

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 66

READT 078/13

IN THE MATTER OF charges laid under s.91 of the Real Estate Agents Act 2008

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE (CAC 20007)**

Prosecutor

AND **MARION-ROSE JARMAN**

Defendant

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 21 September 2015

COUNSEL

Mr L J Clancy for the prosecution
Mr R B Quin for the defendant

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Marion Jarman has pleaded guilty to two charges of misconduct as a real estate salesperson. Essentially, on two occasions she purchased a residential property in Huntly from Housing NZ Ltd without a signed agency agreement nor an adequate appraisal, and very soon on-sold those properties without disclosing in writing to the purchasers that she would benefit financially from the respective transaction. Those charges read in full as follows:

“Charge 1

7 Chisholm Street, Huntly

- 1. Following a complaint by Douglas Boyde (complainant), Complaints Assessment Committee 20007 (Committee) charges Marion-Rose Jarman (defendant) with misconduct under s.73(c) of the Real Estate Agents Act 2008 (Act) in that her conduct consisted of a wilful or reckless breach of the*

Act and/or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules), namely:

- (a) Rule 6.1; and/or,*
- (b) Rule 6.2; and/or,*
- (c) Rule 6.3 and/or,*
- (d) Rule 9.1; and/or,*
- (e) Rule 9.5; and/or,*
- (f) Section 126; and/or,*
- (g) Section 136.*

Particulars:

By way of an agreement for sale and purchase dated 4 July 2011, the defendant agreed to purchase a property at 7 Chisholm Street, Huntly, from Housing New Zealand Ltd for \$60,000.

The defendant acted as salesperson on the transaction, and commission was charged, without a signed agency agreement.

The written appraisal provided to Housing New Zealand Ltd was not supported by comparable information on sales of similar land.

By way of an agreement for sale and purchase dated 29 July 2011, the defendant agreed to sell the property at 7 Chisholm Street to Megan Turrall and Mark Boniface for \$108,000. The defendant again acted as salesperson on the transaction.

The defendant failed to disclose in writing to the purchasers that she would benefit financially from the transaction.

The purchase and on-sale settled contemporaneously on 8 November 2011, resulting in a profit to the defendant of \$48,000.

Charge 2

9 Smith Avenue, Huntly

2 The Committee further charges the defendant with misconduct under s.73(c) of the Act in that her conduct consisted of a wilful or reckless breach of the Act and/or the Rules, namely:

- (a) Rule 6.1; and/or,*
- (b) Rule 6.2 and/or,*
- (c) Rule 6.3; and/or,*
- (d) Rule 6.4; and/or,*

- (e) Rule 9.1; and/or,
- (f) Rule 9.5; and/or,
- (g) Section 126; and/or,
- (h) Section 134; and/or
- (i) Section 136.

Particulars:

By way of an agreement for sale and purchase dated 29 July 2011, the defendant agreed to purchase a property at 9 Smith Avenue, Huntly, from Housing New Zealand Ltd for \$80,000.

The defendant acted as salesperson on the transaction, and commission was charged, without a signed agency agreement.

No written appraisal was provided to Housing New Zealand Ltd.

The defendant failed to obtain the signed consent of the vendor to her purchase of the property.

By way of an agreement for sale and purchase dated 25 July 2011, the defendant had already agreed to sell the property at 9 Smith Avenue to Roland and Lilian Naylor for \$120,000. The defendant again acted as salesperson on the transaction.

The defendant failed to disclose in writing to the purchasers that she would benefit financially from the transaction.

The purchase and on-sale settled contemporaneously on 14 December 2011, resulting in a profit to the defendant of \$40,000.

In the alternative:

Charge 3

3. *If the Tribunal, after hearing the charges above, is not satisfied that the defendant is guilty of misconduct, the Committee further alleges that the defendant has engaged in unsatisfactory conduct and seeks a finding under s.110(4) of the Act.*

Paul Biddington
Chairperson
Complaints Assessment Committee 20007

13 December 2013

Date”

[2] While acknowledging that penalty is a matter for us, counsel for the Committee and counsel for the licensee have engaged in constructive discussions as to what penalty orders might be appropriate in this case. The parties agree that, in all the circumstances, the following orders would appropriately reflect the misconduct admitted:

- [a] An order cancelling Ms Jarman’s licence, under s.110(2)(b) of the Real Estate Agents Act 2008 (Act); and
- [b] A fine in the range \$5,000-\$10,000, under s.100(2)(f) of the Act.

