

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 14

READT 23/14

IN THE MATTER OF

charges laid under s.91 of the Real Estate Agents Act 2008

BETWEEN

COMPLAINTS ASSESSMENT COMMITTEE (CAC 20004)

Prosecutor

AND

JOHN WHISKER

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

SUBSTANTIVE DECISION ISSUED

18 August 2015
[2015] NZREADT 61

DATE OF THIS PENALTY DECISION HEARD ON THE PAPERS BY CONSENT -

11 February 2016

COUNSEL

Mr M J Hodge for the prosecuting Authority
Mr D Bigio for the defendant licensee

DECISION OF THE TRIBUNAL ON PENALTY

[1] In our substantive decision herein [2015] NZREADT 61 we commenced with the following paragraph:

“[1] An agent facing closure of his real estate sales business was about 12 days too slow in actually closing down. Although, upon closing down, he immediately transferred money held for prospective vendor customers (to be spent on advertising their respective properties as for sale) to his accountant’s trust account, he had created a relatively small shortfall which he was slow to repay. He is charged with misconduct or, in the alternative, with unsatisfactory conduct.”

[2] After a detailed analysis of the evidence and submissions we held as follows:

“[88] We note that the concept of the receipt of money and audit of accounts for a real estate agent is dealt with over ss.122 to 125 of the Act. There are also Real Estate Agents (Audit) Regulations 2009. We recommend that the law be changed to require all monies received by a real estate agent in the course of real estate agency work to be held in a trust account.

[89] *Simply put, the defendant took monies from the public at a time when he knew his business prospects were precarious and reliant on funding from his wife, in particular, and himself. He was somewhat too slow to face up to reality. He either knew, or should have known, that he had begun to use the said advertising monies in the ordinary course of company or business operations. This breaches a number of rules because it shows business carelessness or even, perhaps, incompetence and negligence, and is a breach of his fiduciary duty to the payers of the funds in question.*

[90] *However, in the context of the above facts, we do not find the defendant's conduct to be disgraceful or seriously incompetent or seriously negligent. We do find it unacceptable or short of proper professional standards and a breach of various of the Rules. The defendant could also be regarded as negligent in not facing up to closure of the business earlier than he did.*

[91] *Having said all that, we dismiss both charges, but, in all the above circumstances, find unsatisfactory conduct on the part of the defendant."*

[3] As we indicated in the above entitlement, both parties preferred to deal with penalty on the papers as we cover below.

The Submission for the Defendant, Mr J Whisker

[4] Inter alia Mr D Bigio, (counsel for Mr Whisker) stated:

- “1. *It is respectfully submitted that the Tribunal's decision in this matter vindicates the position taken on behalf of Mr Whisker from the outset, namely, that the conduct could never have amounted to more than unsatisfactory conduct. This was indeed the position agreed between Mr Whisker and the CAC at the first hearing of this matter in October 2014.*
2. *After the first Tribunal rejected the consent position Mr Whisker wrote to the CAC on 11 November 2014 offering undertakings and compensation (equivalent to the agreed penalty put before the first Tribunal, being a \$2500 fine and an undertaking from Mr Whisker not to act as agent or be an officer in charge of a licensed agent for a period of two years from the date of the Tribunal's decision) if the CAC would drop the charges. The CAC rejected that position. Subsequent approaches were also rejected.*
3. *So at a very substantial cost Mr Whisker has had to prepare for two appeals only to arrive at a position which he was always prepared to acknowledge. His legal costs to date (exclusive of the cost of preparing these submissions) are \$17,637.00 plus GST.*
4. *In addition, Mr Whisker personally made restitution to the only client who was out of pocket, even though he had no legal obligation to do so ...”*

The Response on Penalty from the Prosecution

[5] Part of the submission on penalty from Mr Hodge (as counsel for the prosecution) read as follows:

- “3. *The subsequent procedural history of this matter is of course that the first panel of the Tribunal rejected the resolution put forward by the parties and the second*

panel of the Tribunal, following a contested hearing, found unsatisfactory conduct proved.

4. *The relevance of this for present purposes is that the Committee considers itself constrained, as a matter of fairness, from seeking a higher penalty than that it had agreed to as part of the resolution set out above. In any event, given the Tribunal's findings, the Tribunal may well consider that no higher penalty is called for (that is, no higher penalty than a censure and a fine of \$2,500 – the proposed undertaking was voluntary and not one which can be imposed).*
5. *Although the Committee maintains that a censure and a fine of \$2,500 remains an appropriate penalty in this case, it is acknowledged that the licensee has been put to further stress and cost as a result of the rejection of the resolution at the level of unsatisfactory conduct. The Committee accepts that it is open to the Tribunal, in these very particular circumstances, to reduce the penalty it might otherwise have imposed on the licensee."*

Penalty Outcome

[6] In our said substantive decision herein of 18 August 2015 we set out our detailed views on Mr Whisker's conduct to explain our finding of unsatisfactory conduct.

[7] Having now absorbed the submissions for each party on penalty which we have covered above, we think a fair and just final outcome from our point of view is that Mr Whisker is hereby censured and also fined \$1,000 to be paid within the next calendar month to the Registrar of the Real Estate Agents Authority at Wellington. We are conscious that, overall, he has been heavily penalised financially.

[8] 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 G Denley
Member

Ms C Sandelin
Member