BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 002

READT 036/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	GRANT JONAS Applicant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 412) First respondent
AND	BRUCE HARTNETT Second respondent

On the papers:

Tribunal:	Mr J Doogue, Deputy Chairperson Ms N Dangen, Member Ms N O'Connor, Member
Submissions received from:	Mr Jonas Ms E Mok on behalf of First Respondent Ms B Webster, on behalf of Second Respondent
Date of Decision:	11 February 2019

DECISION OF THE TRIBUNAL

Background

[1] The following statement of the background to the present appeal adopts the summary of the position which was accurately set out in the submissions made on behalf of the Authority by Ms Mok.

[2] The complaint related to the sale of a property at 108 Buffalo Beach Road, Whitianga 3510 (the Property). The vendor was Tarcus Investments Limited, which traded as The Beach Motels and Cabins (the vendor). The appellant is the sole director of Tarcus Investments Limited.

[3] On 25 January 2017, the appellant listed the Property for sale with the licensee.[1] The GST status question on the agency agreement was not completed.[2] The licensee presented an offer to the appellant, which the appellant accepted after some negotiation with the purchaser.

[4] An agreement for sale and purchase (ASP) was entered into on 31 January 2017, with settlement occurring on 31 March 2017.[3] The ASP specified that the purchase price of $682,000 was inclusive of GST, and that the vendor was registered for GST.[4] Schedule 2 of the ASP, which was required to be completed if the vendor was registered for GST, was not filled out.[5]

[5] The appellant later complained about various aspects of the licensee's conduct, including that the licensee knew that the Property was a business and that it was GST registered, but presented an offer inclusive of GST.[6] He stated that, if the ASP had been correctly completed, the appellant would have known about the risk of incurring GST liability, thereby netting a significantly lower sale price. He also alleged that the licensee failed to consult the appellant about GST, and failed to suggest that the appellant should seek expert opinion regarding GST.

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1 BOD at Tab 1, pp 36–40.
2 BOD at Tab 1, p 40.
3 BOD at Tab 1, p 43.
4 BOD at Tab 1, p 43.
5 BOD at Tab 1, p 53.
6 BOD at Tab 1, pp 4–7.

[6] The appellant sought orders requiring the licensee to receive training for transactions involving GST and that the licensee reimburse the appellant's costs incurred from tax consultancy fees.

GST aspects of the agreement

[7] In order to understand what the obligations of the licensee were in the present case which involved possible GST liability, it is necessary to begin with a brief discussion of the effect of GST provisions in this type of transaction. Schedule 2 of the ASP was inserted into the standard form agreement for a purpose.

[8] The sale of land is deemed to be a supply of goods within the scope of the Goods and Services Tax Act 1985 (the Act).[7] However, where the land supplied is part of the sale of a taxable activity which continues an operation, no GST liability attaches to the business which is transferred or the assets used to carry it on.

[9] The transfer of a capital assets structure for a business, but not the actual business activity, is not the sale of a business as a going concern.[8] These concepts are relevant to the current case because it would appear that the land and buildings which were the subject of the sale had at some point been operated as a motel/rental cabins business. Whether the going concern was still operational at the time of the ASP is not clear and this may have given rise to difficulties in the context of this case. In any event, the appellant obviously thought that he was selling the property on the basis that the transaction would be sold on this basis.

[10] There was an expansion of the circumstances in which the sale of land was able to be treated as zero rated in 2011 when the Act was amended to change the position which had been that a registered person selling the land generally paid output tax unless it was the supply of a going concern.

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[7] Goods and Services Tax Act 1985, s 2.
[8] *Barratt v Commissioner of Inland Revenue* (1995) 20 TRNZ 164.

[11] The problem that had been identified was that a registered person buying land from an unregistered person could potentially claim input tax based upon the land being goods as defined under the Act.

