

Decision No: [2011] NZREADT 7

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 April 2011

Appearances: Michael Hodge for the Committee
Paul Borich for the Defendant

Decision: 4 May 2011

DECISION

Introduction

[1] Following a complaint made by Niko Mikaele Toluono (“the complainant”), Complaints Assessment Committee 10047 (“CAC 10047”) charges the defendant with misconduct under s 73(c)(i) of the Real Estate Agents Act 2008 in that his conduct consists of a wilful or reckless contravention of s 136 of the Real Estate Agents Act 2008.

Particulars

- (a) In about March 2010 the defendant, as agent on the sale of 8 Honey Place, Weymouth (“the property”), failed to disclose to the complainant that he may benefit financially from the sale of the property to the complainant, as the sole director and shareholder of the vendor of the property, Empire Developments (2008) Limited (“the company”).

Background

[2] The defendant is a licensed real estate agent under The Real Estate Agents Act 2008 ("the Act") who is also the sole director and shareholder of Empire Developments (2008) Limited.

[3] The company was at the material time the registered proprietor of a property at 8 Honey Place, Weymouth which was on the market for sale.

[4] Niko Toluono in March 2010 responded to an advertisement advertising the property for sale through the agencies of Southern First National Limited and the defendant personally.

Evidence for Committee

[5] The complainant gave evidence that he made a written offer to purchase the property for \$370,000 acting on the professional advice of the defendant as agent for the company as vendor.

[6] The complainant told us the defendant said he would give the vendor a call or see him the same day to confirm if the complainant's offer would be accepted.

[7] On 16 March 2010 the defendant told the complainant the vendor had made a counter offer of \$378,000 so the complainant made a final offer of \$375,000.

[8] On 17 March 2010 the defendant told the complainant the vendor had accepted this final offer and a Sale and Purchase Agreement was signed and produced in evidence.

[9] The complainant then did a company search and discovered that the defendant was to all intents and purposes the owner of the property through his sole shareholding in the company.

[10] The complainant was adamant the defendant never mentioned he had any interest in the property.

[11] The complainant said he was annoyed by this and as a result of what he described as the defendant's dishonesty and his ill feeling for the defendant's behaviour he cancelled the contract without paying the deposit.

Evidence for the Defendant

[12] The defendant filed a response to the charge pursuant to Regulation 7(i) of the Real Estate Agents (Complaints and Discipline) Regulations 2009 in which he denied the charge but offered the following explanation:-

"I accept I did not advise the prospective purchaser in writing that I might financially benefit from the sale of the property however make the points

(a) no person suffered any financial loss as a result

(b) *the conduct does not amount to s 73(c)(i) misconduct but should be characterised as s 72 unsatisfactory conduct”.*

[13] In his evidence the defendant denied never telling the complainant he had an interest in the property saying he told the complainant he had shares in the company at their first meeting.

[14] He conceded he referred to the vendor in his conversations with the complainant but not as often as the complainant had given in evidence.

[15] The defendant was referred to the statement he made on 22 July 2010 to Ross Gouverneur a Real Estate Agents Authority investigator in which he said at p 2:

“I don’t know if I told the purchaser I owned it or not. I didn’t know I hadn’t told him I owned it until about 3 days after he signed the deal when he phoned me to say I didn’t tell him I owned the property”.

[16] The defendant confirmed in evidence that he knew about his obligation under the Act but didn’t know he had to disclose his financial interest in the transaction in writing.

Relevant Law

[17] Section 136(1) of the Real Estate Agents Act 2008 provides as follows:

136 Disclosure of other benefits that licensee stands to gain from transaction
 (1) A licensee who carried out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.

[18] Section 73(c)(i) provides as follows:

73 Misconduct
 For the purposes of this Act, a licensee is guilty of misconduct if the licensee’s conduct—

(c) consists of a wilful or reckless contravention of—
 (i) this Act.

Conclusion

[19] The Tribunal has no hesitation in finding the charged proved on a balance of probabilities. We prefer the evidence of the complainant to that of the defendant and we are satisfied that at no stage did the defendant disclose to the complainant that he was the sole shareholder in the company which was the registered proprietor of the property.

[20] The defendant’s own admission that he knew of his obligations under the Act to disclose his interest to the complainant leaves the Tribunal in no doubt that his conduct was wilful. His failure to comply with the Act was intentional and in the knowledge that it was contrary to the Act. That makes his conduct wilful.

Penalty

[21] As this is the first case before the Tribunal of a breach of s 136(1) and s 73(c)(i), counsel are to make submissions as to penalty at a hearing in Auckland on 18 May 2011.

DATED at WELLINGTON this 4th day of May 2011

Judge M Hobbs
Chairperson

Ms J Robson
Member

Mr G Denley
Member