

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 80

READT 067/14

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

BETWEEN **PETER EGDEN**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 20005)**

First respondent

AND **EVA AND TREVOR ABERCROMBIE**

Second respondents

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Ms C Sandelin – Member
Mr G Denley – Member

HEARD at AUCKLAND on 28 August 2015

DATE OF DECISION 12 November 2015

APPEARANCES

Mr P Hall & Ms A Davies for the appellant
Mr L J Clancy & Mr J Simpson for the first respondent
No appearance for the first named second respondent. Mr Trevor Abercrombie is deceased.

DECISION OF THE TRIBUNAL

[1] Mr Peter Egden is a real estate agent practising in Auckland. He appeals the 9 July 2014 decision of the CAC which found him guilty of unsatisfactory conduct.

[2] The decision arose from a complaint by Mr and Mrs Abercrombie about the actions of a number of agents at Compass Realities Limited. Mr Egden was the licensee at the time of the events of the subject of the complaint. Mr and Mrs Abercrombie complained about the actions of Ms Sharon Hackett when she

acted for them in selling their property in Oriana Avenue, Lynfield. The complaint also involved Ms Hackett's husband Michael and Mr Somaraju. Both men were salespersons at Compass Realities. The Real Estate Agents Authority (REAA) did not uphold the substance of the complaint but found some items of concern in the conduct of the agents. In particular, they found Ms Hackett was unlicensed at the time of the sale. Mr Somaraju was found not guilty of any misconduct. The CAC found that Mr Hackett was the vendor of one of the two properties concerned and therefore was not conducting real estate agency work. However the CAC found that Mr Egden, as the principal agent for Compass Realities, was liable for employing an unlicensed person as a salesperson. This is an offence against s 143 of the Real Estate Agents Act. Further, the CAC found that Mr Egden had an obligation to ensure that Sharon Hackett, as an employee of the business, was familiar with the Act and the licensing requirements of the Act, and this failure meant he was in breach of Rule 8.3.

[3] The Authority therefore ordered Mr Egden to pay a fine of \$1,500 and ordered publication of Mr Egden's name. Mr Egden appeals against that decision.

[4] Mr Egden says that he was not working as the principal licensee for Compass Realities at the time of Ms Hackett's misconduct (September 2011 to January 2012). He says that Compass Realities was incorporated in November 2010, and that he was never a director. Rather, the directors were Mr Somaraju and Mr Hackett. Mr Egden says he worked as a licensed agent for Compass Realities from 8 November 2010 to January 2011.

[5] Mr Egden says that in January 2011 he ceased his involvement with Compass Realities to care for his terminally-ill wife. He told the Tribunal that he discussed and agreed with the directors that they would close down the real estate agency in February 2011.

[6] He said that notwithstanding the fact that Compass Realities had spent about \$100,000 setting up the business and the necessary procedures in late 2010, by January 2011 the directors were happy to accept that he could no longer be involved in the business and that as a consequence (because there was no other licensed agent) the business would cease trading. He provided the Tribunal with copies of bank statements which showed that for the relevant time in question he had not received any income from Compass Realities. He said he believed that the business would cease trading on his departure.

[7] In February 2011 he commenced part-time employment with Kensington Park as a sales executive and this became part-time work for a related company, Kensington Park Realty, in May 2011. He began to work full-time in September/October 2011.

[8] Under cross-examination Mr Clancy showed him the application to renew the Compass Realities licence signed by him in December 2011. Mr Egden had also signed a consent to disclosure of information to the Licensing and Vetting Service Centre on 14 December 2011. Mr Egden acknowledged that he had signed these documents and said at that time he still believed that Compass Realities was not trading but signed the renewal licence on the basis that they may reinstate the licence at some later date.

[9] Mr Clancy also questioned him on the communications that he had with the REAA. Mr Egden's evidence had been that he did not tell the Authority that he was not working for Compass Realities because he did not believe that this was relevant to the complaint which he did not think was addressed to his conduct. However he acknowledged that from 5 October 2013, he was aware that the question that he was being asked to address was *"We need to know the reason why Compass allowed an unlicensed agent ie Sharon Hackett to sell a property under their business name"*.

