BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 66

READT 037/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	DEAN CATIONS Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 403) First Respondent

On the papers

Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms N Dangen, Member
Submissions received from:	Mr Cations Ms A Davies, on behalf of the Authority
Date of Decision:	26 October 2018

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Cations is a licensed salesperson engaged at Mike Pero Real Estate New Brighton, Christchurch ("the Agency"). On 3 April 2018, Complaints Assessment Committee 403 ("the Committee") made two findings of unsatisfactory conduct against him, in relation to his conduct in marketing two properties in Christchurch (Property A, in Avondale, and Property B, in Parklands) ("the substantive decision").

[2] In a penalty decision dated 12 June 2018, the Committee made an order for censure, ordered Mr Cations to pay a fine of $4,000, and ordered him to complete and pass, within three months of the decision, Unit Standard 26148 – Demonstrate knowledge and use of inspection, appraisal and agency agreement for real estate, and Unit Standard 23137 – Demonstrate knowledge of the sale and purchase agreement and facilitate the sale of real estate.

[3] Mr Cations has appealed against the penalty decision. The issue for determination is the quantum of the fine.

Substantive decision

Property A

[4] Property A was listed by Mr Cations under an Agency Agreement dated 6 December 2016, specifying a commencement date of 9 January 2017. However, Mr Cations was requested by the solicitor acting on behalf of the vendor to erect a sign and advertise the property over the holiday period. He therefore erected a sale sign at the property on 23 December 2016. Mr Cations was told by his Branch Manager to remove the sign, which he did on 27 December 2016.

[5] The Committee found that by erecting the sale sign before the Agency Agreement came into effect, Mr Cations breached r 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), which provides that:

> Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.

[6] Mr Cations acknowledged that notwithstanding the solicitor's request, he should not have erected the sale sign. The Committee found that Mr Cations should have been well aware of the Rules, and that his breach of r 9.6 was unsatisfactory conduct.

Property B

[7] The Committee found that Mr Cations had made changes to an agreement for sale and purchase ("the agreement") after the vendor and purchaser had signed it. The Committee noted Mr Cations' statement that he had written the agreement for Property B afresh, believing it would be easier to understand and clearer. The Committee found that when he re-drafted the agreement, Mr Cations made an error in recording the deposit amount as being due on acceptance, when the intention of the parties was that the deposit would be payable on confirmation of the conditions in the agreement.

[8] The Committee further found that Mr Cations had added a late settlement interest rate into a signed contract without the authority of either party. The Committee referred to an email Mr Cations sent on 27 August 2016, in which he said "Only thing added was 14% late settlement and in my 7 years it's never happened. And it went past lawyers and purchasers as well". The Committee recorded that it took Mr Cations' admission that he added a late settlement interest rate (which could have had serious consequences) into a signed contract, without the authority of either party, very seriously.

[9] The Committee considered that Mr Cations' conduct overall demonstrated a casual if not slapdash approach to the "paperwork" side of a licensee's role. He had repeatedly breached r 5.1 of the Rules (pursuant to which licensees must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work), amounting to very serious unsatisfactory conduct.

Penalty decision

[10] The Committee considered that altering a contract after it had been signed by the parties was the more serious breach. It considered that the fact that there were no serious consequences for the parties, or for Mr Cations, was more by good luck than by good management. The Committee also noted that Mr Cations had previously been found to have engaged in

unsatisfactory conduct (albeit not at the high end of unsatisfactory conduct), and considered it was appropriate to impose a fine on a second adverse finding.

[11] The Committee therefore made an order for censure, and a fine of $4,000. The Committee recorded that Mr Cations had taken steps to improve his skills by enrolling in two Unit Standards, and made a formal order for him to complete these.

[12] The Committee recorded that it had taken into account the principles of promoting and protecting the interests of consumers and the general public, maintaining professional standards, punishing offences, and rehabilitation. The Committee acknowledged that penalty orders must be proportionate to the offending, and to the range of available orders.

Submissions

(a) Mr Cations

[13] Mr Cations submitted that the fine of $4,000 was inconsistent with penalties imposed in other cases, disproportionate to the offending, and that the Committee gave insufficient weight to several important mitigating factors.

Inconsistency with penalties imposed in other cases

[14] Mr Cations referred the Tribunal to seven penalty decisions. We were not given copies of these decisions, so have relied on Mr Cations' summaries:

[a] Complaint No C15453: the licensee commenced marketing a property before the listing agreement was initialled: the licensee was fined $500.

