

Decision No: [2011] NZREADT 16

Reference No: READT 051/10

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

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10047)**

**AND** **PAUL BERNARD WHITEFORD**

Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Judge M Hobbs – Chairperson  
Ms J Robson – Member  
Mr G Denley – Member

Hearing: 20 July 2011

Appearances: Nicole Wilde for the Committee  
Paul Borich for the Defendant

**PENALTY DECISION**

***Introduction***

[1] On 4 May 2011 the defendant was found guilty by the Tribunal of misconduct under s 73(c)(i) of the Real Estate Agents Act 2008 (the Act) in that his conduct consisted of wilful contravention of s 136 of the Act.

[2] Briefly the facts found to be proved were that in March 2010 the defendant, as agent for the vendor on the sale of 8 Honey Place, Weymouth failed to disclose to Niko Toluono the purchaser that he may benefit financially from the sale of the property because he was the sole director and shareholder of the vendor of the property, Empire Developments (2008) Limited.

[3] In spite of the defendant's denials the Tribunal found that at no stage did he disclose that he was the sole shareholder in the Company which owned the property being sold and that in negotiating a higher price made reference to a vendor from whom he needed instructions.

[4] Section 110 of the Act contains the penalties that can be imposed, the relevant parts of which in this case are:-

### 110 Determination of charges and orders that may be made if charge proved

- (b) an order cancelling the licence of the licensee and, in the case of a licensee that is a company, also cancelling the licence of any officer of the company:
- (c) an order suspending the licence of the licensee for a period not exceeding 24 months and, in the case of a licensee that is a company, also suspending the licence of any officer of the company for a period not exceeding 24 months:
- (f) an order that a licensee who is an individual pay a fine not exceeding \$15,000 and order a licensee that is a company pay a fine not exceeding \$30,000:
- (g) where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct, an order that the licensee pay to that person a sum by way of compensation as is specified in the order, being a sum not exceeding \$100,000.

It should also be noted that under s 151 of the Act a breach of s 136 renders the defendant liable on summary conviction to a fine not exceeding \$10,000.

[5] Mr Borich for the defendant made reference to a decision of the Complaints Assessment Committee in the case of *Lancaster*, CA 3575577, number 10001597, 15 September and 18 November 2010 and the penalty imposed by the Committee in that case as an indication of the sort of penalty we should impose.

[6] The Tribunal can dispose of that submission simply by saying that the facts in *Lancaster* are distinguishable and in our view the case should have been referred to this Tribunal. Furthermore in the circumstances of that case the penalties imposed were manifestly inadequate.

[7] A more compelling submission from Mr Borich is his argument that the defendant's conduct in breaching s 136 by failing to disclose his interest to a purchaser was less serious than a failure to make such disclosure to a client vendor.

[8] We accept that an agent owes a fiduciary duty to a client vendor and not a purchaser. The Real Estate Agents Act (Professional Conduct and Client Care) rules 2009 defines a customer as being "*a person who is a buyer or potential buyer of land or a business and who is not a client*". This means that a "*customer*" of a real estate agent is a purchaser and a "*client*" is a vendor: the two roles under this Act and under the Rules are distinct.

[9] However the rules while they confirm the agent's fiduciary duty to a vendor and a general duty of fair dealing towards purchasers contain *inter alia* Rule 6.4 which states:-

6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.

[10] Accordingly while we accept the submission of Mr Borich, this case is still a serious one to be met with a response which ensures appropriate standards of conduct are maintained in the real estate industry.

[11] We also accept that on the facts of this particular case there was no great inequality in the bargaining position between the defendant and the purchaser who had some experience in buying and selling property. Nor was there any loss to Mr Toluono who on discovering the dishonesty of the defendant cancelled the contract he had entered into, apart from his expenditure of \$450 on a valuation he obtained.

[12] In our view the aggravating features of the defendant's conduct are his quite deliberate and wilful breach of s 136(1) of the Act and his vain attempts to persuade us in his evidence that Mr Toluono was not being entirely truthful.

[13] The Tribunal can find little by way of mitigation apart from the defendant's acceptance that this conduct was unsatisfactory while denying it amounted to misconduct.

[14] We agree with the submission of Ms Wilde that decisions of industry disciplinary tribunals emphasise the maintenance of high standards and the protection of the public above any punitive element, although orders made in disciplinary proceedings may have a punitive effect.

[15] To this effect, McGrath J for the majority of the Supreme Court in *Z v CAC*<sup>1</sup> (Blanchard, Tipping and McGrath JJ) held (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."*

### **Defendant's Personal Circumstances**

[16] The defendant is no longer employed as a real estate agent and his licence will expire on 31 March 2012.

[17] He is currently working in a bakery business the details of which we are unaware with an estimated income after tax of \$600 per week and has accumulated losses from his previous employment of \$200,000 the details of which we are again unaware.

[18] The defendant is married with two children one of whom he supports and Mr Borich tells us he could only pay a fine by instalments of \$30 per week which would be a matter for the District Court under s 98 of the Act.

### **Conclusion**

[19] After consideration of the matters we have referred to we consider it would normally be appropriate in such a case as this to impose a fine towards the upper level of the maximum of \$15,000 or a suspension of licence towards the lower end. The Tribunal is however constrained by the facts that firstly the defendant is no longer working as an agent so any order affecting his licence would be an idle exercise and secondly his limited financial resources.

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<sup>1</sup> [2009] 1 NZLR 1

[20] Accordingly the defendant is fined \$4,000 and ordered to pay Mr Toluono \$450.

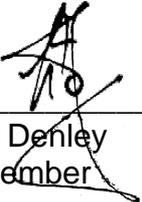
[21] In accordance with s 113 of the Act the Tribunal advises the parties of the right to appeal this decision to the High Court pursuant to s 116 of the Act.

**DATED** at WELLINGTON this 22<sup>nd</sup> day of July 2011

  
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Judge M. Hobbs  
Chairperson



  
\_\_\_\_\_  
J Robson  
Member

  
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G Denley  
Member