

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 49

READT 038/15

IN THE MATTER OF charges laid under s 91 of the Real Estate Agents Act 2008

BETWEEN COMPLAINTS ASSESSMENT COMMITTEE 402

AND TANYA DUNHAM

Defendant

Date of substantive decision: 24 March 2016

Hearing as to penalty: 4 July 2016

Tribunal: Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms N Dangen, Member

Appearances: Ms C Paterson, on behalf of Complaints Assessment Committee 402
Mr P Hunt, on behalf of the defendant

Date of Penalty Decision: 13 July 2016

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] On 9 June 2015 Complaints Assessment Committee 402 (the Committee) laid two charges of misconduct under s 73 of the Real Estate Agents Act 2008 (the Act) against the defendant, Ms Dunham. The charges may be summarised as follows:

- [a] That she failed to disclose to the complainants who were viewing, and subsequently purchased, a property in Forrester Drive Tauranga (the property) that building work was planned for a neighbouring property that would affect the property's views (Charge 1); and
- [b] That she failed disclose, at the relevant time, that the vendors of the property were her parents (Charge 2).

[2] Following a hearing on 3 December 2015 at Tauranga, the Tribunal found in a decision dated 24 March 2016¹ that Ms Dunham was guilty of misconduct under s 73(a) (disgraceful conduct) on Charge 1, and that she had engaged in unsatisfactory conduct under s 72 on Charge 2 (the Tribunal's decision). Ms Dunham appeared before the Tribunal at Auckland on 4 July 2016, for a hearing as to penalty.

A summary of the background facts

[3] The factual background is set out in full in the Tribunal's decision, and need not be repeated here. The events all took place between August and December 2013.

[4] Ms Dunham listed the property for sale on 27 July. The vendors were Ms Dunham's parents, Mr and Mrs Fisher.

[5] On 2 August Ms Dunham was sent an email by the owner of a property across the road (Mr Keate), advising that he planned to build a new double garage with a second storey above. He asked Ms Dunham to advise any potential purchasers of his plans, as the construction would affect the property's water views. He also offered to provide Ms Dunham with a copy of the plans.

[6] Ms Dunham acknowledged receipt of the email, but did not obtain the plans. However, she altered the marketing material for the property so as not to include a picture of the view that would be affected.

¹ *Complaints Assessment Committee (CAC 402) v Dunham* [2016] NZREADT 26.

[7] The complainants, Mr and Mrs Ogilvie (the Ogilvies), first viewed the property on 25 August. They were attracted to the property by its “stunning” view. They made an offer for the property on 29 August, subject to finance, a LIM, and a building report. Their offer was accepted by the vendors the same day. Ms Dunham provided contractual documents to the complainants on 30 August.

[8] The Ogilvies conducted a building inspection on 31 August. Their evidence was that during this visit Ms Dunham told them that there was to be some building work on the property across the road. They said that when they responded that it looked as if there was going to be a double garage or carport, on a single level, Ms Dunham said “oh that is right, probably”.

[9] The Ogilvies also said that during this visit, they found out for the first time that the vendors were Ms Dunham’s parents. Up to that point, Ms Dunham had only said that the vendors were relatives of hers. No written advice of this was given to them.

[10] The Ogilvies finalised the sale and purchase agreement on 2 September, conducted a pre-settlement inspection on 28 November, and moved into the property on 29 November. On 18 December they noticed that construction had started on a second storey on the property across the road. On speaking with the Mr Keate, they learned for the first time of a second storey being built. The views from the property have been significantly impacted as a result of the construction.

The Tribunal’s findings

Charge 1

[11] The Tribunal accepted the Ogilvies’ evidence that they made it clear to Ms Dunham during their first viewing that the views from the property “were stunning and important to them”.² The Tribunal also found that Ms Dunham had misled the

² At [111] of the Tribunal’s decision.

