

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 54

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 (Vendors)

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

First respondent

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

Second respondents (Licensees)

**MEMBERS OF TRIBUNAL**

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

**BY CONSENT HEARD ON THE PAPERS**

**DATE OF OUR DECISION HEREIN ON PENALTY** 22 May 2015  
[2015] NZREADT 40

**DATE OF THIS DECISION ON APPLICATION FOR RECALL** 16 July 2015

**REPRESENTATION**

Mr P J Napier, counsel for the applicant/licensees  
Mr V E Goodman, counsel for the vendors  
Ms K Lawson-Bradshaw, counsel for the Authority

**DECISION OF THE TRIBUNAL ON APPLICATION FOR RECALL**

***Introduction***

[1] On 22 May 2015 we issued a decision [2015] NZREADT 40 on penalty between the above parties in which we dismissed the vendors' appeal against the penalty imposed on the licensees by Complaints Assessment Committee 306 on 1 October 2014 for unsatisfactory conduct.

[2] On 22 May 2015 counsel for the second respondent licensees filed an application to recall our decision on the basis that we had not addressed the licensees' position i.e. their cross-appeal on penalty; and, given our reasoning in paragraphs [40] to [42] of our said decision of 22 May 2015 on penalty, that we should have quashed the Committee's order that the licensees refund part of the commission.

[3] In that decision on penalty we set out the basic facts as:

***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."*

[4] That seems to have been about three weeks from the signing of the agreement for sale and purchase.

[5] We also noted that:

***"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.*

*[9] 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."*

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

[11] 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."

[6] We now set out paragraphs 40 to 44 of that penalty decision of ours.

"[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.*

[7] There is no dispute that, in the said penalty proceedings before us, the second respondent licensees also cross appealed the Committee's penalty determination. Indeed Mr Napier's submissions as counsel for the licensees of 27 February 2015 covered that cross appeal aspect as follows:

"(a) *The second respondents have formally filed a cross claim. It is acknowledged, however, that there appears to be no particular provision for a cross appeal to be filed. Nevertheless, the second respondents have formally notified their position.*

(b) *It is submitted that there is no requirement for a cross appeal to be filed because section 111(4) of the Real Estate Agents Act 2008 provides:*

*"After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee."*

(c) *The second respondents therefore set out, the basis that they believe that the Committee's decision should be modified, and the reasons for the same. This also addresses the basis of the appellants' argument."*

[8] The appellant vendors had sought compensation for the loss incurred as a result of the licensees failing to insert a clause into the Sale and Purchase Agreement setting out that the kitchen in the property was non compliant but that the purchasers acknowledged that and would make no claim against the vendors in that regard. It was submitted for the licensees that no commission should have been refunded as this was just an indirect way to compensate the appellant vendors.

### ***Legal Principles of Recall***

[9] There is no dispute that as set out in *Horowhenua County v Nash (No. 2)* [1968] NZLR 632, there are three main circumstances when a recall decision may be recalled, namely:

- [a] Since the hearing there has been an amendment to a relevant statute or regulation or a new decision of relevance in higher authority;
- [b] Counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; or
- [c] Some other special reason means that justice requires the judgment to be recalled.

### ***The Submissions for the Applicant Licensees***

[10] The applicants maintain that we did not address their cross appeal when giving our said decision of 22 May 2015 on penalty herein. Counsel for the applicants, Mr Napier, puts it that when an argument is not addressed, the correct procedure is to have the judgment recalled, and not appeal it as there is nothing to appeal. He puts it that the present application comes within the third limb of *Horowhenua County v Nash (No. 2)* [1968] NZLR 632. He submits that justice requires the recall of the decision for a party's argument to be addressed. Mr Napier refers to *Brake v Boote*

(1991) 4 PRNZ 86, where (he puts it) in recalling a judgment in just this situation, Holland J stated:

*“I am satisfied that within the words of Wild CJ this is a case where for ‘very special reason justice requires that the judgment be recalled’. One would hope that it would be a very special occasion when a Judge failed to determine an issue that was properly put before him. I am satisfied that it is, and I am satisfied that justice requires that error to be corrected.”*

[11] Mr Napier submits that in our penalty decision we only turned our mind to the appellants’ appeal and not to the cross appeal from the respondent licensees. He puts it that is abundantly clear from our paragraph [44] where we state *“Accordingly, this appeal against penalty is dismissed”*. We accept that paragraph can be taken as Mr Napier has and we did not specifically refer to the cross-appeal application to modify the Committee’s findings.

[12] Accordingly, Mr Napier submits for the licensees that their cross appeal must be specifically addressed and it is not adequate for us to have dealt with it obliquely *“if, which is denied, it was dealt with at all”* as he puts it.

### ***The Submissions for the Vendors***

[13] Mr Goodman refers to aspects of our said penalty decision which he regards as reasoned, particularly, in terms of our deciding that the sentencing package imposed on the licensees by the Committee was fair and just and was confirmed by us.

[14] Inter alia, he puts it that the Committee’s findings regarding the conduct of the second respondent licensees were damning and he refers to aspects of the Committee’s decision in that respect. He then puts it that the licensees should consider themselves fortunate that the Committee, and us, restricted the licensees to only refunding 30% of the commission to the vendors (i.e. a refund of \$10,453.50). Mr Goodman submitted that the licensees have never disputed the findings of the Committee in regard to the conduct of the licensees, nor have the latter ever denied that they failed to meet proper standards of conduct.

[15] Mr Goodman also submits that it is clear from our decision that we did not overlook or ignore the cross-appeal of the licensees and the submissions made by Mr Napier on their behalf, and that we gave proper consideration and weight to them, so that our decision on penalty should stand.

### ***The Stance of the Authority***

[16] Essentially Ms Lawson-Bradshaw (as counsel for the Authority) focuses on paragraph [42] of our penalty decision, which is set out above, and submits that it demonstrates that we did consider the cross appeal of the licensees and that our final sentence of that paragraph, in particular, sets out the jurisdiction for a partial refund of commission.

### ***Discussion***

[17] We accept that the said paragraph [44] of our penalty decision does not specifically refer to our dismissing the cross-appeal from the licensees. However, we consider we dealt with all the issues raised by their counsel, Mr Napier, and after

quite some thought decided as we did. Accordingly, we did not accept the cross-appeal on penalty just as we had not accepted the case for the appellant vendors on penalty. We take the view that, in our penalty decision of 22 May 2015, we carefully covered all appropriate submissions and issues. We also recorded the salient parts of the Committee's decision which is rather critical in its concerns about the conduct of the licensees.

[18] Essentially, Mr Napier is putting it that, in terms of our reasoning in our said penalty decision, no part of the commission achieved by the licensees in selling the property of Mr and Mrs Vucich (in the name of their Coastal Paradise Trust) should have been taken back from the licensees in favour of those vendors.

[19] We consider that our said paragraphs [40] to [43] of the penalty decision in issue are self explanatory. It is a matter of surmise as to what would have been the price or sale outcome if there had been the said disclosure of the non-compliant kitchen in the agreement of sale and purchase. We felt that the penalties imposed by the CAC, including the partial refund of commission, were fair and just in all the circumstances.

[20] In terms of the general law on recall of a decision, we do not think that the applicant licensees have made out a case and we have set out the relevant legal principles above. In any case, we adhere to the view which we expressed in our said penalty decision herein of 22 May 2015 and the relevant paragraphs are set out above.

[21] Accordingly, the application of the licensees for recall is hereby dismissed.

[22] 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