BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 73

READT 090/14

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**CHRISTINE and NEIL MURPHY**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 301)**
	First respondent
AND	**VANESSA MOWLEM**
	Second respondent

MEMBERS OF TRIBUNAL

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

BY CONSENT PENALTY IS HEARD ON THE PAPERS

DATE OF SUBSTANTIVE DECISION 10 June 2015 [2015] NZREADT 44

DATE OF THIS PENALTY DECISION 28 October 2015

APPEARANCES

The appellants on their own behalf
Ms N E Copeland, counsel for the Authority
Messrs R Latton and J Bardsley, counsel for the second respondent licensee

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In our 10 June 2015 decision herein we quashed the decision of Complaints Assessment Committee 301 to take no further action against Ms Vanessa Mowlem ("the licensee") and we found her guilty of unsatisfactory conduct. The parties agreed that penalty be determined on the papers and we appreciate the typewritten submissions on penalty from all parties.

[2] The question which we dealt with in our substantive decision was whether the complainant purchasers (the appellants) were misled by the licensee so as to believe that a residential property they sought to purchase (and did purchase) was subject to another competing offer. The following are extracts from our reasoning in that decision:

> *"[62] From our experience at endeavouring to assess the truthfulness of witnesses, we much prefer the evidence of the appellants and we find the responses, denials, and explanations of the licensee quite unconvincing.*
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> *[63] The evidence can be assessed as that the complainants were not told by the licensee that another party had actually made an offer. Mr Bayley thought that the complainants had told him they understand that another offer was expected and hoped for. There could be some confusion in the precise recollection of witnesses at this stage with the passage of time. At the very least, the complainants were told there was another party intending to bid when there was no such party. The so-called blocked telephone call could not, in commercial reality, be construed as another likely prospective party. In any case, we do not find that blocked telephone call story from the licensee to be credible in all the circumstances.*
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> *[64] One wonders why the complainants did not withdraw their offer at the end of the 4.15 pm meeting with the licensee of 12 February 2011 when the licensee said she was going to see the other person involved in a pre-auction bid situation. We can accept they deduced that the licensee simply had to go to that other party and uplift or, maybe, draw up the other offer. However, there was no other party. We consider that was dishonest on the part of the licensee.*
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> *[65] Overall, we find that the licensee rather cleverly built up a very strong assumption by the complainants that they had a pre-auction bidding rival when they did not. That must be dishonest, and a breach of rules 6.2, 6.4 and, due to the way they were manipulated, be a breach of the said rule 9.2. It must also be a breach of rule 6.3 which reads: "6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute."*
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> *[66] We accept that a desirable selling technique for a salesperson is to have prospective purchasers feel that they must quickly make their best offer as others are interested and likely to do that. However, in this case we find that the appellants were led to believe another offer had been made or was being made, and that concept was quite cleverly developed by the licensee, and that was dishonest on the part of the licensee because there was no other verifiable interest.*
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> *...*
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> *[69] We are all very satisfied that the appellants are truthful and that they have proved their allegations on the balance of probabilities.*
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> *[70] Very simply put, it has been suggested that the licensee is in the clear, in terms of the Act, because she did not say to the complainants that another offer existed. It seems to us that she contrived that the appellants think that, and the licensee understood them to believe that to be so.*
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> *[71] In any case, the licensee at least told the appellants there was another very interested party, when there was no such party, and that the party was going to make a pre-auction offer when that was not so. That was a lie."*

The Submissions from the Appellants

[3] The appellants seek, inter alia, that the licensee be censured in the interests of protection of the public. Also they consider it *"unconscionable"* that the licensee be allowed to retain her share of commission for a purchase which they put it *"she induced us to undertake, following her deliberate and dishonest behaviour. It cannot be right that she is allowed to benefit from her behaviour"*. They seek that they be repaid that commission.

[4] The complainants also seek some type of rectification or relief from the consequences to them of the licensee's failure. They put it that the licensee caused them to purchase the property for $840,000 when a recent market valuation assesses the market value of the property at material times (i.e. the time of their purchase) as being $765,000. The complainant appellants seek that the licensee be ordered by us to make good that difference which is $75,000.

[5] They also seek that the licensee be fined $10,000 and pay the $805 costs of that recent market valuation (obtained on 13 August 2015 but assessing the value of the property for sale purposes as at 12 February 2011 when the complainants purchased it).

The Submissions for the Licensee

[6] Mr R Latton (counsel for the licensee) took issue with a number of our findings but, in terms of penalty, he submitted that it be assessed on the basis that a miscommunication, rather than deliberately misleading conduct, took place and that the penalty should be a fine at the lower end of unsatisfactory conduct in the range of a fine of $2,000 to $4,000.

[7] Mr Latton submitted that a censure or further education would be too harsh a penalty in the circumstances where, as we explain below in paragraphs [11] to [13], he submits that the licensee's integrity is impugned by us on the basis of a mistaken assumption which would have coloured our findings.

[8] Mr Latton submitted that, as we cover below, the Authority is correct in putting it that the complainants cannot recover the difference between what they paid for the property and its actual value at the time in terms of *Quin v the Real Estate Agents Authority* [2012] NZHC 3557. We have covered the effect of *Quin* in our decisions on many occasions in recent times and we refer further to it below.

[9] Mr Latton also submitted that the licensee should not be ordered to repay the complainant purchasers the commission she was paid on the sale of the property. He emphasises that amount was not paid by the complainants but was paid by the vendors of the property and, he puts it, there is no reason why the complainants should receive a windfall gain.