[12] The High Court made reference to these difficulties in the case of *YL NZ Investment Ltd v Ling*[9] in which Bell AJ observed:

> [19] … A registered person buying land from an unregistered person could potentially claim input tax taxed based on the land being second-hand goods. There is risk to the Inland Revenue if the person selling the land did not pay the output tax — the Inland Revenue would still have to pay the purchaser their input tax. That was seen as a structural imperfection under the GST regime. Section 11(1)(mb) is the response:
>
> **11 Zero-rating of goods**
>
> (1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0 per cent in the following situations:
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> …
>
> (mb) The supply wholly or partly consists of land, being a supply –
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> (i) made by a registered person to another registered person who acquires the goods with the intention of using them for making taxable supplies; and
>
> (ii) that is not a supply of land intended to be used as a principal place of residence of the recipient of the supply or a person associated with them under section 2A(1)(c);

[13] As Bell AJ further explained:

> [20] The three features of compulsory zero-rating under this sub-section are:
>
> (a) the supply consists wholly or in part of land;
>
> (b) the supply is made by one registered person to another registered person who acquires the land with the intention of using it for making taxable supplies; and
>
> (c) the land supplied is not intended to be used as a principal place of residence by the recipient or anyone associated with them.

[9] *YL NZ Investment Ltd v Ling* [2017] NZHC 1793.

[14] In order for s 11(1)(mb) to be successfully invoked it would be necessary for the vendor to be able to establish that the second of the above criteria, "(b)", was applicable. That is to say, certainty was required that the purchaser for GST would be registered at the time of settlement. The purchaser and the standard form agreement warranted that the particulars in Schedule 2 were correct at the date of the agreement. Therefore, if the vendor proceeded on the assumption that the transaction would be zero rated on the grounds, amongst others, that the purchaser was registered for GST and that assumption proved to be incorrect, the vendor would nonetheless be able to recover compensation for breach of the warranty.[10]

[15] In the present case, because Schedule 2 was not completed, the vendor would have no recourse against the purchaser in the event that the purchaser was not registered for GST.

[16] The pre-formatted agreement which the parties were using had been approved by the Auckland District Law Society and the Institute, and had been drafted in order to avoid the very difficulties that arose in this case. However, the form of the agreement was of no assistance because the licensee was of the belief that the correct way to deal with the present transaction was to ignore the requirements of Schedule 2 and leave the table uncompleted. To depart from an agreed standard form template which had been carefully considered by persons knowledgeable about these matters, was an unsatisfactory decision and one by which the licensee exposed his principal to the potential of losing substantial amounts of money.

The decision of the Committee

[17] The decision of the Committee was that no penalty in effect was called for. The Committee made that decision on the basis that the licensee had already undertaken voluntary additional training in the area of GST issues. It also took into account the fact that the licensee had voluntarily paid the sum of $2076 towards costs incurred by the appellant in obtaining advice from consultant accountants concerning the effect of

[10] Cl 15.0 of the ASP.

the GST arrangements contained in the agreement, which the licensee had drawn up for the parties to sign.

[18] The Committee, in effect, made an order which would have resulted in the identity of the licensee not being disclosed, although the facts of the case, other than those which might have led to his identification, were to be published.

Was the decision of the Committee erroneous?

[19] In the submissions which she filed on behalf of the agency Ms Mok submitted that the correct approach to an appeal of this kind was as follows:

> 4.2 The Tribunal has previously adopted the approach in *Morton-Jones v Real Estate Agents Authority* for penalty appeals,[11] and recently confirmed this position in *Century 21 Wellington Limited v Real Estate Agents Authority*:[12]
>
> > [17] … the Tribunal only need deal with the issue as to whether the penalties imposed by the Committee were appropriate...In making this decision the Tribunal must determine whether the appeal is a general appeal or an appeal against the exercise of a discretion.
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> > [18] The High Court in *Morton-Jones v Real Estate Agents Authority* has confirmed that appeals against penalty decisions under the Act are an appeal against the exercise of a discretion. The High Court held:
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> > > [86] What this conclusion means is that the principles summarised by the Court of Appeal in *May v May* apply: the Tribunal's decision on penalty should not be overturned on appeal unless the Tribunal has made an error of principle, considered irrelevant matters, or was plainly wrong. The practical task is to identify matters that limit the discretion to determine whether the Tribunal has acted within it.

