the property in such a way that she knew or should have known could be misleading to any purchaser.
- 3.11 Licensee 1 again accepts he made an error in not proofing the advertisement prior to it being published, nevertheless the Committee is of the view licensee 2 failed to exercise skill, care and competence when carrying out real estate agency work.
- 3.12 The view of the Committee is that as part of the process of accountability a fine is appropriate and should be imposed. The Committee has the power to impose fines up to a level of \$10,000.00. In the circumstances of the case the Committee considers conduct to be at the lower range and taking all factors into consideration believes an appropriate fine is one of \$1,000.00.
- 3.13 Accordingly, pursuant to section 93(1)(g) licensee 2 is fined \$1,000.00 to be paid within 21 working days of the date of the decision. Also because of the circumstances the Committee orders licensee 2 be censured and accordingly makes an order censuring licensee 2 pursuant to section 93(1)(a). Furthermore, as licensee 2 was still in her probationary period when the conduct occurred the Committee orders licensee 2 to undertake further education in relation to Unit Standard 23138 – knowledge of Council zoning and building law. Such education to be completed within 90 days of the decision.

The Agency:

- 3.14 The complainants in their submission stated they were unaware licensee 2 had not had a great deal of experience in real estate agency work and the lapse of licensee 1's obligations in respect of supervision of licensee 2 was "one off". The Committee does not see it that way.
- 3.15 Licensee 1 as principal agent of the agency has an obligation and responsibilities under section 50 of the Act at all times to properly supervise and manage all salespersons carrying out real estate agency work. Licensee 1 had provided the Committee with the agency policy in relation to supervision and the Committee was satisfied that it was an appropriate policy.

- 3.16 *Not only was licensee 1 sloppy in his supervision and management of licensee 2, he also did not set a very good example to licensee 2 on how a reasonably competent agent should carry out real estate agency work. As licensee 2 was still in her probationary period, this placed extra responsibility on licensee 1 to be certain that the work performed by himself and licensee 2 was performed competently.*
- 3.17 *Furthermore, the view of the committee is that although the Lawyers and Conveyancers Act 2006 states licensees who have not had 6 months experience in real estate agency work, are to have an appropriate person prepare sale and purchase agreements and are not to give advice, this restriction should also be applied to other contractual documents such as listing agreements, by supervising agents, to ensure that licensees, still in their probationary period are properly supervised and managed. This situation regarding the non-compliant kitchen may not have occurred if licensee 1 had used this approach.*
- 3.18 *The complainants also requested in their submission an order be made under section 93(1)(e) that the licensees refund \$35,000.00 from the commission they received and this would be accepted by the complainants as a full and final settlement of their claim against the licensees.*
- 3.19 *The Committee views the conduct of both licensees falls short of the standard that a reasonable member of the public is entitled to expect from reasonably competent licensees. With this mind, and the complainants' request for a refund of the commission, the Committee is of the view licensee 1, as principal of the agency and having a higher degree of responsibility than licensee 2, warrants the making of an order by the Committee that the agency refund the complainants 30% of the entire commission received. Accordingly, pursuant to section 93(1)(e) the agency is to refund the complainants 30% of the entire commission received to be paid within 21 working days from the date of the decision.*
- 3.20 *Furthermore, the view of the Committee is the agency should be censured. Accordingly, pursuant to section 93(1)(a), the commission makes an order censuring the agency."*

Relevant Law

[13] Section 72 of the Real Estate Agents Act 2008 defines "unsatisfactory conduct" and reads as follows:

"72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*

- (c) *is incompetent or negligent; or*
- (d) *would reasonably be regarded by agents of good standing as being unacceptable.”*

[14] We have the same powers as a Committee when ordering penalty for unsatisfactory conduct. Section 93(1) of that Act provides:

“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:

- (a) make an order censuring or reprimanding the licensee:*
- (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:*
- (c) order that the licensee apologise to the complainant:*
- (d) order that the licensee undergo training or education:*
- (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint:*
- (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:*
- (g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company:*
- (h) order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order:*
- (i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.”*

[15] In accordance with the interpretation of s.93(1)(f)(i) in *Quin* [2012] NZHC 3557 (per Brewer J), licensees cannot be ordered to provide straight compensation to complainants when findings of unsatisfactory conduct are made. Rather, they 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, they 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. Even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. For example, an order under s.93(1)(f) cannot be made in respect of a straight monetary loss for a loss in market value of a property.

[16] Section 9 of the Fair Trading Act 1986 reads:

“No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”.

[17] Section 14 details that concept to generally state that no person shall, in trade, in connection with the sale or grant or possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land make false or misleading representations or use physical force, harassment, or coercion in such a connection.

