BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 74

READT 019/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**M D COTTLE FAMILY TRUST and McBRIDE STREET CARS LTD**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**TIMOTHY BARNETT** of Dunedin, Real Estate Agent
	Second respondent

READT 020/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**TIMOTHY BARNETT** of Dunedin, Real Estate Agent
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**M D COTTLE FAMILY TRUST and McBRIDE STREET CARS LTD**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

BY CONSENT PENALTY SUBMISSIONS HEARD ON THE PAPERS

DATE OF OUR SUBSTANTIVE DECISION: 27 July 2015 [2015] NZREADT 57

DATE OF THIS DECISION ON PENALTY: 28 October 2015

APPEARANCES

Messrs R McDougall and M D Cottle for the appellants in 019/14 (and second respondents in 020/14)
Mr C S Withnall QC, counsel for second respondent licensee in 019/14 (and for appellant in 020/14)
Mr M J Hodge, counsel for the Authority

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] As covered in some detail in our substantive decision herein of 27 July 2015 [2015] NZREADT 57, Mr T Barnett was the real estate agent who handled the appellants' sale in October 2011 of their commercial property at 57-63 King Edward Street, Dunedin, for $712,000 plus GST. We confirmed the Committee's finding of unsatisfactory conduct for the reasons set out in detail in that decision of ours.

[2] The Committee ordered the licensee to pay a $2,000 fine; and to undertake and complete, as further education, Unit Standard 5674 *"prepare agency agreements and appraisals of commercial and industrial sites and qualify clients"*. The licensee was also censured by the Committee.

[3] For present penalty purposes, relevant extracts from our decision are:

> *"[92] The Disputes Tribunal decision between the parties accepted that Mr Cottle had received a service from the licensee and that "the substantial merits and justice of this claim require that Mr Barnett be paid for this service ...". The referee had noted that Mr Cottle accepted that Mr Barnett be paid a commission at $10,000 plus GST.*
>
> *...*
>
> *[96] We consider that the licensee has been guilty of unsatisfactory conduct but at a fairly modest level. There should have been a listing agreement. The failure of the licensee to do so seems to have come about because of the rather loose manner in which he received instructions from Mr Cottle in 2006 to, in effect, look out for a purchaser but not formally advertise the property for sale. The law at that stage was the Real Estate Agents Act 1976 but was considerably tightened up by the Real Estate Agents Act 2008 and its Rules. However, well before the time of sale, the licensee was expected to know the requirements of the 2008 Act and it is concerning that no listing agreement was entered into.*
>
> *[97] It is puzzling that, in the circumstances, the licensee did not disclose to Mr Cottle the identity of a potential purchaser pursuant to the Arthur contract of November 2011 as being Calder Stewart. However, we find that he was not asked*

that directly and that he could not then be sure as to the involvement of Calder Stewart even though he knew that Mr Arthur seemed to be an employee of that business. Also, the focus of the parties at that time was on price which then seemed very acceptable to the vendors.

[98] It is currently clear law that the Quin case (supra) cannot be applied in favour of the complainants with regard to unsatisfactory conduct but, in any case, that is concerned with compensation and we are concerned with whether, in all the circumstances, the licensee should refund the commission or any part of it to the vendors due to breach of s.126 by the licensee.

[99] We take the view that the licensee provided an effective service for the vendors over 2006 to 2011 and the actual commission charged was much less than the normal entitlement to an agent achieving such a transaction price. Also, we can understand (but not approve) the licensee's explanation for adding a net $1,000 to the original $10,000 as agreed commission because he had provided services for some years longer than ever contemplated in 2006. We do not think he was entitled to do that unilaterally as he did. However, when we stand back and review this saga in terms of the evidence adduced to us, we do not think it fair or just to interfere with the commission which the licensee has been able to retain.

[100] There has also been unsatisfactory conduct by the licensee in that over 2006 to 2011 he did not update the original 2006 appraisal in writing. We take into account that, in the interests of vendors, he kept up to date with market values at material times. However, as at 2011, the appraisal provided by the licensee in 2006 was rough and inferential rather than clear and did not meet the expectations of Rule 9.5.

[101] It is also unsatisfactory that he did not provide information about the 2008 Act and Regulations as required and expected these days because he was under the mistaken belief that such requirement only applied to residential property and not to the commercial car yard property which this case is about. He was correct to the extent that the provision of an approved guide under s.127 only relates to the sale of residential property. He was in breach of 2009 Rules 8.1, 10.1, 10.2, and 10.3 in particular.

...

[102] We accept what Mr Barnett says about Mr Arthur being a nominee purchaser, namely, that Mr Barnett did tell Mr Cottle that Calder Stewart was involved with Mr Arthur. We prefer the evidence of Mr Barnett.

[103] Insofar as Mr Cottle asserted he was not advised to take legal advice, we can understand that Mr Cottle was so jubilant at the sale it did not seem appropriate for the licensee to refer to consulting a lawyer. Nevertheless, that was a breach of Rule 9.9 and by itself is also unsatisfactory conduct.

