BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 53

READT 001/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**RICHARD AND JILL BURROWS**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**RAEWYN PATERSON and DENNIS CORBETT**
	Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at WHANGAREI on 6 November 2014

DATE OF OUR SUBSTANTIVE DECISION HEREIN 5 March 2015
[2015] NZREADT 17

DATE OF THIS PENALTY DECISION 14 July 2015

REPRESENTATION

The appellants on their own behalf
Ms K H Lawson-Bradshaw, counsel for the Authority
The licensees on their own behalf

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] On 6 November 2014, we heard an appeal by Mr and Mrs Burrows against Committee 20002's decision of no further action on their complaints against licensees Raewyn Paterson and Dennis Corbett. On 5 March 2015 we upheld the appeal in part and found that both licensees had engaged in unsatisfactory conduct (refer *Burrows v REAA & Patterson* and *Corbett* [2015] NZREADT 17). This related to the licensees having achieved a sale of the complainant's property at 168 Marsden Road, Paihia, on 19 March 2012.

[2] We now address the appropriate penalty for that unsatisfactory conduct.

Our Unsatisfactory conduct finding of 5 March 2015

[3] We found that Mr and Mrs Burrows had provided the two licensees (at the local Harcourts agency) with express instructions to share their commission on the said property sale with the appellants' previous salesperson, Mr R Robertson, but that contrary to these instructions, and in breach of Rule 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, the licensees did not share their commission with Mr Robertson. That Rule 9.1 reads as follows:

> *"9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law."*

[4] We considered that while the licensees did not intentionally mislead the Burrows, they did fail to follow instructions. We stated:

> *"[86] When we absorb all the evidence and argument, it seems to us that the licensees, probably through mental confusion, have not followed the instructions from the complainant vendors, with which they had appeared to agree at the outset, that a fair share of commission be paid to Mr Robertson if they sold the property and that he would pay them a fair share of commission if he achieved the sale."*
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> *"[87] We consider that the licensees did not observe the clear vendor instructions that Mr Robertson share in commission one way or another. That seems to us to be unsatisfactory conduct, but in the particular context we have covered above, rather at the lower end of the scale."*

Submissions for the appellant complainants

[5] The appellant complainants put it that the essence of their taking this appeal was to have Mr Ross Robertson paid some commission as they had insisted when listing with the second respondents and which they thought they had then arranged. They put it that details of the sale and commission paid are:

(a) Sale price as per Sale and Purchase Agreement 19/3/2012 − $875,000 excluding GST.

(b) Commission as per signed listing agreement with Harcourts and based on (a) above:

Initial Fee	$500.00
4% on the first $400,000	$16,000.00
2.5% on the balance @ $475,000	$11,875.00
Total (excluding GST)	$28,375.00

[6] They put it that the normal commission-sharing arrangement between agents at the relevant time, 19 March 2014, was on a 50/50 basis so that when two agents agree to work together to make a sale, the commission is split 50/50 regardless of which agent makes the sale. They maintain that when an agent with a sole agency agrees to split commission with another agent who has a potential purchaser, the split is 50/50.

[7] The complainants emphasised that in the six months prior to the sale, as covered in our substantive decision herein, they had worked extensively with Mr Ross Robertson in his office and on at least six occasions he held open homes for prospective buyers to view the property. They say that they placed a half page advertisement in the local newspaper on 5 November 2011 advertising their property for sale on a tender basis as suggested by Mr Roberson at the time, but there was no interest flowing from that. They recall that Mr Robertson placed a regular advertisement in the local Ray White monthly publication and in the Auckland Herald. They then state:

> *"A further insight into our house sale situation was that the original valuation for loan purposes was in excess of $2 million dollars and we started on the 18/12/2009 at a sale figure of $1.8m, reducing finally to $1.1m prior to our sale through Harcourts for $875,000.*
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> *We can assure you that it was because of the efforts by Ross Robertson over this time that we felt a commitment to him when signing up to the Harcourts agent agreement.*
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> *From the time of signing the agent agreement being 15/02/2012 to the date of sale 19/03/2012, Harcourts had not undertaken any promotion or advertising material on our property which is why they needed to call into Ross Robertson's office to obtain a sales brochure to show their eventual buyer. The buyer arrived from Christchurch out of the blue at Harcourts office, Raewyn [i.e. the licensee Ms Paterson] advised this when ringing for a time to view the house. It is possible that they may have seen one of our advertisements prompting them to fly to the Bay of Islands on the off chance our house was still on the market."*

[8] The complainants then record that they would never have taken action against the local branch of Harcourts "*unless we honestly believed we had been intentionally misled and that Mr Robertson had been unfairly misled on the same basis*". They continue that "*in the interest of being reasonable*" they could accept that Mr Robertson's share of commission be 40% rather than 50%.