[b] Complaint No C22539: two offences within a short period, but a lower overall fine: the licensee listed a property while it was still under another agency and did not disclose to the client the possibility of liability for two commissions; one month later, the licensee provided false information as to the age of the property and whether it had been subject to EQC claims: the licensee was fined $2,000.

[c] Complaint No C20306 (involving two licensees): the licensees failed to advise the complainant that the LIM for the property disclosed that it was in a flood zone and at a risk of flooding; advised the complainant that the property could be used as a home and income when it could not; and put the complainant under undue pressure: one licensee was fined $7,000, the other was fine $5,000.

[d] Complaint No C20896: the licensee marketed a property and introduced it to buyers without any authority to do so, and failed to prepare a Comparative Market Analysis: the licensee was fined $4,500.

[e] Complaint No C18008: the licensee was related to the vendors and failed to disclose numerous issues with the property, known to him: the licensee was fined $5,000.

[f] Complaint No. C21132: the licensee failed to disclose the results of a prior methamphetamine test before the property went to auction: the licensee was fined $1,500.

[g] Complaint No. C19562: the licensee placed a caveat on a vendor's property to prevent settlement until commission was paid to his agency: the licensee was fined $3,000.

[15] Mr Cations submitted that these cases demonstrated that licensees had been ordered to pay smaller fines for conduct at a similar level to his, and had been ordered to pay similar (or, in two cases, smaller) fines to that he was ordered to pay, in cases of more serious offending. He further submitted that measured against cases where licensees' conduct was more serious, but the fine less than that imposed against him, his fine should be even less than the more serious cases.

Proportionality to seriousness of the offending

[16] Mr Cations submitted that although the Committee recognised the principle that penalty orders must be proportionate to the offending, it did not apply it.

[17] With regard to Property A, Mr Cations submitted that there was no issue of protection of the public (as the sale sign was erected with the consent of the vendor); no issue as to maintenance of professional standards (as it was either ignorance of the rule on his part or a momentary oversight, which would require improving his professional standards rather than punishment); the fact that the sign was up for only four days, with the vendor's consent, did not require punishment (as should be recognised in order to maintain the credibility of the Tribunal); and the need for rehabilitation was met by the training he had already enrolled in.

[18] With regard to Property B, Mr Cations submitted that the fact that both parties had agreed to the insertion of the penalty interest rate reduced the seriousness of any offending. He submitted a letter from the purchasers (not provided to the Committee) in support of this submission. He also submitted that the "detail added was in the scheme of things, relatively minor and is comparable to an administrative slip – easily fixed, without detriment to any party", and his error lay in failing to get the parties to initial the alteration. He submitted that as the actions he took were with the knowledge and consent of both parties, the most relevant principle was the maintenance of professional standards, and there was nothing in his having failed to get the change initialled that required punishment, or deterrence, or to make an example of him to deter others.

[19] Mr Cations then submitted that the Committee was wrong to reason that because he had a previous unsatisfactory conduct finding (which he described as being a failure to get a written acknowledgement of information he received from a vendor, and characterised as at the lower end of such conduct) a second offence should attract a fine. He submitted that this showed an arbitrary approach to making penalty orders.

Mitigating factors

[20] Mr Cations submitted that the Committee failed to take into account the absence of any aggravating factors, that he obtained no personal gain, that his offending was the result of sloppiness rather than dishonesty, that in the two years following the complaints he had had no other problems and had a good standing in the community, and his ability to pay a fine. Mr Cations submitted four letters attesting to his good character, and pro bono work for the community.

The Authority's submissions on appeal

Committee's error in respect of Property B

[21] The Authority accepted that in respect of Property B, the natural interpretation of Mr Cations' email of 20 August 2016 (referred to in paragraph [8], above) was that he had obtained the consent from the parties and their solicitors to the penalty interest clause, rather than the Committee's interpretation. The Committee was in error in finding that Mr Cations had added a penalty interest clause without either party's knowledge. Ms Davies submitted that while Mr Cations was still wrong to fail to have the additional clause initialled, his overall culpability is lower, and it is appropriate to reconsider the penalty imposed.