[10] Mr Latton also submits that there is no basis for the complainants to be repaid the costs of their obtaining a valuation report quite recently in August 2015 as covered above as it seems to have been obtained primarily to support their claim for compensatory damages to which they are not entitled due to *Quin*. Mr Latton puts it that the licensee's conduct did not cause the complainants to incur that cost expense of the valuation report of August 2015.

[11] Mr Latton sought to make much of one of our findings, namely, that a 12 February 2011 blocked telephone call, which we detailed in our substantive decision herein and was

referred to by the licensee in her evidence, did not occur. He particularly referred to our statement at paragraph [24] of that decision, namely:

> *"We observe that the brief of evidence filed for the licensee on about 17 April 2015 seems to be the first time that there has been reference to such a blocked telephone call or that any such explanation has been provided by the licensee".*

[12] Mr Latton correctly points out that we were mistaken in that respect because in the licensee's 7 April 2014 response to the Authority she did give that explanation and, indeed, the Committee's decision of 26 September 2014 referred to that explanation.

[13] Mr Latton put it that error of ours may have coloured our decision in finding her less credible than the complainants. He submits that we should take into account that error when now dealing with penalty. However, such a call would not show that there was then another genuinely interested prospective purchaser.

The Stance of the Authority

[14] Counsel for the Authority made particular references to our observations in paragraphs [64], [65], [66], [70] and [71] of our substantive decision of 10 June 2015 which paragraphs are set out above.

[15] In terms of the appropriate penalty in this case, counsel for the Authority submitted that a financial penalty must be set at a level so as to *"bite"* given the commercial reality of commission rates, particularly, in cases where the unsatisfactory conduct is at a high level.

[16] Ms Copeland also submitted that here the licensee's conduct as found by us is at the high end of unsatisfactory conduct and that, given our findings, the licensee may consider herself fortunate that our decision was not that misconduct charges should be laid.

[17] As Ms Copeland pointed out, the licensee received a commission for the sale of the property to the appellants in circumstances where, as we found, the licensee was dishonest in developing a story that another offer had been made, or was being made, and in doing so manipulated the appellants into promptly making their best offer on the property.

[18] The Authority submitted that, given the risks to consumers inherent in the licensee's conduct, and the need to uphold public confidence in the industry, the appropriate penalty would be a combination of a fine in the range of $8,000 to $10,000, a censure, and an order that the licensee undergo further training by completing US23136 (demonstrate knowledge of misleading and deceiving conduct and misrepresentation).

[19] Counsel for the Authority also put it that we may consider it appropriate to order the licensee to pay the $805 fee incurred by the appellants in obtaining the said August 2015 valuation.

[20] Ms Copeland particularly submitted that, unless we find personal and compelling mitigating features applying to this licensee, the penalty should be at the high end of the scale.

[21] With regard to the *Quin* case Ms Copeland helpfully put it:

"3.7 The appellants seek an order requiring the licensee to pay them the difference between the purchase price ($840,000) and the market value (assessed at $765,000). In the Authority's submission, if the appellants were to seek reimbursement of this loss, they would be seeking compensation for straight market loss. This kind of monetary award was discussed in the decision of Quin v The Real Estate Agents Authority, where the High Court held that committees (or the Tribunal on appeal) cannot order licensees to pay complainants money as compensation for errors or omission (compensatory damages) under s 93(1)(f) of the Act.

3.8 Instead, the Authority submits that licensees can only be ordered to do something or take actions to rectify or "put right" an error or omission. If the licensee can no longer "put right" the error or omission, they can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission. Any expenses incurred by the licensee as a result of doing what he/she is ordered to do must be borne by the licensee.

3.9 Even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. An order under s 93(1)(f) cannot be made in respect of a straight monetary loss for a loss in market value.

3.10 As such, the Authority submits that an order under s 93(1)(f) cannot be made on the facts of this case."

Discussion

[22] 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 *Z v CAC* [2009] 1 NZLR 1; *CAC v Walker* [2011] NZREADT 4. It is important to remember that general deterrence is a critical consideration, even if specific deterrence is not required if we are satisfied the licensee would not repeat his or her conduct.

[23] 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.

[24] Standard principles of sentencing need to be considered including factors such as aggravating and mitigating features, and remorse. 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.

[25] 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. Having said all that, it is often appropriate to consider rehabilitation of the professional, and that may involve requiring a licensee to undergo training or education.

[26] Generally speaking, orders under s 93 of that Act must be proportionate to the offending and to the range of available orders. Similarly, with regard to orders made by us under s 110 of the Act.

Outcome

[27] In the extracts from our substantive decision herein of 10 June 2015 set out above, we expressed our concerns about the character of the licensee's conduct which led to our finding of unsatisfactory conduct against her.

[28] Due to *Quin* we cannot consider the award of compensation to the appellant complainants. Also, we do not think it appropriate to order payment to them of any part of the commission which the vendors paid to the licensee. We consider that s 93(1)(e) which, enables us to order a refund of commission, relates to the quality of work from a licensee to a vendor complainant.

[29] The $805 valuation fee was incurred by the appellant complainants for a lost cause in respect of compensation due to *Quin*. Mr Latton put it that the licensee's conduct did not cause the complainants to incur that cost. We accept that there is insufficient nexus between that conduct and that expense.

[30] The licensee is fined $4,000 payable to the Registrar of the Authority at Wellington by 30 November 2015; and the licensee is ordered to undergo further training by completing US23136 being a course to demonstrate knowledge of misleading and deceiving conduct and misrepresentation.

[31] 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