[10] The evidence showed Mr Egden did not give a substantive response to the CAC until 5 December when he said:

"You have asked for my response to this complaint, as I have not met Mr or Mrs Abercrombie and they chose not to use our in-house complaints procedure there is nothing else that I can add other than what has already been provided by Sharon Hackett. I understand Sharon met with an investigator from the REAA and provided a statement around this issue. My understanding that due to an oversight her licence was delayed something she was unaware of at the time and was resolved (sic)."

[11] There are also two file notes recording conversations with Mr Egden in April 2013. The first notified Mr Egden of the complaint. Mr Egden told the REAA he did not know which staff member had been complained about and told the REAA investigator that Sharon had not informed him of the complaint. The investigator asked for a copy of the property file. Mr Egden told him that the records were kept in archives and asked to be emailed the details of where he could send the file. This happened.

[12] On 19 April 2013 Mr Egden called Ms Mead (another investigator) and said that he had now located the correspondence concerning the complaint and now recalled the complaint. He said the file was under lock and key. He told the investigator that Sharon Hackett had worked for Compass for three or four years and that Compass Realities was formed 12 months ago and that they worked together during this time. He promised to forward the file to Ms Mead.

[13] Mr Egden could not explain to the Tribunal why he had made these comments which suggested a continued involvement with the business, knowledge of its staff, and the complaint.

[14] Mr Clancy also asked Mr Egden about a number of unidentified deposits into his account during the time that Mr Egden said that he was not working for Compass Realities. Mr Egden's evidence was that he had no income during this time but may have transferred some capital into his account. He could not recall where the deposits he was being asked about came from.

[15] However, he did deny Mr Clancy's allegation that he was "licence farming"¹. He said that he did not tell the investigator that he was no longer working at Compass Realities simply because he thought his obligation to the REAA was to try and assist in resolving complaints.

[16] Mr Clancy also asked Mr Egden why he had not notified the Authority of his change in circumstances. In particular, he asked why, when he began working for

¹ A practice whereby the licence holder allows his/her name to be used by an agency in return for a fee.

Kensington Park, he did not notify the REAA that his position at Compass Realities had ended. Mr Egden said it had not occurred to him that he needed to do this and as far as he was aware Compass Realities was not trading and this was all that mattered.

Findings of Fact

[17] Mr Hall (for Mr Egden) submitted that the CAC had got the decision completely wrong. He submitted that:

1. Mr Egden was not working for Compass Realities at the time of the offences;
2. Mr Egden did not employ Ms Hackett as an unlicensed salesperson in breach of s 143;
3. Mr Egden did not fail to ensure that Ms Hackett was familiar with the licensing requirements of Rule 8.3 (as he did not employ her);
4. Mr Egden did not fail to identify Ms Hackett as an unlicensed salesperson.

[18] Mr Hall submitted that s 143 of the Act creates an offence for anyone to employ or contract an unlicensed person as an agent, branch manager or salesperson. Mr Hall's submission was that only a person who actually employs or contracts a salesperson can be in breach of s 143. He submitted that in this particular case it was clear that Mr Egden had never employed Ms Hackett and that it was always Compass Realities Limited who did. Further, factually this was also not possible for the CAC to find that Mr Egden employed Ms Hackett at the time that Mr Egden was at Compass Realities. Ms Hackett was not working for Compass Realities but rather worked in another arm of the business. Mr Hall submitted that even if Mr Egden could somehow be liable under s 143 as a representative of the employer, he could not be liable for an action that happened after he left the employ of the company.

[19] Further, Mr Hall submitted that even if there was a breach (which he denied), this could not amount to unsatisfactory conduct under s 72. This submission was to the effect that because he was not carrying out real estate agency work which is a prerequisite before a finding of unsatisfactory conduct.

[20] He also submitted Mr Egden did not breach Rule 8.3 because there was no obligation in the circumstances of this case on Mr Egden to ensure that Ms Hackett was familiar with the provisions of the Act. His submission was that a [supervising] agent can only breach Rule 8.3 if that agent was working in the business and the person whose familiarity with the Act and Rules he was required to ensure was engaged or employed by that person.