[18] We set out the following of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 Rules 2012 namely:

“5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.

9.2 A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.

9.7 Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must—

(a) recommend that the person seek legal advice; and

(b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and

(c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).

9.9 A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for signature unless all material particulars have been inserted into or attached to the document.

10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects¹, a licensee must either—

(a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or

(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.”

The Appellants’ Submissions

[19] The appellants have submitted that the Committee erred in only ordering the agency to refund 30% of the commission. The appellants contend that they should be refunded

\$35,000 to cover \$30,000 towards the “forced” sale price reduction of \$50,000 and \$5,000 towards their legal fees and expense. They also seek reimbursement from the second respondents of such legal costs and expenses of an incidental to this appeal.

[20] The appellants point out that Mr McLeod is the sole director of Helensville Realty Ltd, which is a licensed real estate agency. Ms James is a licensed real estate salesperson. The stance of the appellants is that they allege that the second respondents did not exercise a proper standard of professional conduct and client care in terms of the Real Estate Agents Act 2008 and its 2012 regulations and that they breached their duties under the Fair Trading Act 1986. Simply put, it is alleged that those second respondents presented an agreement for the sale of the property to purchasers, (a Mr and Mrs Richards), at \$1,150,000 but, as a direct result of the alleged negligence and misleading conduct of the second respondents, the appellants were left with no alternative but to reduce the sale price by \$50,000 in order to achieve an unconditional sale of the property.

[21] Apart from the allegation of negligence and breach of ss.9 and 14 of the Fair Trading Act 1986 the appellants allege breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 and in particular Rules 5.1, 8.3, 9.2, 9.7, 9.9 and 10.7 all of which are set out below.

[22] The appellants submit that Mr McLeod personally prepared the relevant agreement for sale and purchase and put it *“notwithstanding that he was aware that Ms James had discussed, apparently at length, the non compliance of the kitchen in one of the dwellings on the property, Mr McLeod decided (without consultation with the appellants) not to include a clause to the effect that the purchasers acknowledged that they were aware that the kitchen was non complying and that they would make no claim against the vendors in that regard”*.

[23] The appellants refer to Mr McLeod having subsequently told the appellant Mr Vucich that he did not include the clause because he did not want to give the purchasers’ lender grounds to decline their loan application, or cancel the agreement. It is submitted by the appellants that had the clause been included in the agreement, there would have been no grounds whatsoever for the purchasers to demand a reduction in the purchase price.

[24] Inter alia, the appellants submit that, due to the deficiencies of the licensees, the purchasers were able to put undue and unfair pressure on the appellants as vendors.

[25] It is particularly submitted by the appellants that Ms James failed to adequately disclose known defects to the purchasers and, if she had, the purchasers could have sought expert advice. They submit that the agency company and Mr McLeod failed to ensure that Ms James was properly supervised and managed. They also submit that Mr McLeod should have recommended to the purchasers that they seek legal advice before signing the agreement to purchase.

[26] Inter alia the appellants submit it is unjust that the second respondents be able to retain 70% of the commission in the circumstances, that they should pay \$35,000 to the appellants together with costs, and that a deterrent financial penalty should be imposed on them.

The Second Respondents’ Submissions

[27] The second respondents deny liability for the sale price reduction in the property. They put it (through Mr Napier) that the appellants chose to discount the property by \$50,000 and that the loss or reduction was not caused by the licensees’ or the agency’s

actions; and that, regardless of their actions, this discount would have been likely made on the property.

[28] Mr Napier noted that the three complaints made by the appellant vendors are:

- [a] Graeme McLeod knowingly omitted a clause regarding the non-compliant kitchen from the Sale and Purchase Agreement (the Agreement) in order for the purchasers to secure finance; and Anne-Louise James was aware of the omission and failed to adequately disclose the building defects to the purchasers.
- [b] That Anne-Louise James advertised the property as a “Home and Income” when there was a non-compliant kitchen which would affect the ability of the purchasers to rent the property; and failed to adequately disclose the building defects to the purchasers.
- [c] The agency and Graeme McLeod failed to ensure Anne-Louise James was properly supervised and managed resulting in the property being advertised as a “Home and Income” when the non-compliant kitchen would prevent it from being rented.

[29] Mr Napier notes that, in effect, the appellants are seeking a refund of all the commission they have paid on the sale transaction to the agency so as to make up a substantial part of the shortfall of what they believe they should have got for the sale.

[30] As Mr Napier put it, the underlying logic of the appellants seems to be that they maintain the second respondents have caused their property to be undersold by \$50,000. He submits that, in fact, the appellant vendors chose to give a \$50,000 discount to achieve a sale of that property because (the purchasers) were not prepared to pay the previously agreed purchase price when they, the purchasers, became aware of the ramifications of there being an unconsented kitchen in the premises. Apparently, the stance of the purchasers has been that, if they had been aware earlier of the state of that kitchen, they would have offered \$50,000 less for the property or not purchased it at all.

