**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2016] NZREADT 15

READT 078/14

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| **IN THE MATTER OF** | charges laid under s 91 of the Real Estate Agents Act 2008 |
| **BETWEEN** | **COMPLAINTS ASSESSMENT COMMITTEE (CAC 302)** |
| | Prosecution |
| **AND** | **JAMES DAVID MAIRS** |
| | Defendant |

**MEMBERS OF TRIBUNAL**

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

**SUBSTANTIVE CASE HEARD** at AUCKLAND on 30 July 2015

**DATE OF THE SUBSTANTIVE DECISION** 4 September 2015
[2015] NZREADT 63

**DATE OF THIS DECISION ON PENALTY** 11 February 2016

**COUNSEL**

Mr M J Hodge for the prosecution
Mr T D Rea for the defendant

## DECISION OF THE TRIBUNAL ON PENALTY

### *Background*

[1] In a decision herein of 4 September 2015 (*REAA v Mairs* [2015] NZREADT 63) we dismissed a charge of misconduct against the defendant (Mr J D Mairs) but found him guilty of unsatisfactory conduct. The parties have agreed that we deal with penalty on the papers.

[2] In our said decision of 4 September 2015 we commenced as follows:

> *"[1] A real estate salesperson effected the sale of an Auckland apartment by auction for a forestry truck-driver owner living in Tokoroa (as proprietor of his vendor company) on the instructions of that owner's Hamilton accountant and with the involvement of that owner's Putaruru solicitor, but without a written authority from the owner.*
>
> *…*

*[3] The broad issue is whether, in the circumstances, the conduct of the defendant in marketing the apartment for the owner without that owner's written agreement was serious negligence or, merely, negligence."*

[3] Our concluding paragraphs were as follows:

*"[64] We record that the defendant appeared an honest witness to us as did the other witnesses who appeared before us. As indicated above, there is no dispute over any factual issue.*

*[65] Broadly, we accept Mr Rea's submissions for the defendant as we have covered them above; although we consider that the 2010 listing agreement was for a marketing process which was completed unsuccessfully in 2010, was given to another real estate firm, and cannot be interpreted as extending to the purported 2013 sale.*

*[66] We stress that it is a fundamental error for a real estate agent to fail to obtain a signed listing agreement from the owner vendor. However, in the unique context we have set out above, we consider that it is only fair and just to assess the licensee's conduct as unsatisfactory and not as misconduct.*

*[67] In our recent decisions we have had occasion to deal with s 126 of the Act which, for present purposes, covers that an agent is not entitled to any commission or expenses from a client vendor in connection with real estate agency work unless that work is performed under a written agency agreement signed by or on behalf of the client and the agent. That must be an indication from Parliament that it is basic for the marketing of realty that the vendor sign an agency agreement or listing agreement with the agent licensee. We consider that it is fundamental competence that an agent ascertain that the property owner has authorised a sale process in writing.*

*[68] Accordingly, we dismiss the charge of misconduct but find the licensee guilty of unsatisfactory conduct. The parties are, of course, entitled to a hearing about penalty although they may prefer to deal with that by submissions on the papers.*

*[69] Our current thinking is that, essentially, the licensee was over-influenced by directions given to him in good faith by the very experienced and reputable accountant for the vendor, and to some extent by the vendor's solicitor, and he failed to obtain proof by signature from the vendor that the vendor had definitely decided to sell the property. The licensee should have acquired direct authority from the vendor rather than assumed authority from the vendor's accountant.*

*[70] There is, of course, the possibility that the vendor was given to understand by somebody that the auction price obtained by the defendant could be bettered if the vendor pulled out of the 2013 auction sale. However, we understand that there was a resale at a lower price than had been achieved by the licensee."*

***The Submissions of the Prosecution on Penalty***

[4] Having referred to the above extracts from our said decision herein, part of Mr Hodge's submissions for the prosecution on penalty read:

*"3.3 In the context where not only did the licensee market the property for sale without the signed authority of the vendor, but actually took the property to auction at which the property sold under the hammer, all without the vendor's authority, it is submitted that the Tribunal's decision was, in effect, that this would have amounted to misconduct, or at least may well have, but for the unique context of the case. In terms of assessing the licensee's culpability for penalty purposes, much then turns on the extent to which the Tribunal considers that the licensee's conduct is ameliorated by that unique context.*