[104] We record that, in this case, it is immaterial whether the vendors were dealing with the licensee or Tim Barnett Realty Ltd and we decline to join that company as a party to these appeals as applied for by the vendors. In terms of in-house complaints procedures, the licensee was the real estate business and he was available to pursue an in-house complaints procedure. However, he did not advise the vendors of available procedures and of the existence of the Authority.

...

[106] In terms of penalty, we currently feel that the Committee's $2,000 fine should stand against Mr Barnett but that the Committee's censure and educational requirement are not now necessary or appropriate for the licensee. The licensee has now retired from real estate agency work due to ill health and has voluntarily suspended his licence. Of course, the complainant vendors are entitled to raise the issue of refund of commission in submissions on penalty. The parties are entitled to a hearing over penalty. They may prefer instead to deal with that on the papers or they may accept our current views. We direct the Registrar to arrange a Directions Hearing by telephone in the usual way to progress a timetable towards our dealing with the issue of penalty."

The Submissions of the Appellants on Penalty

[4] Extracts from the typewritten submissions filed with the Registry by the appellant complainants on penalty read as follows:

"It is difficult for us as complainants to make submissions as to penalties when there was such a palpable bias by the Tribunal panel against us as self-represented complainants during the Tribunal hearing.

The core issues of this matter were:

1. *Professional conduct of Mr Barnett.*

2. *Unlicensed trading by Tim Barnett Realty Limited.*

3. *No agency agreements.*

4. *Non-disclosure to clients that the agency company existed.*

5. *Entitlement to commission earned by agency company.*

6. *Entitlement to commission by Mr Barnett.*

7. *No audits by the agency company for money held under trust.*

8. *Failure by REAA to properly administer the licence and audit regimes.*

We believe the Tribunal gerrymandered its jurisdiction prior to the Tribunal hearing to predetermine the outcome. That decision ruled out consideration of points 2 to 7 during the Tribunal hearing and we conclude that the reason was to exclude any examination of point 8.

By failing to join the company to the action the Tribunal has allowed the company to become orphaned holding the commission and has no power to order the company to refund the commission for non-compliance. We are concerned that the Tribunal has placed us in that position.

Questions that will arise after the judicial process is completed as to why the jurisdiction was gerrymandered, was there any conspiracy with other parties and if was corrupt as to legal process or incompetent. ..."

[5] The complainants then raise quite a number of matters such as that the matter should have been held as a rehearing. In fact it was so. It is even alleged that when, in the course of the hearing Mr McDougall appeared to be suffering from angina problems he was forced to carry on. That is not correct. Later in the submissions is the following paragraph:

> *"This bias against considering matters of the unlicensed agency company extends back to the REAA and the Complaints Assessment Committee and we believe that the core of the issue is a major lapse by the REAA to properly police and enforce its licensing regime and its audit compliance and it appears to us that either separately or in together the REAA, CAC and Tribunal have pursued a deliberate path to avoid a public examination of that primary issue."*

[6] Then the appellants set out a number of rather curious concerns about our process. A little later there is a type of threat contained in the following paragraph:

> *"The industry has picked up on some of these matters and Mr McDougall has been contacted by two real estate people who have seen the public decisions of the CAC the Tribunal and believe something is very wrong with the matter. It is his intention to raise matters with the Minister responsible for the REAA once the legal process has completed."*

[7] There is also much hearsay in that paragraph. A further paragraph reads:

> *"Obviously this criticism will be taken badly by the Tribunal members and extend the bias towards us, accordingly we ask all three members to step aside for the consideration of penalties and that a separate panel replace it ..."*

[8] Then, constructively, the appellants submit that Mr Barnett should be ordered to surrender his licence, be fined, pay full costs to the Tribunal; pay an amount towards the time of the vendors; pay an amount equal to the commission to the vendors; and that should he ever wish to trade as a licensee he should make a fresh application, presumably, to the Registrar of the Authority which is the procedure he would need to follow in any case unless his licence is only suspended by us at this point and assuming he has not in the meantime surrendered it. Then, the appellant complainants seem to seek what they refer to as a full investigation into the general conduct of the licensee.

[9] We find the accusations of the appellants very surprising and, perhaps, contemptuous of this Tribunal. The appellants are entitled to appeal our decision and may think they have grounds for taking High Court review proceedings. Generally, their criticism seems to be that we totally lack commercial knowledge. Almost entirely the submissions of the complainants on penalty are submissions against the findings we made in our substantive decision herein of 27 July 2015 and, therefore, are quite irrelevant to the present issue of penalty.

The Stance of the Licensee

[10] Mr C S Withnall QC, as counsel for the licensee, puts it that most of the submissions for the appellants are irrelevant to the issue and demonstrate a failure to understand the statutory process and as he continues *"accompanied by a disgraceful attack on the Tribunal bordering on contempt, which is then used to justify a claim that the Tribunal should recuse itself".* Mr Withnall noted that the appellants had mounted a similar attack on the Committee and, as Mr Withnall also put it: *"apparently suffer from the perception*

that a Tribunal at any level which does not agree with them is guilty of bias and misconduct".