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11 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804; *Burnett v Real Estate Agents Authority (CAC 404)* [2017] NZREADT 2. It is noted, however, that in there is a conflict of authority in the High Court on this point. Several decisions in the comparable context of disciplinary appeals under the Lawyers and Conveyancers Act 2006 and in the medical field have suggested that appeals from orders decisions should be approached as a general appeal. See *TSM v Professional Standards Committee* [2015] NZHC 3063 at [12]–[15]; *Davidson v Auckland Standards Committee No 3* [2013] NZHC 2315, and the decisions of the Full Bench in *Sisson v The Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society* [2013] NZHC 349, [2013] NZAR 416 at [14]–[15] and *Hart v Auckland Standards Committee (1) of New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103 at [12].

12 *Century 21 Wellington Limited v Real Estate Agents Authority (CAC 412)* [2017] NZREADT 47 (31 July 2017) at [17]–[19]. Citations omitted.

> [19] This does not mean that the Tribunal substitutes its own view for that of the Committee but that the Appellant must identify an error of law or principle, or that the Committee took into account irrelevant considerations, or that they failed to take into account relevant considerations, or that the decision is plainly wrong.

[20] We accept that the statement above correctly sets out the approach that we are required to take to this appeal.

[21] We do not consider that the Committee was in error in the way that it decided the penalty question in this case.

[22] As part of its decision, the Committee stated that the principles that it was concerned with were the following:[13]

[a] promoting and protecting the interests of consumers and the public generally;

[b] maintaining professional standards;

[c] punishing offences; and

[d] rehabilitating the professional;

[23] The appellant did not contend that any of these principles were irrelevant or wrong or that the Committee had omitted to consider any relevant issue of principle.

[24] The Committee concluded that the licensee ought to have exercised greater care in the preparation of the agreement.

[25] The position was summarised in the submissions for the Authority in the following statement:

> The Committee found that the licensee was aware of the Property's use as a motel at the time of purchase, and should therefore have been aware of the potential GST implications, as compared to the sale of a residential dwelling. The Committee held

[13] BOD at Tab 3, p 110.

> that the licensee had an obligation to ensure the parties to the transaction were aware of the issues and potential risks of structuring the transaction on a GST inclusive or exclusive basis, particularly the risks for the appellant …

[26] The Committee nonetheless concluded that the extent of fault on the part of the licensee was at the lower end of the spectrum. We will next consider whether or not the Committee came to a correct determination on the evidence that it had before it.

[27] One matter which bears upon the assessment of the carelessness of the licensee in this case is the matter of how obvious was the issue in regard to which the licensee made an error or failed to take proper steps. The Committee was influenced by the fact that in this case that the land and buildings had previously been used as part of a motel business. They correctly noted that this gave rise to possible implications in terms of GST. They appear to have been of the view that because of this knowledge which the licensee must have had, the need to confront the question of GST and ensure that the agreement correctly dealt with it was obvious.

[28] As we have noted in this decision, it was even more obvious that GST needed to be dealt with because the form of the agreement required that step to be taken in every case where the vendor was GST registered.

[29] For that reason, in our view, a reasonable licensee would have been well aware that GST was a significant issue in this case and the licensee ought to have thought carefully before departing from the printed form of the agreement. To do so without instructions from the vendor and without being clear as to what the consequences would be, the licensee should have appreciated that what he was proposing to do involved risk. Had the vendor taken legal advice and, in consequence of doing so, told the licensee that the advice was that it was acceptable to draw up the agreement without completing Schedule 2, then it is probable that any charges against the licensee would fail.

[30] However, that did not happen in the present case. The vendor at the very least ought to have pointed out that executing the agreement without Schedule 2 having been completed was not what the standard form agreement contemplated and that it was inherently risky to sign it in that form. The licensee did not tell the vendor this.

[31] The licensee asserts that he advised the vendor to obtain professional advice but, as we have noted, that is denied by the appellant and there is no written record of the licensee having made such a recommendation. We do not therefore consider that this is a factor which bears upon the culpability of the licensee.