*3.4 Plainly the Tribunal has held that the unique context meant that the conduct was unsatisfactory only, but it is submitted that that context does not ameliorate the position to such an extent that the unsatisfactory conduct can be described as minor or low level only.*

*3.5 Particularly in circumstances where the property was being taken to auction, it was a bad error for the licensee not to ensure he had obtained proper authority before that point was reached. It is submitted that the licensee's unsatisfactory conduct must be regarded as at least being in the mid range for unsatisfactory conduct, and therefore a mid range fine, and censure, should be the outcome in this case.*

*3.6 This was not a momentary lapse of judgement or an error made in the heat of having to make a snap decision. There was no pressing urgency that prevented the licensee from obtaining the proper authority, and if that did not come through from the vendor, then the property should not have been taken to market, and certainly not to auction. There was plenty of time for the licensee to get this right and he failed to do so."*

[5] Mr Hodge then referred to the evidence available of the financial impact to the prospective purchaser on the failure of his purchase related to this prosecution and set out the apparent costs of the need for that person's alterative storage of furniture, waste of legal costs, loss of work time, exchange rate loss, valuation cost and emotional stress. These were costed for the defendant at about $30,000 in total but that is a broad figure.

[6] Mr Hodge then referred to *Quin v The REAA* [2012] NZHC 3557 as precluding any compensation for emotional distress or for any market loss due to the failure of the transaction but stated:

*"3.9 However, the costs incurred for renting garage space, legal costs and labour hire cover are arguably in a different category. It is submitted that these types of expenses are able to be met through an order under s 93(1)(f)(ii) of the Act. It was not and is not practicable for the licensee to rectify his error or omission (once it had been exposed as a result of the transaction failing to settle). It is possible for steps to be taken at the licensee's expense to provide relief from the consequences of the error or omission, namely meeting the legal and other costs the complainant was required to pay. It is submitted that an order in favour of the complainant may be made in the region of $4,000 to $5,000."*

[7] Mr Hodge concluded by submitting that appropriate penalty orders would be a censure, a fine at least in the mid range (i.e. between $4,000 to $6,000), and an

order under s 91(1)(f)(ii) in favour of the complainant in the region of $4,000 to $5,000.

***The Response for the Defendant on Penalty***

[8] Mr Rea analysed the reasoning in our substantive decision and put it that the defendant has already suffered a very significant penalty as a result of being prosecuted before us for misconduct. He referred to the particular circumstances of the present case as we encapsulated them in paragraph [1] of our 4 September 2015 decision set out above.

[9] He then noted that the defendant's costs amounted to about $30,000 and would have been unnecessary if the Committee had made a finding of unsatisfactory conduct rather than bringing a prosecution before us. He referred to distress of the defendant at being under threat of that prosecution for a year or so from August 2014 to September 2015.

[10] Mr Rea does not accept that the defendant's conduct was in the mid-range of unsatisfactory conduct but rather submits it was at the lower end of any such scale.

[11] With regard to *Quin v Real Estate Agents Authority* [2012] NZHC 3557, Mr Rea stated:

> *"18 Counsel for the Authority submits that these costs are "arguably" available under section 93(1)(f)(ii), notwithstanding the finding by the High Court in Quin v Real Estate Agents Authority that section 93(1)(f) does not allow orders for compensation. Presumably, this is a reference to the passage of the Quin decision by Justice Brewer at paragraph [65]:*
>
> > *"In situations where a complainant has already done what was necessary to rectify the error or omission, or to provide relief from its consequences, the power would extend to requiring the licensee to reimburse the complainant".*
>
> *19 It is submitted on behalf of Mr Mairs that (with the possible exception of costs relating to the rental of garage space to store furniture) the orders sought by the Committee are in the nature of compensation, squarely barred by the High Court in Quin. That is because they are wasted expenditure as a result of the inability to settle. They are not costs incurred by the complainant in taking steps to rectify any error or omission, nor were they costs incurred by the complainant to provide relief from the consequences of any error or omission.*
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> *20 Legal costs would have been incurred by the complainant in the purchase of the property, irrespective of any error or omission by Mr Mairs. The fact that the transaction could not be completed means that those costs were wasted expenditure, however, that is a common head of loss in a claim for compensatory damages. The legal costs in the attempted purchase were not incurred either to rectify an error or to provide relief from an error. They were simply wasted costs.*
>
> *21 To the extent that the legal costs might have been increased above what would ordinarily have been incurred in a straightforward purchase, again this was a consequence of the inability to settle. The additional costs were*