[21] He also submitted that Mr Egden could not be in breach of s 50 because this section only applied to licensed salespersons (which Ms Hackett was not).

[22] For these reasons, Mr Hall submitted that the decision of the CAC was wrong in fact and law and should be set aside.

[23] Mr Hall also submitted that even if the Tribunal found that the unsatisfactory conduct finding should remain, Mr Egden should have permanent name

suppression.² He submitted that there was no prejudice or disadvantage to the public in not knowing Mr Egden's details or his offending. Further publication would have a significantly adverse impact on Mr Egden professionally and personally and damage his reputation. He told the Tribunal Mr Egden was 71 and he was concerned because he has just joined a new firm as an associate and his reputation was key.

[24] Mr Clancy took a completely different legal approach to Mr Hall. In taking this stance, he must implicitly have agreed with Mr Hall's submissions that the decision of the CAC that there had been a breach of s 143 was incorrect. However, Mr Clancy submitted that Mr Egden was still guilty of unsatisfactory conduct because:

- He held an agent's licence for Compass until the end of 2012.
- Compass Realities Limited held an agent's licence under the Act.
- Under s 44(2) of the Act, where a company holds the agent's licence, at least one officer of the company must also hold an agent's licence. Mr Egden was the eligible officer for Compass Realities and therefore deemed to be the officer of the company.
- Between November 2011 and April 2012 Ms Hackett did not have a licence under the Act.
- Mr Egden did not take any steps to cancel, suspend or surrender his own agent's licence or the agent's licence held by Compass Realities even though by his own evidence he took no part in the business or management or supervision from February 2011.
- Mr Egden did not advise the Registrar of any change in circumstances.

[25] Mr Clancy put his emphasis on s 50 which requires that any salesperson carrying out any agency work must be properly supervised and managed by the agent or branch manager.

[26] Section 50(2) defines "properly supervised and managed" to mean:

- "(2) ... the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—*
- (a) that the work is performed competently; and*
- (b) that the work complies with the requirements of this Act."*

[27] Mr Clancy submitted that the combined effect of s 44(2) and s 50 is to prohibit a practice known in the real estate industry as 'licence farming'. That is where a licensed agent attaches his licence to a company so that the company can have an agent's licence but then provides limited or no supervision (or involvement) with the company and its trading activities. Mr Clancy submitted that Mr Egden had an obligation as an eligible officer under s 50 to ensure that Compass Realities' salespeople were properly supervised and managed. This, he submitted, included the requirement that all agency work was to be conducted by a properly licensed

² Mr Egden has interim name suppression.

salesperson. Mr Clancy submitted that Mr Egden clearly failed to discharge responsibility and therefore, notwithstanding the fact that he appears not to have been there in person (or perhaps because of it), he is liable for a breach of s 50. Mr Hall in reply submitted that as Ms Hackett was not a licensed salesperson the section could not apply.

Discussion

[28] The Tribunal does not accept that Mr Egden believed Compass Realities did not trade between January/February 2011 and November 2012 (when the REAA say the licence was suspended). It is hard to understand why Mr Egden took no steps to notify the Authority of this change in circumstances, or that the business was not trading when he renewed the licence; if this in fact was what he believed.

[29] Taken in the totality, we find that the evidence, which includes bank statements with unexplained deposits from unidentified sources during the relevant time; the signing of an application to renew the licence, and the comments made by Mr Egden to the Authority all support the view that he was a part of the business, paints a different picture to that now portrayed by Mr Egden. The Tribunal are prepared to accept that Mr Egden himself was not involved in the business as he was caring for his wife and then working for another organisation but he was, at the very least, careless or reckless about his responsibilities as the agent/eligible officer for Compass Realities Limited, and more likely received some benefit from continuing to hold the licence. The most telling factor in reaching this conclusion is his conduct when the complaint was made. A man with no involvement should have made his lack of knowledge and involvement clear from the beginning. Mr Egden did not – he found the file, referred to the inhouse complaints procedure and discussed the complaint with Ms Hackett. All these steps show Mr Egden either was involved (unlikely given his employment at Kensington Park) or wanted the REAA to believe he was.