Ogilvies by remaining silent as to the likely effect of the construction on Mr Keate's property. She had the plans available to her, and could easily have provided them.³

[12] The Tribunal found that Ms Dunham had breached r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) by withholding the information in the plans either wilfully or recklessly, and that such conduct would reasonably be regarded by agents of good standing, or by reasonable members of the public, as disgraceful.⁴ On that basis, the Tribunal found Ms Dunham guilty of misconduct under s 73(a) of the Act and observed that the misconduct was "at a concerning level".⁵

Charge 2

[13] The Tribunal accepted the Ogilvies' evidence that prior to the building inspection on 31 August, Ms Dunham had only told them that the defendants were "relatives" of hers. The Tribunal found⁶ that Ms Dunham told them during the visit on 31 August that she was the vendors' daughter, but failed to disclose in writing that persons related to her (her parents) would benefit financially from the sale of the property.⁷

[14] The Tribunal found that Ms Dunham had breached s 136 of the Act, and that her conduct was in breach of a 72 of the Act (as to unsatisfactory conduct). The Tribunal found that her conduct did not amount to misconduct, but found that the alternative charge of unsatisfactory conduct was proved.

Sentencing principles

[15] As stated by McGrath J, for the majority of the Supreme Court in *Z v Complaints Assessment Committee*:⁸

³ At [107].

⁴ At [112].

⁵ At [120].

⁶ At [118].

⁷ As required by s 136 of the Act.

⁸ *Z v Complaints Assessment Committee* [2009] NZLR 1 (SC), at [97].

... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned.

[16] The principal purpose of the Act is to “promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.”⁹ The Act achieves these purposes by:¹⁰

- (a) Regulating agents, branch managers, and salespersons:
- (b) Raising industry standards:
- (c) Providing accountability through a disciplinary process that is independent, transparent, and effective.

[17] These purposes are best met by penalties for misconduct and unsatisfactory conduct being determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection and the maintenance of confidence in the industry, and the need for deterrence.

[18] To this we add that a penalty should be appropriate for the particular nature of the misbehaviour, that we should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances, and that we should impose the least punitive penalty that is appropriate in the circumstances.

Submissions as to penalty

[19] Ms Paterson submitted for the Committee that the Tribunal’s finding on Charge 1 amounted to a finding of dishonesty by omission, by wilfully or recklessly withholding information about Mr Keate’s building works. She submitted that this was a conscious omission; a clear communication that did not advise the Ogilvies as to the extent of the construction.

⁹ Section 3(1) of the Act.
¹⁰ Section 3(2).

[20] Ms Paterson further submitted that the dishonest nature of Ms Dunham's conduct in Charge 1 was reflected in her failure to make proper disclosure that her parents were the vendors, in Charge 2. She submitted that s 136 of the Act is specifically designed to protect consumers in a situation where a licensee is acting in a position of conflict.

[21] Ms Paterson acknowledged that Ms Dunham's conduct while disgraceful, was not as serious as, for example, that involving misuse of client funds. However she submitted that the Committee was not aware of any factors that would mitigate against suspension, and that a suspension in the range of three to six months, or a substantial fine, was required to meet the purposes of the Act.

[22] Mr Hunt submitted for Ms Dunham, in respect of Charge 1, that her omission to advise the Ogilvies of the extent of Mr Keate's plans was at the lowest end of the range of disgraceful conduct. He submitted that Ms Dunham was acting "on the spot", and her omission was her failure to correct the Ogilvies' comment as to the construction. He submitted that this was a one-off event, rather than a deliberate course of action.

[23] In respect of Charge 2, Mr Hunt submitted that Ms Dunham had acknowledged from the outset that she had breached s 136 by failing to make written disclosure of her relationship to the vendors.¹¹ He noted that the Tribunal had found unsatisfactory conduct on this charge, rather than misconduct.

[24] In mitigation, Mr Hunt submitted that Ms Dunham had changed the advertising for the property when she learned of Mr Keate's plans, she had taken steps to improve her practices, she felt remorseful, she has had 23 years' experience in the industry without any previous disciplinary action against her, she was the sole breadwinner for her family, and she had been vilified by recent publicity of this case, which had included threats and hate messages. He also submitted character references from professional associates of Ms Dunham.

