BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 60

READT 004/14

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE 20002**
AND	**JOHN CHAND (a licensed salesperson)**
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

SUBSTANTIVE CASE HEARD at AUCKLAND on 3 and 4 September 2014

SUBSTANTIVE DECISION ISSUED 18 December 2014 – [2014] NZREADT 102

DATE OF THIS DECISION ON PENALTY (HEARD ON THE PAPERS)
12 August 2015

COUNSEL

Ms S M Earl for Prosecuting Committee
Mr P J McDonald for defendant

DECISION OF THE TRIBUNAL ON PENALTY

[1] In our substantive decision herein of 18 December 2014 we covered the evidence and submissions and explained our then finding of unsatisfactory conduct against the defendant in some detail. We set out our views as follows:

> *"**Outcome***
>
> *[57] In the course of the process from the laying of the charge to the matter being heard before us, the prosecution, quite appropriately and sensibly, dropped the actual charges of misconduct under s.73 of the Act and focused on there being unsatisfactory conduct on the part of the defendant in terms of s.72, in as much as there has been a breach of s.136 of the Act. That there has been such a breach cannot be disputed from the evidence and, indeed, has been admitted on behalf of the defendant; in any case, we so find.*
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> *[58] We realise that Mr McDonald submits on behalf of the defendant that, in all the circumstances, we not enter a finding of unsatisfactory conduct and, presumably, he seeks that we find that no further action be taken.*

[59] However, we find that there has been unsatisfactory conduct because s.136 has simply not been complied with. The defendant failed to disclose in writing to the prospective purchaser of the property that he and his wife might (and/or their company) benefit financially from the transaction. In terms of s.136(3) that disclosure was required before any contractual documents were provided to the prospective purchaser. The principle in s.136 is very important for the proper functioning of the real estate industry and its breach will almost always, we expect, amount to unsatisfactory conduct at least; and we have found that it does in all the circumstances of this case.

[60] It is axiomatic that ignorance of the law is no excuse. In any case, it is surprising that, one year after that requirement became the law, experienced real estate agents were seemingly unaware of it.

[61] We are, of course, conscious of the various mitigating factors put to us by Mr McDonald and we, particularly, take into account that in marketing the property the defendant was open in orally expressing his interest as shareholder with his wife and director of the vendor company; and that he has a good record; and we can accept that these proceedings have caused stress and expense; and also one would have expected his supervising agent to have impressed the need upon him to comply with s.136. We do not see it as particularly mitigating that no harm was done.

[62] We take into account that the licensee has not transgressed against Kiwibank in terms of the Act or the Rules.

[63] If either party wishes, there will be a further hearing to deal with penalty and the Registrar would, in such case, arrange a timetable conference (to fixture for a penalty hearing) with our Chairman by telephone in the usual way. However, we can indicate to the parties that our present view is that, due to our finding of unsatisfactory conduct, we would fine Mr Chand $1,000 (to be paid within one calendar month to the Registrar of the Authority at Wellington). If such a penalty fits with both parties there will be no need to deal further with penalty and we would simply order accordingly."

Further Submissions on Penalty

[2] Both parties take the view that they were fully heard on the issue of penalty prior to our said substantive decision of 18 December 2014. However, on behalf of the prosecution, Ms Earl maintains the submission that a penalty similar to that we imposed on Ms Clark in *Clark v Real Estate Agents Authority (CAC 20004)* [2014] NZHC 1611 (i.e. a fine in the vicinity of $3,000 and a censure) is appropriate.

[3] Mr P J McDonald, as counsel for the defendant, simply records that he was fully heard on the question of penalty prior to our said substantive decision and leaves it to us to now deliver our decision on penalty.

Discussion

[4] In our said substantive decision herein we first refer to *Clark* at paragraph [23] when we stated:

"[23] We emphasise the requirements of s.136(1). Section 136 was recently considered by the High Court in Clark v Real Estate Agents Authority (CAC

20004) [2014] NZHC 1611. The issue in that case was whether written disclosure of a possible financial benefit to the licensee was required to be made by the appellant when the contractual documents were provided by a different individual licensee within the same licensed agency. The Court (per Moore J) reviewed the legislative context and background to the Act in examining the meaning and purpose of s.136 and found as follows:

> *"[46] Its purpose is plain It is designed to protect prospective purchasers through transparency. Prospective purchasers are entitled to be aware of the identity of those they are dealing with. Are they dealing with the owner or someone related to the owner or is this a normal, commercial arm's length transaction? Such disclosure permits the prospective purchaser to assess the weight to be given to representations made by the salesperson. It assists the prospective purchaser in making an informed decision as to the way they conduct themselves in negotiations."* [Emphasis added]

[24] The Court agreed with us that the duty is an ongoing one which crystallises, at the latest, at the time the contractual document is provided to the prospective purchaser, and that the duty is not restricted only to those licensees who actually present contractual documents."

[5] Further relevant references in that decision to *Clark* were in the following paragraphs:

> *"[33] As Ms Earl submits, the importance of disclosure for the purposes of s.136 has been confirmed in Clark, given the need to protect consumer interests through transparency. The rule is not technical in nature, but provides a clear requirement for there be a written record of the fact that a licensee may benefit financially from the transaction.*
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> *[34] Ms Earl notes that the licensee relies on the fact that he made verbal disclosure of his interests but submits that this is not sufficient to avoid liability under s.72. We agree. In Clark, we had found as a matter of fact that there had been oral advice that one of the licensees may benefit financially from the transaction but we still made a finding of unsatisfactory conduct. On appeal, Moore J observed that it followed from the oral advice that the licensees understood the moral need to alert the purchaser of the potential benefit, even if they did not know of the specific requirements imposed on them by s.136 (the Court commenting that this lent further support to the policy imperatives implicit in the obligations created by s.136). The Court confirmed the requirement is written disclosure and observed that if there had been written disclosure, there would be no room for any lack of clarity."*

[6] We are conscious that in our substantive decision of 18 December 2014 herein we set out in quite some detail the submissions from both counsel including in relation to penalty and we see little point in repeating those. Indeed having taken those into account we set out our views on penalty in paragraph [63] of that decision (also set out above). We endeavoured to follow standard principles of sentencing including factors such as aggravating and mitigating features, and remorse. We do not see the facts of this case as quite as concerning as those of the *Clark* case.

[7] We accept, of course, that the principal purpose of the Act is to promote and protect the interests of consumers in respect of real estate transactions and promote

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.

[8] Professional standards must be maintained. The aspects of deterrence and denunciation must be taken into account. 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. 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.

[9] In terms of our assessment of the facts of this case, which we covered in quite some detail in our said substantive decision, and in terms of general sentencing factors, we fine Mr Chand $2,000 to be paid within one calendar month to the Registrar of the Authority at Wellington.

[10] 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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Ms N Dangen
Member

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Ms C Sandelin
Member