[22] Ms Davies referred to the purchaser's letter submitted by Mr Cations, confirming that their approval had been sought to the addition of the penalty interest clause. She noted that it appeared to refer to a different property from that referred to in Mr Cations' email of 20 August 2016. The fresh agreement for sale and purchase of Property B was dated 11 May 2016, whereas Mr Cations' email referred to a different address in the subject line, and was dated some three months later. She submitted, however, that Mr Cations' culpability is the same, even if the error in not having the interest clause initialled in fact related to a different property.

[23] Ms Davies submitted that in the light of the Committee's error in finding that the penalty interest clause was added without the knowledge and consent of the parties, its assessment of Mr Cations' conduct as "very serious" cannot stand. Ms Davies submitted, however, that Mr Cations' conduct demonstrated a number of departures from acceptable standards in different transactions, in respect of which it was appropriate to impose a fine.

Property A

[24] Ms Davies referred to decisions of the Tribunal in which it has stressed the importance of the agency agreement, as the "foundation upon which transactions involving the sale and purchase of a property rest".[1]

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[1] *Summit Real Estate Ltd v Real Estate Agents Authority (CAC 10012)* [2011] NZREADT 38. Ms Davies also referred to the Tribunal's decisions in *Martelli v Real Estate Agents Authority (CAC 409)* [2018] NZREADT 23, and *T v Real Estate Agents Authority (CAC 20005)* [2013] NZREADT 84.

[25] She acknowledged that Mr Cations only had the sale sign up for four days, and removed it when instructed to do so. She also acknowledged that Mr Cations had not dealt with any offers, or shown people through the property. She submitted, however, that there was a risk that inquiries could have been made by members of the public and had that occurred, Mr Cations would not at the time have had authority to act for the vendors, and may have obtained an advantage over other agents.

[26] Ms Davies submitted that Mr Cations' breach is at the lower end of unsatisfactory conduct, but not so low that a fine is inappropriate. She submitted that although he was acting at his clients' request, he had the responsibility to explain to them that he could not put the sale sign up until the agency commenced, or that the agency agreement should be amended.

Property B

[27] Ms Davies submitted that while licensees are not expected to be lawyers, they are expected to have a basic knowledge of contract law, as they commonly negotiate contracts between vendors and purchasers, and they prepare contracts (often with conditions as to finance and solicitor's approval) before solicitors are involved. She submitted that Mr Cations had demonstrated a lack of care and skill regarding contractual requirements and processes.

[28] Ms Davies submitted that with respect to the date the deposit was due, the written agreement for sale and purchase did not reflect the parties' intentions. As a result of Mr Cations' failure to initial the penalty interest rate, the variation to the agreement was not in writing, and that condition was not binding. This was notwithstanding that it was known about and agreed to by the parties. She submitted that Mr Cations' conduct could have had significant consequences for both his client vendors and himself.

[29] Ms Davies also referred the Tribunal to evidence before the Committee that with regard to the penalty interest rate, Mr Cations did not follow instructions from the Agency's Brand and Territory owner.

Previous unsatisfactory conduct finding

[30] This finding was on 31 March 2017, and concerned conduct in the first half of 2016. Mr Cations was found to have failed to exercise the required level of skill, care, and competence when he failed to record adequately critical information about the status of earthquake damage insurance claims. Ms Davies submitted that the issues raised there were broadly similar to the issues with the agreements for sale and purchase in the present case, and that the prior finding demonstrated the need for deterrence, by way of a fine.

Appropriate penalty

[31] Ms Davies submitted that Mr Cations' errors, in two separate areas of the Rules, and over two transactions, were of a basic nature, and showed a lack of care that is not expected of a licensee with seven years' experience.

[32] With respect to the penalty decisions referred to by Mr Cations, Ms Davies submitted that while Tribunal penalty decisions should be reasonably consistent with other cases, ultimately each decision must turn on its own facts. She submitted that the circumstances of Complaint C15453 (noted at paragraph [13][a], above) had some analogy to the present case, but the Committee considered there were strong mitigating factors, including that the licensee had an unblemished disciplinary record, leading to a fine of $500.

[33] Ms Davies submitted that a greater fine is appropriate here, where there was more than one type of breach, in more than one transaction, and Mr Cations does not have an unblemished disciplinary history. She submitted that a fine must be imposed in order to meet the principles of sentencing, in particular the maintenance of professional standards and the protection of the public through specific and general deterrence.

