

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 55

READT 010/15

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **PHILIP HORROBIN**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 30001)**

First respondent

AND **LONGLONG TIAN**

Second respondents

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Ms N Dangen – Member
Mr G Denley – Member

HEARD at AUCKLAND on 15 JUNE 2015

DATE OF DECISION 20 July 2015

APPEARANCES

Mr Bigio for the appellant
Ms Copeland for the first respondent
Mr Tian in person with translator

DECISION OF THE TRIBUNAL

The Issue

[1] Mr Horrobin is the licensee of City Realty Limited trading as Ray White City Apartment Sales. A member of his staff is a Mr James Mairs. Mr Mairs is a licensed salesperson who listed for sale an apartment at 110/85 Wakefield Street, Auckland. Mr Tian was the purchaser of the property at auction. Unfortunately he has not been able to complete this sale because it has transpired that the owner of the property, a Mr Tony Rees, the director of T Rees Investments Limited had not authorised the sale of this property. Mr Mairs had had previous dealings with a Mr David Waine who was the accountant for Mr Rees. Mr Waine signed the listing agreement on the company's behalf. This had apparently happened before and so Mr Mairs accepted Mr Waine's statement that he had authority to sell the property for Mr Rees. In an email dated 19 March 2013 Mr Wayne said "*Hi James, yes I have been instructed by*

Tony to have the property sold. He wishes to minimise his ongoing exposure regards David". The listing agreement was not signed by Mr Rees but signed by Mr Waine on his behalf and sent to Mr Mairs in an email dated 6 March 2013. In this email the signed listing agreement came back marked "*signed T Rees*" in the body of the email.

[2] Not unnaturally, when Mr Tian discovered that he could not complete the sale he complained about the actions of the agent. Mr Mairs is facing a charge which will be heard by this Tribunal sometime in late June or early July 2015.¹ The Complaints Assessment Committee found that Mr Horrobin was guilty of failing to supervise Mr Mairs. In a decision dated 29 August 2014, the Committee said:

"The Committee is surprised that the agency would allow a listing to be completed without:

- (a) Confirmation from the owner as to the accuracy of the information provided in the listing;*
- (b) Ensuring that the person signing the listing agreement had appropriate authority to do so; and*
- (c) Ensuring that proper authorisation was held from the proper owner to take the property to auction.*

The Committee has therefore concluded that:

- (i) The agent as agent and supervisor of licensee 2 should have ensured that the appropriate controls were in place to avoid such situations occurring and therefore must take responsibility for the situation that has occurred and the impact on the complainant."*

[3] They therefore found Mr Horrobin guilty of unsatisfactory conduct. In their penalty decision dated 29 January 2015 the Complaints Assessment Committee ordered that Mr Horrobin:

- (a) be censured;
- (b) he apologise in writing to Mr Tian within 21 days;
- (c) that he pay a fine of \$3,000; and
- (d) that he undertake further training in relation to management of a real estate business. The Complaints Assessment Committee said that within three months of the order he was to complete Unit Standard 26154 "*demonstrate knowledge of requirements for properly supervising and managing a real estate business*".

[4] Mr Horrobin appeals the penalty decision. Mr Bigio has submitted that there is [and was] absolutely no evidence to suggest that there was or is a lack of proper supervision within the agency. Mr Bigio submitted that this was a case in which an

¹ The Tribunal discussed with Mr Bigio whether the fact that Mr Mairs' breach of any Rule had not been established affected Mr Horrobin. Mr Bigio said that Mr Horrobin acknowledged that the lack of signature should have been checked.

error was made but the error was not systemic. Mr Bigio submitted that no additional training is required.

[5] The Tribunal wished to hear evidence from Mr Horrobin as to the supervision that he undertook of staff and the checks that were undertaken by the agency to ensure that only actual owners can sell property. Mr Horrobin therefore gave evidence.

[6] Mr Horrobin told the Tribunal that City Realty had regular training sessions with Fortune Manning Solicitors which went through all aspects of the sale process with agents including ensuring that the listing authority was correctly signed and how agents should follow the title to make sure the contract is binding on the owner of the property.

[7] After these events Mr Horrobin engaged a Mr Crews (who is a leading industry-based compliance investigator) to undertake a review of the entire listing processes undertaken by the agency to ensure compliance with the Act and Rules. Mr Horrobin told the Tribunal that Mr Crews had made some suggestions but had not found any systemic failures.

[8] Mr Horrobin told the Tribunal he took responsibility for not checking this listing but that Mr Mairs and Mr Waine had a course of dealings which had led Mr Mairs to believe that Mr Waine had authority to sell the property on Mr Rees' behalf. Mr Horrobin acknowledged however that if he had been aware of this fact he would have ensured that an actual authority from Mr Rees was obtained.

The REAA position

[9] The Real Estate Agents Authority submitted that the penalty was appropriate for the finding of unsatisfactory conduct was not manifestly excessive.

Approach on appeal

[10] Despite the apparently conflicting decisions as to whether or not an appeal on a penalty has a general right of appeal or is an appeal from a discretion the Tribunal is content to accept that the decision of Kacem v Bashir [2010] NZSC 110 applies. Thus this Tribunal should make a decision on the facts and apply the law so that Mr Horrobin is entitled to a judgment in accordance with the opinion of this Tribunal acting as an appellate body.

What is the correct penalty?

[11] The Tribunal consider that the censure of Mr Horrobin and the apology (which has been provided) were both appropriate remedies.

[12] A penalty in a professional disciplinary case serves two main purposes: protection of the public and maintaining standards.

[13] Having heard evidence from Mr Horrobin we do not consider that the order that Mr Horrobin undertake further training is needed for the maintenance of standards, or protection of the public. The evidence we have heard demonstrates that Mr Horrobin does adequately supervise the City Realty business and has taken appropriate steps to reassess his supervision in light of this case.

[14] We agree with the Complaints Assessment Committee that a fine is required. The maximum fine that can be imposed by the Tribunal for unsatisfactory conduct is the sum of \$10,000. We consider that this breach was at the lower end of the scale being an error in checking that the actual authority existed. Whether in fact there has been a breach of Mr Mairs' obligations is still a matter which is to be determined. Accordingly in all the circumstances we think that \$3,000 fine, or a third of the maximum fine is too high for a lower level offence and the appropriate figure would be the sum of \$1,500. We therefore determine that Mr Horrobin should pay a fine of \$1,500.

[15] Accordingly the Tribunal amend the decision of the Complaints Assessment Committee by substituting for its penalty finding the following penalty:

- (a) Mr Horrobin is censured.
- (b) Mr Horrobin is to provide an apology to Mr Tian (already provided).
- (c) Mr Horrobin is to pay a fine of the sum of \$1,500.

[16] The Tribunal draws the parties' attention to the provisions of Rule 116 of the Real Estate Agents Act 2008.

Ms K Davenport QC
Chairperson

Ms N Dangen
Member

Mr G Denley
Member