[32] The Committee noted that the appellant was a person who had a background in accounting. It concluded that when the licensee advised the appellant to obtain legal advice, the appellant refused the suggestion. While this did not excuse the licensee, the Committee concluded that the appellant had to accept a degree of responsibility for the position that he found himself in.

[33] The appellant apparently does not dispute that he told the licensee that he had been an accountant. It is true that he sought to minimise the significance of his previous occupation by stating that his accounting experience had been limited to preparing company accounts. However, in our view, providing this information to the licensee would obviously influence the view of the licensee about the transaction. It could well have justified his view that the appellant knew what he was doing. It could have conveyed to the licensee that this was not a person who through ignorance was putting himself at risk in regard to technical and arcane GST issues.

[34] We accept that this was a factor that substantially mitigated the extent of culpability of the licensee.

[35] We would summarise the position as being that the licensee should have been put on his guard about potentially creating hazardous GST problems by submitting for execution by the parties an agreement which was only partially complete. He should have appreciated the requirement of r 9.9 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 which warns against submitting agreements that do not contain all material particulars. The licensee ought to have appreciated that there could be a substantially different financial outcome from the transaction if the form of the agreement which the licensee unwittingly prepared cast the burden of GST on the vendor rather than making the transaction one which was zero rated. Measured in financial terms, the risk was not a trifling one. On the other hand, as we have noted, the licensee may well have been lulled into a false sense of security by the statement

from the appellant that he was an accountant because this could reasonably give rise to an assumption that the appellant would know what he was doing when it came to GST.

[36] We also consider that it ought to have been obvious to the licensee that the potential quantum of loss which the principal would suffer if a mistake was made about GST would be substantial. This was not a careless mistake about a minor matter.

[37] The Committee also was influenced by the fact that the licensee had voluntarily undertaken further training on three occasions on the subject of tax/GST as part of his verifiable training for 2018.

[38] The appellant agreed that the licensee had agreed to pay one of the three invoices that he had received from consultant accountants advising him on the GST issue. It was the contention of the appellant that he ought to pay the other two as well.

[39] The Committee took into account the fact that the licensee had paid $2760 on a voluntary basis. They did not consider that it was appropriate to order that the licensee pay additional invoices which the appellant had received from the consultants. They considered that the invoices which they had sighted contained very little helpful detail[14] and that they were not convinced that the invoices were relevant to the issue of an appropriate penalty.

[40] We note that no submissions were made before us as to the basis upon which we could conclude that the Committee had taken an erroneous view of the situation in regard to the unpaid invoices.

[41] A further part of the order that the Committee made was that the circumstances of the case were to be published but, effectively, on an anonymised basis. We comment that an order in that form would not have had any punitive effect, assuming that it was complied with. However, circulation of the details of the breach by the licensee would have contributed to general deterrence above the licensees who found

[14] BOD at Tab 3, p 109.

themselves faced with the same difficulty that the licensee dealt with in this case concerning the GST issue.

[42] Reverting to the statement of principles which we have already mentioned that the Committee adopted, we are unable to see that there has been any error on the part of the Committee. It is not our function to substitute a penalty which we consider would have been more appropriate. The Tribunal can only intervene in the question of penalty and the circumstances which were discussed in the case of *Century 21* to which we earlier made reference.

[43] It is arguable, in our view, that the approach to penalty which the Committee took resulted in a decision that was rather more lenient than what another Committee or the Tribunal itself might have imposed. This was not a trivial case when viewed from the perspective of the potential financial harm that could have been caused to the vendor. However, we agree with the Committee that there are indications that the licensee was reassured by the fact that the appellant was an accountant.

[44] We consider that the Committee considered all the correct matters and that in the end it was a matter for its judgement as to how it should proceed on the particular facts of this case having regard to the principles which it had correctly identified. The actual penalty decision which the Committee came to lay was within the permissible limits of the discretion that they had to decide what sentence to impose. Conversely, the approach that the Committee took to penalty after considering all of the mitigating features is not one that they could only have come to in error.

[45] The appeal is therefore dismissed.

[46] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

J Doogue
Deputy Chairperson

Ms N Dangen
Member

Mr N O'Connor
Member