¹¹ Mr Hunt referred to an open letter to the solicitors for the Authority, dated 19 October 2015, recording that she admitted the (alternative) charge of unsatisfactory conduct.

[25] Having referred to the character references submitted to the Tribunal, Mr Hunt submitted that the public interest did not require Ms Dunham's omission to be met with suspension from working as a real estate agent. He submitted that the appropriate sanction would be a censure and (if the Tribunal considered a fine to be necessary) a minimal fine. He also submitted that Ms Dunham's prompt admission of unsatisfactory conduct, and her personal and financial circumstances, should be taken into account if the Tribunal were considering making an order for costs.

Discussion

[26] The Tribunal was referred to a selection of recent decisions as to penalty. The most serious conduct involved in the decisions cited to us was characterised by the Tribunal as "aiding a specific act of dishonesty and a fraudulent scheme", and led the Tribunal to order the licensee's licence to be cancelled, and the licensee to pay a fine of \$5000.¹² In another case the Tribunal ordered a licence to be suspended for three years, and a fine of \$5000, where the licensee had forged a signature in a listing agreement, and used the forged document to claim commission and to lodge a caveat.¹³ In that case, the Tribunal took into account that the licensee had barely been able to operate for the previous five years.

[27] In other cases cited to us, the Tribunal:

- [a] Ordered suspension for nine months and a \$1000 fine (providing a blank Agreement for Sale and Purchase to an unlicensed person and failing to alert the Authority to the fact that an unlicensed person was undertaking real estate agency work);¹⁴
- [b] Censured and fined a licensee \$10,000 who had had a client sign and backdate a listing agreement;¹⁵ and

¹² *CAC 20006 v Azimi* [2014] NZREADT 97.

¹³ *CAC 10020 v McDonald* [2014] NZREADT 29.

¹⁴ *CAC 10063 v Picknell* [2013] NZREADT 41.

¹⁵ *CAC 20002 v Gollins* [2015] NZREADT 26.

[c] Ordered suspension for one month, a fine of \$3000, costs totalling \$2500, and compensation of \$3000, where a licensee had altered an Agency's database so that it contained inaccurate information ,upon resigning from the Agency.¹⁶

[28] The decisions cited serve to remind this Tribunal that individual cases will vary considerably as to their facts, the circumstances in which the conduct occurred, and the individual circumstances of the licensee.

[29] In relation to Charge 1, we do not accept Mr Hunt's submission that this was a one-off, on the spot omission. It was a serious omission which we cannot accept as being accidental or involuntary. Ms Dunham's exchange with the Ogilvies must be seen in the context of Mr Keate having told her of the full extent of the construction, and her having failed to obtain the plans when he offered them.

[30] Further, Ms Dunham's conduct had a direct impact on members of the public, in contrast to, for example, that in *Vessey and Gollins*, which affected Agencies. We do not accept that the conduct was mitigated by her having altered the marketing material: what was influencing the Ogilvies as potential purchasers was what they saw when they were at the property.

[31] As to Charge 2, we accept that as Ms Dunham did (belatedly) orally advise the Ogilvies were her parents. However, there was a clear breach of the requirement to provide written advice under s 136 which is, as Ms Paterson submitted, a provision for consumer protection.

[32] Standing back and looking at the conduct, Ms Dunham's personal financial circumstances, and the character references, we have concluded that suspension is not required in this case. We advised the parties of this conclusion at the end of the penalty hearing. As noted above, however, we regard Ms Dunham's conduct as being serious, and it requires censure and a fine.

¹⁶ *CAC 20004 v Vessey* [2015] NZREADT 46.

Penalty order

[33] Ms Dunham is censured in respect of both Charge 1 and Charge 2. She is ordered to pay a fine of \$6,000 on Charge 1, and to pay a fine of \$2,000 on Charge 2. The fines are to be paid to the Registrar of the Authority at Wellington, within three months of the date of this decision. We make no order as to costs.

[34] We note that the complainants did not seek compensation.

[35] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms N Dangen
Member