[11] Mr Withnall QC also notes that, notwithstanding the content of our paragraph [99] (set out above) in our substantive decision herein, the appellants seek an order that the licensee be ordered to pay them an amount equal to the commission on the transaction but no reasons are given and, in particular, no material whatsoever is put forward in support of that submission.

[12] Mr Withnall QC generally supports the approach we outlined in paragraph [106] of our decision (as set out above) and puts it that no useful purpose would be served by our making any further orders, especially as the licensee has retired and no longer carries on business. Mr Withnall concludes as follows:

> *"It is noted that no reasoning is given in the appellants' submissions to justify the making of any of the orders sought; it is submitted that this entire process has been basically for the purpose of attempting to get for free the valuable services Mr Barnett provided in good faith"*.

The Submissions for the Authority on Penalty

[13] Mr Hodge submits for the Authority that, while not as serious as some of the conduct before us, the provision of an agency agreement and appraisal is a fundamental obligation under the Real Estate Agents Act 2008 and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. We noted at paragraph [97] in our said substantive decision, that Mr Barnett received loose instructions from Mr Cottle in 2006 to, in effect, look out for a purchaser but not formally advertise the property for sale. The law at that time was the Real Estate Agents Act 1976, which was then considerably tightened up by the Real Estate Agents Act 2008 and its Rules.

[14] Mr Hodge put it that the Authority would ordinarily, on the facts as found by us, submit that orders censuring Mr Barnett and requiring him to undergo further training would be appropriate. However he adds that, given the licensee is now retired from real estate agency work and has voluntarily suspended his licence, the Authority appreciates why we consider that these requirements may no longer be necessary or appropriate for the licensee. The Authority is neutral on this in the circumstances of this case, but submits that we should record that if the licensee were to re-enter the real estate industry in the future, he should then be required to complete the appropriate further training as a pre-condition.

[15] The Authority submits that our discretion to order a licensee to refund commission in whole or in part is an important consumer remedy in what is, of course, a consumer protection Act, and Committees and we are able to have recourse to it in a wide variety of circumstances. He adds that a refund does not necessarily always follow as a matter of course if there has been a breach of s 126, although it will often do, but ultimately must be a matter for our determination on the facts.

[16] The Authority also submits that a licensee's failure to meet their basic obligation of having a listing agreement in place will often result in an order for that licensee to refund all, or part, of the commission. We have considered the issue of a refund of commission in this case, having heard the evidence, and determined we would not apply s 93(e) of the

Act given the circumstances of this case. The Authority accepts this finding was open to us on the particular circumstances of this case.

[17] Mr Hodge observed that the decision of *Quin v The Real Estate Agents Authority* [2012] NZHC 3557, precludes complainants being awarded compensation. The High Court held that Committees (or this Tribunal on appeal when dealing with unsatisfactory conduct as distinct from misconduct) cannot order licensees to pay complainants money as compensation for errors or omission (compensatory damages) under s 93(1)(f) of the Act.

[18] Instead, Mr Hodge submits for the Authority that licensees can only be ordered to do something or take actions to rectify or put right an error or omission in terms of s 93(1)(f)(i) of the Act. 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.

[19] Insofar as the complainants submit the licensee be ordered to pay an amount towards the time of the vendors and to pay an amount equal to the commission to the vendors, the Authority submits that such orders would amount to compensation and as such are precluded under *Quin*.

Outcome

[20] 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 the Tribunal is satisfied the licensee would not repeat his or her conduct.

[21] 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.

[22] The range of orders for unsatisfactory conduct introduced by the Act are a vital part of the disciplinary process through which the Act seeks to achieve its purpose.

[23] 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.

[24] 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.

[25] Taking into account the above submissions, we broadly agree with those of Messrs Withnall QC and M J Hodge. The portions of our substantive decision set out above also convey our reasoning about penalty.

[26] Mr Barnett has voluntarily suspended his licence under s 58 of the Act.

[27] Taking into account all the circumstances as we have covered them above and in our substantive decision of 27 July 2015, we fine Mr Barnett $2,000 to be paid to the Registrar of the Authority at Wellington within 20 working days of this decision. That is the same fine which was ordered by the Committee but we cancel the Committee's censure and its order that Mr Barnett undertake further specific education as recorded above.

[28] However, in the apparently unlikely event that Mr Barnett ever seeks to revive his licence, we reserve the right to impose educational and training requirements upon him at that point as a precondition to revival of that licence. In any case, that could be done on any annual renewal of registration. Should that point arise we would, of course, seek advice from the Registrar as to the type of education required but it would certainly include the view of the Committee that he undertake and complete as further education Unit Standards 5674 *"prepare agency agreements and appraisals of commercial and industrial sites and qualify clients"*.

[29] As we were about to issue the above, we received an application by the appellant complainants to vacate our decision and disqualify ourselves. The contents of that are contemptuous of us and focus, rather speciously and in some respects untruthfully, on applying that our Chairperson recuse himself. In any case, that application is too late and not related to penalty. It is dismissed. The appellants have appeal rights and, possibly, review rights. They are free to follow that course.

[30] 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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Mr J Gaukrodger
Member