[30] We agree with the submission of Mr Hall that the CAC were wrong to find that there had been a breach of s 143 and Rule 8.3 by Mr Egden. We modify the finding of the Authority by reversing that decision and substitute our finding as set out below. We agree that to be in breach Mr Egden would have had to have employed Ms Hackett.

[31] We have concluded that Mr Egden was in breach of s 50. Section 50 provides that in carrying out agency work a salesperson must be supervised and managed (s 50(2)) which means ensuring that the work is performed competently and complies with the requirements of the Act. Ms Hackett was clearly not properly supervised or Mr Egden would have taken steps to ensure she had a licence. Section 50 makes this Mr Egden's responsibility (s 44/2). As an officer for the company it was Mr Egden's responsibility to advise the Real Estate Agents Authority he had resigned from the company, he failed to do this. He therefore continued as the officer for Compass Realities and was ultimately responsible for management of the company including the employment of salespeople.

[32] To give this section the construction urged upon us by Mr Hall would mean that s 50 would not be breached where an unlicensed salesperson was employed by an agent despite the fact that clearly this conduct shows a clear lack of supervision. It would mean too that people like Mr Egden who hold the licence but are not employees would not have any responsibility for engaging or permitting the employer

to engage unlicensed salespeople. This clearly indicates a lack of proper supervision of the “sales people” by the licensed agent.

[33] The definition of “salesperson” in the Act means a person “who holds, or is **deemed** to hold, a current licence as a salesperson under this Act” (emphasis added). In failing to ensure that Ms Hackett had a licence, Mr Egden was allowing Ms Hackett to hold herself out as a properly licensed salesperson.

[34] It would be an interpretation contrary to the purpose of the Act (which includes protecting the interests of consumers and promoting public confidence in the performance of real estate agency work) if the definition of “salesperson” could not include those who hold themselves out to be salespersons in breach of the Act. The definition of a “salesperson” includes someone who is “deemed” to hold a licence. There is nowhere else in the Act which refers to a person being deemed to be a salesperson and the Tribunal must give this definition its ordinary meaning.

The Tribunal

[35] The Tribunal must use also a purposive interpretation to give effect to what we consider the proper interpretation of s 50 and definition of “salesperson”. The Tribunal conclude that “salesperson” can include someone who holds themselves out to be a salesperson and for the purpose of s 50 they are deemed to be a salesperson³. Mr Egden had an obligation to properly supervise those who worked as salespeople. He had an obligation to ensure that person complied with the Act – including being licensed. He did not do this and Ms Hackett sold the property to the Abercrombies.

[36] Accordingly, the Tribunal find Mr Egden guilty of unsatisfactory conduct for a breach of s 50. His conduct in not supervising Ms Hackett in circumstances where he was still the licence holder and had taken no steps to advise the REAA he was no longer an active part of the Compass Realities business amounts to unsatisfactory conduct. We consider the penalty imposed was appropriate and do not amend that order.

Name Suppression

[37] We have considered the submissions of Mr Hall that Mr Egden should have name suppression. We have also considered the fact that on 17 December 2014 another CAC found Mr Egden guilty of a breach of s 142 of the Act for failing to ensure that a salesperson that he had employed did not have a current real estate agent’s licence. He has not appealed this decision. In circumstances where there has been no name suppression of Mr Egden, in a very similar case, makes it inappropriate to suppress Mr Egden’s name a second time for almost identical offending. We have considered Mr Egden’s personal circumstances, but Mr Egden has not demonstrated any reason why his reputation did not suffer damage when the CAC’s 17 December 2014 decision was published but would suffer damage in this case. All the matters that Mr Egden advanced to support the application cannot outweigh the public interest in knowing the name of an agent who has breached his obligations to supervise the salesperson who worked in the agency with him.

³ “Deemed” is also used in the definition of agent and branch manager in Section 4.

[38] Accordingly the Tribunal modify the finding of the CAC by substituting this decision which finds Mr Egden guilty of unsatisfactory conduct under s 50. In all other respects we confirm the CAC's penalty decision.

[39] We draw the parties' attention to the appeal provision in s 116 of the Real Estate Agents Act.

Ms K Davenport QC
Chairperson

Ms C Sandelin
Member

Mr G Denley
Member