[31] Accordingly, Mr Napier submits that the actions of the licensees and of Helensville Realty Ltd have not in any way caused the appellants to sell their property for \$50,000 less than they otherwise would have achieved. He also puts it that, if the appellants genuinely believed the property was worth \$50,000 more than they sold it for, they would not have renegotiated the price downwards with the purchasers by that amount. He observes that the agency’s initial appraisal for the property was \$970,000 to \$1,097,000 and the sale price after the renegotiation was \$1,100,000.

[32] Mr Napier submits that Helensville Realty Ltd effected the sale of the appellants property for what the appellants obviously thought was the best price available as, otherwise, they would not have accepted the \$50,000 discount and would have gone back on the market; and, therefore, is entitled to the usual commission.

[33] Accordingly, he submits that the appropriate penalty for each of the second respondents is a censure and a small fine.

The Stance of the Authority

[34] Ms Lawson-Bradshaw notes that the appellants’ attribute the sale price reduction of \$50,000, on the sale of their property, to the conduct of the licensees (and the agency) and

claim \$30,000 towards this loss. She puts it that there are causation issues in regard to the appellants' claim for loss. She notes that the appellants would have difficulty proving that they would not have incurred a \$50,000 price reduction had the licensees performed as required and had included the "*acknowledgement of non-compliance*" clause at the outset. It is submitted for the Authority that it is likely this reduction would have resulted even if the clause had been included from the outset.

[35] It is also submitted for the Authority that, even if the appellants could prove that this is a loss that they would not otherwise have suffered, the loss claimed is effectively compensation for straight market loss and therefore the kind of monetary award not contemplated by the Act or the High Court in terms of *Quin*, as referred to above.

[36] In relation to the \$5,000 claimed for legal costs, the Authority submits that it is open to us to determine that these costs relate to steps that would not have been taken but for the agency's failures and, therefore, relief is available under s.93(1)(f)(ii). It seems to us that s.93(1)(i) is also available.

[37] It is observed by the Authority that although it is a matter for us, there is also jurisdiction under s.93(1)(e) for us to vary the refund of commission originally ordered by the Committee.

Reasons for Decision

[38] We agree with the logic and reasoning of the Committee but we are asked to focus on its precise imposition of penalty. As covered in *Real Estate Agents Authority v Lum-On* [2012] NZREADT 47, we must consider the following four matters or functions in regard to penalty, namely, protecting the public; maintenance of professional standards; punishment; and rehabilitation of the agent where appropriate. With regard to the concept of punishment we add our statement from *CAC (20003) v Fourie* [2014] NZREADT 71 (at [32]):

"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."

[39] Licensees must maintain professional standards. The aspect of deterrence and denunciation must be taken into account. It is settled law that a penalty in a professional disciplinary case is primarily about the maintenance of standards and the protection of the public, but there can be an element of punishment. Disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[40] It has not been demonstrated to us that the vendor complainants deserve any compensation from the licensee in this forum. In any case, we are barred from that by the reasoning in *Quin*. It is very arguable, on the balance of probabilities, whether the complainant vendors have actually experienced loss in terms of the market value of their

property at material times in all the circumstances, especially that of the non-compliant kitchen.

[41] We agree with the reasoning of the Committee. We accept the Committee's finding that Mr McLeod was not open and frank with the appellant vendors and that the Committee's general view of his conduct is correct. We accept that the Committee was correct in finding both Ms James and the agency (Helensville Realty Ltd) also guilty of unsatisfactory conduct.

[42] The aspect of penalty needs the application of common sense and an overall effort to be just to all parties. On the balance of probabilities, the vendors would very likely have needed to reduce their asking price by about \$50,000 due to the kitchen being non-compliant. The Committee has indirectly made the agency contribute \$10,453.50 to that by ordering that it refund the complainant vendors (the appellants) 30% of the commission it received. That partial commission refund ordered against the agency by the Committee is, presumably, to reflect that agency's failing to adequately supervise the other two second respondents, and that inadequate service was provided to the complainant vendors.

[43] In all the circumstances, we think that the sentencing package imposed on the respective second respondents by the Committee is fair and just and we confirm its decisions. As covered above, we are prevented by *Quin* from taking the compensation issue further. The vendor appellants may feel they should take legal advice on whether they should sue the second respondents in the civil courts, but we do not think they have been caused loss by the second respondents. It seems fair to us that costs lie where they fall.

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

[45] 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 J Gaukrodger
Member

Ms C Sandelin
Member