[9] Mr and Mrs Burrows (the complainant/appellants) then focus on their own costs related to their successful appeal (i.e. our decision in [2015] NZ READT 17) and record that various copying, binding, and courier costs caused them expenditure of $167 and in addition to that, by needing to supply copies of their various submissions and documents to all parties, their total expenses (including further stationery, printing and postage) would certainly exceed $300. They also refer to incurring travel costs to the Whangarei Court for the hearing on 6 November 2014 and other related travel and time costs and seek some remuneration for that "*even if only nominal*" (as they put it).

[10] The complainants emphasise that they did not appeal to us for "*an award for ourselves*" and do not expect that, but they feel that their initial agent, Mr Ross Robertson, has been unfairly treated by the second respondent licensees.

The submission on penalty from the second respondent licensees

[11] The licensees noted that Mr and Mrs Burrows seek that there be a commission split between them and Mr Robertson in terms of our substantive decision of 5 March

2015 and put it that they feel "*some events have been unintentionally overlooked*". They then continue:

> *"Both Raewyn and myself met with Mr and Mrs Burrows and where informed by Mr Burrows that urgency was needed to sell his home as the bank was threatening a forced sale. Our recommendation was an auction campaign as soon as possible and prior to the bank getting involved. In this situation the bank would consider this the best option as it had a time frame rather than leaving the property marketed at a price as it had been for quite some time with Mr Roberson, without success. After discussions, Mr Burrows agreed for us to auction the property but wished to talk to Mr Robertson before signing the auction listing agreement. Ms Burrows stated that Mr Robertson would have to be involved so we met with Mr Roberson and agreed to work with him in taking the property to auction. We agreed to share the commission on the basis it would go to auction and Mr Robertson was well informed of this. We then prepared the auction listing authority for Mr and Mrs Burrows to sign. At this meeting Mr Burrows appeared somewhat agitated and made it very clear he was now not going to take the property to auction. Hence you will note on the listing agreement we than crossed out the auction mode of sale and replaced it with 'Price by Negotiation'. Mr Burrows made it clear again that he wanted Mr Robertson included so we agreed to a joint exclusive listing and explained to Mr and Mrs Burrows that Mr Robertson would in fact be entitled to all of the commission if he sold the property and we would be entitled to all of the commission if we sold the property under a joint exclusive agreement. This is an industry standard for joint exclusive listings.*
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> *We acknowledge that Mr Burrows may have misunderstood how the joint exclusive agency works and wish to point out that Mr Robertson was and is very much aware of how a joint exclusive agreement works. Any other agreement between agencies is in writing after discussion and negotiation between the agencies with a focus on getting a result the seller is happy with. Mr Robertson made no effort to negotiate or even discuss the sale. Nor did he follow up to see if the property had been sold.*
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> *We would like to offer a donation of $1000 to a charity or club of Mr and Mrs Burrow's choice in Paihia, or in a close by area, and hope that this will in some way go towards restoring some goodwill in a situation that was clearly a misunderstanding.*
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> *While we respect the Authority's decision, we do not believe a fine is appropriate as we have taken instruction as directed by Mr Burrows and achieved an excellent result under very trying circumstances that Mr and Mrs Burrows were in at the time. Also, this was a result Mr Robertson had been trying to achieve for a long time."* [Our emphasis].

The submissions for the Authority

[12] Ms Lawson-Bradshaw submits that a failure to follow client instructions is not an insignificant matter and can have serious consequences. While the consequences to Mr and Mrs Burrows were not direct, she submitted that the penalty imposed should reflect that the licensees, nevertheless, breached an important duty to their clients.

[13] The Authority submits that it is open to us to order that both of the licensees be censured; and ordered to pay a moderate fine in the region of $2,000 each.

[14] Ms Lawson-Bradshaw also covered relevant law to which we refer below.

Our views on penalty

Principles

[15] It is well established that decisions of disciplinary tribunals should emphasise the maintenance of proper professional standards and the protection of the public through specific and general deterrence. 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. As counsel for the Authority also put it, general deterrence is a critical consideration, even if specific deterrence is not required should we be satisfied the licensee would not repeat his or her conduct.