*not incurred to correct an error, nor were they incurred to provide relief from the consequences of an error. Similarly, if the complainant needed to hire additional labour so he could make time to be available to attend to legal issues, this was not a cost incurred to rectify an error or provide relief from an error. It was incurred as a consequence of the legal difficulties that arose with the transaction. Reimbursement would amount to compensatory damages contrary to Quin.*

*22 The only cost incurred by the complainant that is potentially within the scope of orders available under section 93(1)(f) is the cost allegedly incurred to rent garage space to store furniture, if this was required due to the inability to settle the transaction. That might be claimable if furniture needed to be stored elsewhere than in the property, and arranging alternative storage provide relief from one of the consequences of the inability to settle (an absence of space within which to keep the furniture)."*

[12] Mr Rea added that the cost of renting garage space for furniture could not have amounted to very much and that the property was to have been sold fully furnished and subject to any existing tenancy so that it is difficult to understand how the complainant believed that on settlement he could have stored his additional furniture at the expense of someone else.

[13] Mr Rea then put it that orders available under s 93(1)(f) of the Act are discretionary and there are other parties who would seem more culpable for any loss by the complainant prospective purchaser than the agent. In particular, he referred to the vendor's accountant having given assurances to the defendant to market the property for the vendor without proper vendor approval and so the defendant acted in good faith in accepting those assurances, and to our having noted that.

[14] Mr Rea referred to the defendant's early admission of unsatisfactory conduct, to the misconduct charges having failed before us, to the defendant's previously unblemished career; and submitted that the finding of unsatisfactory conduct was a significant penalty in itself.

[15] In particular, Mr Rea put it that the defendant has learned from his experience and will be acutely aware in the future of the need to specifically confirm authority to sell directly with the vendor. He submits that a monetary penalty is not appropriate as the defendant has already been penalised significantly in defending misconduct charges when he would have pleaded guilty to unsatisfactory conduct.

***Our Views***

[16] We have given quite some thought to the detail of the helpful submissions of both counsel. It seems to us that the complainant intending purchaser has experienced a disappointing reversal in the course of the risks of commerce.

[17] In our substantive decision we analysed in quite some depth the conduct of the licensee and the type of failure which came about. We emphasised that he is a credible and honest person who was misled in good faith but that exposed the oversight that he had, in very unusual circumstances, not properly secured the approval of the vendor that he market the property. As Mr Hodge has also emphasised, to market the property without the signed authority of the vendor was a bad error by the licensee who had plenty of time to organise the necessary authority.

[18] Section 93(1)(f) of the Real Estate Agents Act 2008 reads for present purposes:

> *"(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following: …*
>
> *(f) order the licensee—*
>
> *(i) to rectify, at his or her or its own expense, any error or omission; or*
>
> *(ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:"*

[19] Our routine comment on *Quin* as in *Tong* re *REAA and Ors* [2014] NZREADT 3 reads:

> *"[18] In any case, the amount sought by the appellants is compensation for straight market loss. This kind of monetary award was discussed in the decision of Quin v The Real Estate Agents Authority [2012] NZHC 3557 where the High Court (per Brewer J) 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. Licensees can only be ordered to do something or take actions to rectify or "put right" an error or omission s 93(1)(f)(i). If the licensee can no longer "put right" the error or omission, that licensee can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission, s 93(1)(f)(ii). Any expenses incurred by the licensee as a result of doing what he/she is ordered to do must be borne by the licensee. Even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. …".*

[20] It may be that some of the costs incurred by the present complainant (the would-be purchaser) were to overcome or provide relief from the error of the licensee in failing to obtain the vendor's written authority to settle. Frankly, there is some vagueness or uncertainty as to the prohibitory scope of the *Quin* case in relation to unsatisfactory conduct by a licensee.

[21] However, in the present case it does not seem to us to be fair to use the error of the licensee as a basis for compensation to the would-be purchaser. This is because the licensee relied on instructions from an ostensible agent of the vendor, namely, the vendor's accountant with support from the vendor's lawyer. Also the vendor, seemingly on a whim, took the opportunity of there being no current listing agreement to seek a higher sale price than the licensee had achieved for him but was unsuccessful in that respect. We do not have jurisdiction to consider compensation being paid by anyone other than a licensee.

[22] We do not think that a censure is particularly called for in this case. The penalty we impose is a $3,000 fine to be paid within three calendar months from the date of this decision to the Registrar of the Authority at Wellington.

[23] 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