[3] Should we agree that the above orders are appropriate, the prosecution does not seek any further orders, including orders for costs or compensation.

General Principles on Penalty

[4] It is well established that penalty decisions of professional disciplinary tribunals should emphasise the maintenance of high 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: *Z v CAC* [2009] 1 NZLR 1; *CAC v Walker* [2011] NZREADT 4.

[5] As Ms Jarman has pleaded guilty to misconduct, we may make any of the orders set out in s.110(2) of the Act which reads:

“110 Determination of charges and orders that may be made if charge proved

...

(2) *The orders are as follows:*

- (a) *1 or more of the orders that can be made by a Committee under section 93:*
- (b) *an order cancelling the licence of the licensee and, in the case of a licensee that is a company, also cancelling the licence of any officer of the company:*
- (c) *an order suspending the licence of the licensee for a period not exceeding 24 months and, in the case of a licensee that is a company, also suspending the licence of any officer of the company for a period not exceeding 24 months:*
- (d) *an order that a licensee not perform any supervisory functions until authorised by the Board to do so:*
- (e) *an order, in the case of a licensee who is an employee or independent contractor, or former employee or former independent contractor, that any current employment or engagement of that person by a licensee be*

terminated and that no agent employ or engage that person in connection with real estate agency work:

- (f) *an order that a licensee who is an individual pay a fine not exceeding \$15,000 and order a licensee that is a company pay a fine not exceeding \$30,000:*
- (g) *where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct, an order that the licensee pay to that person a sum by way of compensation as is specified in the order, being a sum not exceeding \$100,000."*

Agreed Facts

[6] At all relevant times, Ms Jarman was working for Countrywide Real Estate Ltd, trading as Century 21 Countrywide in Huntly.

[7] During the time that Ms Jarman was working for Century 21, she purchased a number of properties that she had been instructed to sell by Housing New Zealand Ltd. The properties were purchased either directly or through Ms Jarman's company or children. She then on-sold a number of the properties for significant profits.

[8] The charges relate to two of those properties: 7 Chisholm Street and 9 Smith Avenue, Huntly.

7 Chisholm Street, Huntly

[9] Century 21 provided HNZ with a 3 December 2010 appraisal in respect of this property in the amount \$65,000-\$70,000. The appraisal does not comply with Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 in that it is not supported by comparable information on sales of similar land.

[10] On 18 January 2011, HNZ Programme Manager Tony Osborne instructed Ms Jarman by email to list the property for \$70,000. On 3 June 2011, Mr Osborn emailed Ms Jarman again, stating "*we are allowed to recommence our sales programme*" and instructing again that the property should be listed at \$70,000.

[11] HNZ received its own valuation of the property from QV Valuations, dated 21 June 2011, at \$60,000. A second valuation, addressed to Ms Jarman from M B Lascelles & Associates and dated 20 June 2011, valued the property at \$55,000.

[12] Mr Osborne signed a document consenting to Ms Jarman purchasing the property dated 4 July 2011. The consent document is in a standard form referring to ss.63 and 64 of the Real Estate Agents Act 1976 rather than s.135 of the Act.

[13] By way of an agreement for sale and purchase dated 4 July 2011, Ms Jarman agreed to purchase the property in her own name for \$60,000. That agreement lists Ms Jarman as salesperson on the transaction (with Bill Broyd), and Century 21 charge \$3,450 commission on the sale.

[14] Despite enquiries at both Century 21 and HNZ, no listing agreement has been located in respect of the sale from HNZ to Ms Jarman. Bill Broyd has confirmed that,

when he worked with Ms Jarman, she was responsible for completing agency agreements and appraisals.