[16] The Real Estate Agents Act 2008 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.

[17] Having found that the licensees' conduct was unsatisfactory, s.110(4) of the Act allows us to make any of the orders that a Complaints Assessment Committee can make under s.93 of the Act.

[18] The range of orders for unsatisfactory conduct introduced by the Act are a vital part of the disciplinary process through which the Act seeks to achieve its purpose.

[19] It is an aggravating feature that the licensees ignored the initial instructions from the complainant vendors. They show little remorse because they believe that their view of local commission-sharing practice applies and they consider that to be a substantial mitigating factor.

[20] We accept, of course, that the principle purpose of the Act is to promote and protect the interests of consumers in respect of real estate transactions and promote public confidence in the performance of real estate agency work. One of the ways in which the Act achieves its purpose is by providing accountability through an independent, transparent, and effective disciplinary process.

[21] Professional standards must be maintained. The aspects 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.

[22] Generally speaking, orders under s.93 must be proportionate to the offending and to the range of available orders. Essentially, we consider that the original requirement of the complainant vendors, i.e. to provide a fair share of commission to Mr Robertson, must be enforced.

[23] Some of our reasoning in our said substantive decision of 3 March 2015 reads:

> *"[76] The licensees seem to think that commission was not to be split unless the property was to be sold at auction. As covered above, they opine that it is industry practice that under a joint agency the selling agency takes all the commission. That may well be so; but in the present case the vendors' firm instruction was that commission be shared fairly between the agencies and the vendors believe that the licensees agreed to that. The complainants made it very clear at all times that they required Mr Robertson to be involved and receive a fair part of any sale commission. His evidence is that he expected some share of commission but there had been no explicit discussion about the precise sharing, except that if the property was sold by auction the split would be 50/50.*
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> *[77] Ms Lawson-Bradshaw emphasised that, in her cross-examination of Ms Paterson, the latter accepted that the licensees had not spelt out to the complainants that Mr Robertson would no longer be receiving any share of commission if the property was sold through the Harcourts agency and not by auction.*
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> *[78] The essence of Mr Corbett's approach is that there was no arrangement between Mr Robertson and the two second respondent licensees about splitting commission if the property was not sold by auction. He asserts that if the property had been sold by auction 'there would have been no hesitation in paying Mr Robertson commission'. He also asserts that he does not recall Mr and Mrs Burrows stating that, regardless of the mode of sale, Mr Robertson is to be paid a share of commission. That recollection, or lack of it, is surprising in terms of the evidence of the complainants as we have covered it above." …..*
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> *[80] Frankly, the said listing agreement is rather untidy and imprecise. However, it broadly complies with s.128 of the Act, although it does not specify the manner of splitting commission between the two agencies, but it does cover the liability of the vendors to commission. We consider that the listing agreement does not comply with Rule 9.10 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which reads:*
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> > *'9.10 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.'*
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> *[81] A material particular in the listing in this case was the manner in which commission be split. That has not been covered, so that these proceedings have eventuated. The licensees prepared and managed the listing agreement. Having said that, Mr Robertson knew about the joint listing and should have been more pro-active to protect himself in terms of the complainant vendors' directions to the licensees about splitting of commission. …..*
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> *[83] The relevant complaint is against the licensees and they failed to act in accordance with the instructions of the vendors to fairly involve Mr Robertson in sharing commission.*
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> *[84] We record that, in terms of the Act, the Committee carefully decided these issues 'on the papers', whereas we have heard very full evidence and are able*

to assess credibility of witnesses. We accept the evidence of the complainants and of Mr Robertson. The licensees seem honest people but rather confused as to what they agreed with the complainants about sharing commission with Mr Robertson.

[85] There seems to us to have been a clear understanding that a commission share be received by Mr Robertson, and on the basis that the property would not be sold by auction. It seems illogical that the licensees thought that there was only to be a commission share if the property was sold by auction when their firm instructions from the outset were to sell the property but not by auction.

[24] In terms of our assessment of the particular facts of this case and general sentencing factors, we find:

1. The licensees are fined $1,000 each to be paid to the Registrar of the Authority at Wellington within one calendar month of this decision, and

2. The licensees are to refund to the complainant vendors 20% of the said commission (i.e. the sum of $5,675) within two calendar months of this decision on the basis that those appellants then, forthwith, pay it to Mr Robertson, less $200 towards their expenses claimed above.

[25] 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

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Mr G Denley
Member

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Ms N Dangen
Member