[34] While acknowledging the Committee's error in respect of Property B (disclosed only as a result of information provided by Mr Cations after the Committee's decision), and that the conduct in the present case is at the lower level of unsatisfactory conduct, Ms Davies submitted that a fine in the range of $1,500 to $2,000 would be appropriate, together with the orders for censure and further education.

Discussion

[35] We make a preliminary point. We have considered Ms Davies' submissions as to the Committee's error in relation to Property B. If it were the case that Mr Cations made the same error in two sales (Property B and another property), and in one those sales did not obtain the consent of the parties to the transaction, then that would be a matter of serious concern, and would affect the Tribunal's consideration of the appeal. Mr Cations did not clarify the position in his communication to the Tribunal after receiving the submissions on behalf of the Authority. As there is no evidence on the point, the Tribunal proceeds on the Authority's submissions, as made: that is, that Mr Cations added a penalty interest clause to an agreement for sale and purchase and failed to have it initialled by the parties to the transaction.

[36] Penalty orders in disciplinary proceedings before the Complaints Assessment Committees and the Tribunal must further the purposes of the Act, 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."[2] In order to meet these purposes, penalty decisions focus on 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.

[37] Complaints Assessment Committees and the Tribunal apply general principles of sentencing, that penalty orders should be appropriate for the particular nature of the misbehaviour and should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The least punitive penalty that is appropriate in the circumstances should be imposed, and while there is an element of punishment, rehabilitation is an important consideration.[3] Here, we must decide whether the Committee applied the appropriate principles, and whether the penalty ordered was open to it to make.

[38] We note Mr Cations' further communication to the Tribunal, that having seen the submissions for the Authority, he would agree to accept a fine of $1,500 as being appropriate,

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2 Section 3(1) of the Act.

3 See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128] and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

together with the censure and further education already ordered. We stress that penalty is for the Tribunal to determine, and the Tribunal cannot be bound to apply an order that is "accepted" by one or both of the parties concerned.

[39] We have considered Mr Cations' references to penalties imposed in other cases. It is rare (if it is ever so) for the circumstances to be absolutely consistent in any two cases. There are always variations of the factual circumstances, or those of the people against whom the penalties are being imposed. None of the cases referred to by Mr Cations provides us with any substantial assistance.

[40] In this case, the significant factors are that Mr Cations' breaches of the Rules were in respect of an agency agreement, and an agreement for sale and purchase. The breaches are as to documents which are fundamental to licensees' real estate agency work, and to the clients and customers concerned. We are not persuaded that the Committee was wrong to characterise Mr Cations' breach of r 9.6 (in respect of Property A) as "blatant", by a licensee who should be well aware of the Rules, and his breaches of r 5.1 (in respect of Property B) as demonstrating a "casual if not slapdash approach to the "paper-work" side of a Licensee's role". That characterisation is valid even taking into account the Committee's error as to the parties' knowledge and consent.

[41] We also refer to the finding of unsatisfactory conduct against Mr Cations on 31 March 2017. That finding related to conduct between February and April 2016. The Committee had commenced its inquiry in August 2016. The conduct under scrutiny by the Committee in the present case was in December 2016 (property A) and (although there is some uncertainty on the point) around May or August 2016 in respect of Property B. In a relatively short space of time, Mr Cations' conduct over three transactions demonstrated (as the Committee put it) a "casual if not slapdash approach" to his paperwork, and a concerning lack of attention to detail.

[42] We note Mr Cations' submissions as to mitigating factors. His submission as to an "absence of aggravating factors" does not provide him with significant assistance. If there were such factors, a greater penalty would have been appropriate. We note his submission that there have been no problems in the two years since his breaches in this case. We also note his character references, but there is no evidence that any such references were submitted to the Committee.

[43] Taking all the circumstances of Mr Cations' breaches of the Rules, including the Authority's acknowledgement of the Committee's error, and his submissions on appeal, we are satisfied that the Committee was wrong to order Mr Cations to pay a fine of $4,000. We have concluded that the appropriate fine is $2,000.

Orders

[44] Mr Cations' appeal against the Committee's penalty decision is allowed. The order to pay a fine of $4,000 is quashed and replaced by an order that he pay a fine of $2,000. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[45] The orders made by the Committee for censure and further education remain in place.

[46] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Ms N Dangen
Member