[15] When interviewed by the Authority's investigator, Mr Osborne suggested that there may not have been an agency agreement in place as it was not unusual for him to simply confirm sales/listing prices with Century 21 by email (as was the case with this transaction).

[16] By agreement for sale and purchase dated 29 July 2011, just three and a half weeks after she had purchased the property, Ms Jarman agreed to sell the property at 7 Chisholm Street to Megan Turrall and Mark Boniface for \$108,000. That agreement shows Ms Jarman as salesperson on the transaction and Century 21 charged commission.

[17] Ms Turrell states that Ms Jarman told her that she (Ms Jarman) was the vendor of the property and that she (Ms Turrall) was aware Ms Jarman would make a profit on the sale. However, Ms Jarman failed to provide formal written disclosure that she would benefit financially from the transaction as required by s.136 of the Act.

[18] The purchase and on-sale settled contemporaneously on 8 November 2011, resulting in a profit to the defendant of \$48,000.

9 Smith Avenue, Huntly

[19] By email dated 23 June 2011, Mr Osborne asked Ms Jarman to provide a market appraisal for 9 Smith Avenue, Huntly. No appraisal has been located, either on the HNZ file or the Century 21 file. By 7 July 2011 email, Mr Osborne instructed Ms Jarman to list 9 Smith Avenue at \$90,000.

[20] HNZ again received its own valuation of the property from QV Valuations. That 28 June 2011 valuation was for \$80,000. Again, a second valuation has been located, addressed to Ms Jarman, from M B Lascelles & Associates. The second valuation is dated 11 August 2011 and also valued the property at \$80,000.

[21] By 25 July 2011 agreement for sale and purchase Ms Jarman agreed to sell the property to Roland and Lilian Naylor for \$120,000 (\$30,000 above the HNZ list price). As at the date of the agreement, Ms Jarman was not the owner of the property as she had not yet signed an agreement to buy it.

[22] Under a 29 July 2011 agreement for sale and purchase (four days after the Naylor agreement), Ms Jarman agreed to purchase the property from the original vendor, HNZ, for \$80,000 (\$10,000 below list price and \$40,000 below the Naylor offer). That agreement again shows Ms Jarman as the salesperson acting on the purchase from HNZ and again, Century 21 charged HNZ commission on the sale (\$4,255). The Naylor agreement records a "sale by" Century 21 which charged commission on that sale also.

[23] Again, no listing agreement has been located in respect of the sale from HNZ to Ms Jarman, either at Century 21 or HNZ.

[24] The fax header on the HNZ agreement is dated 29 July (the date of the agreement) and Ms Jarman admitted to the Authority's investigator, Mr Gallacher, that she on-sold the house when she "*didn't have the official sale agreement from Housing*

Corp". The Naylor's solicitor confirms that her clients gave her a copy of their agreement on 27 July 2011.

[25] HNZ never gave written consent to Ms Jarman acquiring this property, although an unsigned and undated consent form in respect of the transaction was provided by Century 21.

[26] Mr Naylor states that he believed he was purchasing the house from HNZ or Century 21, not from Ms Jarman personally. Ms Jarman again failed to provide written disclosure that she would benefit financially from that on-sale transaction as required by s.136 of the Act.

[27] The purchase and on-sale settled contemporaneously on 14 December 2011, resulting in a profit to the defendant of \$40,000.

[28] Through her guilty pleas, Ms Jarman has accepted that she wilfully or recklessly breached:

- [a] Her disclosure obligations under the Act (ss.134 to the vendor that she is purchaser and 136 to the purchaser that she may benefit financially);
- [b] Her duty to charge commission only under a proper agency agreement (s.126 of the Act);
- [c] Her fiduciary duties to her client (Rule 6.1);
- [d] Her duty to deal fairly and in good faith with the other parties to the transactions (Rule 6.2);
- [e] Her duty not to engage in behaviour likely to bring the industry into disrepute (Rule 6.3);
- [f] Her duty not to mislead a customer or client, nor provide false information, nor withhold information that should, by law or fairness be provided (Rule 6.4);
- [g] Her duty to act in the best interests of her client (Rule 9.1);
- [h] Her duty to provide a proper appraisal (Rule 9.5).

Submissions for the Prosecution

[29] As counsel for the prosecuting Authority, Mr Clancy submits that the two transactions described above raise a number of very serious disciplinary concerns.

[30] In both cases, Mr Jarman facilitated sales to herself as salesperson without an agency agreement in place. Century 21 charged commission on both sales, in breach of s.126 of the Act.

[31] Ms Jarman also breached Rule 9.5 on both transactions. The appraisal provided to HNZ in respect of 7 Chisholm Street did not comply with the requirements of the rules regarding comparable sales and no appraisal at all was provided for 9 Smith Avenue.

[32] The licensee breached s.136 in both cases, by failing to disclose in writing to the respective purchasers that she stood to benefit financially from the transaction. In respect of 9 Smith Avenue, Ms Jarman also breached s.134 by failing to obtain written consent from HNZ to her purchase.

[33] Most serious, in the Committee's submission, are the professional implications of the level of profit generated by the contemporaneous on-sales in both cases.

[34] While it is not impermissible for a licensee to enter into a sale and purchase agreement with a client (provided ss.134 to 136 are complied with) and, before settlement, to enter into an on-sale agreement with a third party at an increased sale price (giving disclosure under s.136), such transactions carry an inherent risk of conflict between a licensee's own interests and those of the vendor client and of the ultimate purchaser.

[35] A number of the Rules may be engaged and licensees must ensure that those Rules are not breached. For example, a licensee must take scrupulous care not to breach fiduciary obligations owed to his or her vendor client (Rule 6.1), to deal fairly and in good faith with all parties to the transactions (Rule 6.2) and not to mislead the ultimate purchaser (Rule 6.4).

[36] Mr Clancy submits that Ms Jarman clearly breached those rules on both transactions. As he put it, to agree to sell 9 Smith Avenue to the Naylor for \$120,000 in her own name and then, four days later, to agree to purchase the property from her client for \$80,000 was a blatant breach of fiduciary duty. In effect, she diverted the extra \$40,000 the Naylor were willing to pay from her client to herself. It was also a breach of the duty to act fairly and in good faith towards the Naylor to step in between them and the vendor in the way Ms Jarman did.

[37] While Ms Jarman's purchase of 7 Chisholm Street preceded her sale of that property, the time between the purchase and the on-sale was very short (less than a month) and there was no active marketing campaign or renovations to account for the significant profit generated (\$48,000). There is an available inference that Ms Jarman either offered HNZ a price she knew was too low and could easily be bettered on the open market, or that the price negotiated with Ms Turrell was unfairly inflated. Either way, Ms Jarman did not deal fairly and in good faith with both parties, and that was seriously aggravated by her failure to comply with the proper disclosure requirements.

[38] The breach of disclosure obligations, taken alone, is, in the Committee's submission, a serious matter, requiring a firm response by us; and, once the breaches of fiduciary and fair-dealing duties are factored in, the only appropriate penalty is one of cancellation of licence.

[39] While acknowledging that the issue of penalty is ultimately one entirely for us, the prosecution respectfully invites us to adopt the agreed position of the parties, namely, that the following orders would appropriately reflect the misconduct admitted in the present case:

- [a] An order cancelling Ms Jarman's licence;
- [b] A fine in the range \$5,000-\$10,000.

Submissions for the Defendant as to Penalty

[40] Mr Quin, as counsel for the defendant, emphasises that the guilty pleas were entered prior to a hearing being arranged for this prosecution. He also refers to discussions between the prosecution and the defendant leading to their joint view that it be put to us that the appropriate penalty in this case would be a moderate fine and order cancelling the defendant's licence as a real estate salesperson.

[41] He confirmed that there is no dispute of fact and the facts are as set out above.

[42] Mr Quin advised that in November 2013 the Committee made a finding of unsatisfactory conduct against Ms Jarman's employer Countrywide Real Estate ("Countrywide") in relation to conduct by the defendant and the transactions from July 2011. It was found that Countrywide signed off on the sales and received commissions for the July 2011 transactions; and it was ultimately fined \$3,000 and censured.

[43] Mr Quin puts it that Ms Jarman's position is that Countrywide was fully aware of the July 2011 transactions and other transactions involving the HNZ properties in Huntly; and that Douglas Boyde, the branch manager of Countrywide, assisted and even encouraged Ms Jarman with the transactions which is evidenced by the fact that he signed off on the transactions and that Countrywide received commissions on all the transactions.

[44] It is put for Ms Jarman that, at the relevant times, Countrywide's office management and record keeping systems were hopelessly outdated; it was not uncommon for documents (including listing agreements and valuations) or even entire files to be misplaced or go missing completely; and that Countrywide was either unable or unwilling to provide documents to the Committee during the course of the investigation.

[45] Mr Quin also put it that Countrywide appeared to be operating under outdated legislation and had not taken proper steps to bring its practices in line with the Real Estate Agents Act 2008; but Ms Jarman accepts that, due to the number of properties that she had listed for HNZ, that some complacency had crept in and that correct procedures was not always followed.

[46] Mr Quin puts it that HNZ had its own processes in place in terms of valuations and sale to real estate agents and was not unhappy with the prices Ms Jarman paid for the properties.

[47] On the basis that Ms Jarman accepts responsibility for her actions in relation to the transactions and has pleaded guilty, Mr Quin submits that Countrywide is equally culpable given its poor office practices, knowledge of the transactions, assistance provided to Ms Jarman and that it profited from the transactions.

[48] Ms Jarman accepts that an order cancelling her licence is an appropriate penalty given the nature of the charges she has pleaded guilty to; and submits that cancellation provides an appropriate deterrence and protection of the public.

[49] We are advised that Ms Jarman is currently in poor health, in receipt of a sickness benefit, unable to work due to her health, and any fine would have to be paid over time.

[50] It is submitted for her that, taking into account all of the matters referred to above, a similar fine to that imposed on Countrywide (\$3,000) would be appropriate in this case.

Our Views

[51] Clearly the defendant has failed to meet the standards of integrity, probity, and trustworthiness expected of a real estate agent discharging fiduciary and fair dealing duties. Given the breaches admitted by the defendant, a penalty less than cancellation cannot be countenanced.

[52] The defendant seems to have misled HNZ about the market value of its properties in Huntly and then deceived customers of Century 21 as to the amounts they needed to offer in order to acquire the properties. She has shown such an appalling breach of trust, deceitfulness, failure of professional standards, and contempt for the requirements of the law, that she must never again be involved in the real estate industry.

[53] We queried with the parties that compensation is not sought to be an issue. We are advised by Mr Clancy as follows:

“The issue of compensation was discussed between the parties prior to the guilty plea and specific instructions were taken from the Authority. Those instructions have been reconfirmed recently. The Authority accepts that, in all the circumstances (including the evidence that the vendor client, Housing New Zealand, obtained its own valuations prior to sale), orders for compensation are not required on the particular fact of this case. The Authority respectfully submits that the penalty package previously indicated – particularly the cancellation of Ms Jarman’s licence – appropriately recognises the seriousness of the breaches that occurred and properly reflects the purposes of the Act. The Authority is not aware of any settlement involving Century 21.

The Authority’s position in this matter is, of course, without prejudice to submissions it may make in future cases involving breaches of the same rules, in which compensation may well be appropriate, depending on the facts of the case.”

[54] Accordingly, we consider that the penalty approach which the parties invite us to adopt is fair and appropriate in terms of general sentencing principles.

[55] We have often stated our general approach to sentencing where we take into account such factors as aggravating and mitigating features and remorse.

[56] 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 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.

[57] 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.

[58] In terms of our assessment of the facts of this case and general sentencing factors, we find that the orders suggested to us by the parties appropriately reflect the misconduct admitted to by the defendant in the present case . Accordingly, we order that Ms Jarman's licence be cancelled and she is fined \$7,500 to be paid to the Registrar of the Authority at Wellington within three calendar months of this decision.

[59] 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