

[2011] NZREADT 9

Reference No: READT 080/10

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

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE 10044**

AND **YING HE**
Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Judge Michael Hobbs – Chairman
Mr J Gaukrodger – Member
Mr G Denley – Member

Hearing: 20 May 2011

Appearances: Michael Hodge for the Committee
The Defendant in person

Decision: 27 May 2011

DECISION

Introduction

[1] The Complaints Assessment Committee 10044 charges Ying He, salesperson (“the Defendant”), with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 (“the Act”) in that his conduct constitutes a wilful or reckless contravention of rule 9.15 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

Particulars

In about June 2010, the defendant advertised eight apartments at 11 Howe Street, Freemans Bay, Auckland for sale without the authorisation of the owner of the apartments.

[2] The Complainants Assessment Committee 10044 further charges the defendant with misconduct under s 73(a) of the Act in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

In or about the middle of 2009 the defendant advertised properties for sale knowing he did not have authorisation to do so.

Background

[3] The defendant is a licensed real estate salesperson who at the material time was employed by Queen Street Realty Limited in Auckland.

[4] On 20 December 2010 the defendant filed a response to the charge in which he admitted both of the two charges referred to above.

[5] As a consequence of the defendant's admission to both charges they were adjourned for a hearing by way of formal proof on 3 May 2011.

[6] The defendant appeared at that formal proof hearing and indicated that while he was prepared to admit the charges he was of the opinion that his conduct did not amount to serious misconduct.

[7] It became apparent to the Tribunal that the defendant had a limited grasp of some aspects of the English language and we thought it appropriate that he should seek either legal advice or at least some advice from his employer Queen Street Realty Limited. Accordingly to enable the defendant to seek such advice the formal proof hearing was adjourned to 20 May 2011.

[8] On 20 May 2011 the defendant again appeared before the Tribunal in person but advised us that neither his employer nor any of its representatives were prepared to appear on his behalf before the Tribunal. After some discussions between the Tribunal and the defendant he accepted that the matter should proceed on the basis that he admitted the charges against him.

[9] The Tribunal was concerned in relation to the second charge that the lack of particulars contained therein rendered it unfair to the defendant for him to be charged with that offence. Accordingly Mr Hodge for the Committee quite properly applied for leave to withdraw the second charge. That application was granted by the Tribunal which then proceeded to deal with the first charge against the defendant.

[10] A summary of facts was prepared and put to the defendant who having read it was satisfied that it was correct. The defendant also acknowledged that the advertisements, the subject of the charge which were shown to him were correct in all of the details contained therein.

[11] The Tribunal having satisfied itself that the defendant had been given every opportunity for advice and now clearly understood the details of the charge duly found the one charge against the defendant to be proved.

The Facts

[12] The Summary of Facts put to the defendant and accepted by him was as follows:-

- Ying He, also known as Winson He, is licensed as a salesperson under the Real Estate Agents Act 2008 (**Act**).
- Ying He has been charged with misconduct under s 73 of the Act.
- During the period to which the charge relates, Ying He was licensed as a salesperson under the Act working for Queen Street Realty Limited.
- In 2010 the owner of eight apartments at Meridian Apartments, 11 Howe Street, Freemans Bay, Auckland (**apartments**) listed the apartments for sale with five separate real estate agencies. The apartments were advertised for sale by those agencies. Queen Street Realty was not one of the authorised agencies.
- In June 2010 a friend of Ying He saw one of the advertisements for the apartments and discussed it with Ying He. Ying He's friend is a property investor who buys and sells apartments for a profit. Ying He has stated he has done business with this person in the past.
- Ying He copied the details of the apartments and advertised them on the website "www.skykiwi.com". Ying He placed his own name as the real estate salesperson for the apartments, and listed his contact telephone numbers and email address, on the advertisement for the apartments he had placed on "www.skykiwi.com".
- Ying He had not obtained an agency agreement to market the apartments or otherwise have any authority from the owner of the apartments to market them or deal with them in any way.
- On 13 July 2010 an investigator from the Real Estate Agents Authority interviewed Ying He who admitted the facts as outlined above.
- Ying He stated he had advertised the apartments for about two weeks on "www.skykiwi.com" to obtain feedback on what people were prepared to pay for the apartments. He did this for the purpose of passing this information on to his friend who had told him about the advertisement for the apartments and who was interested in the apartments. Ying He refused to provide the name or any contact details of his friend to the investigator.

Penalty

[13] The defendant was asked if he wished to make any submissions as to penalty and he declined. Mr Hodge has submitted 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.

[14] In this regard Mr Hodge referred us to the judgment of McGrath J for the majority of the Supreme Court in *Z v CAC*¹ 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”.

[15] In this case the defendant has admitted a wilful breach of rule 9.15 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which provides as follows:

“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”.

[16] The Summary of Facts accepted by the defendant clearly establish that his conduct was a wilful breach of the rule and clearly reaches the threshold for misconduct referred to by this Tribunal in *CAC v Downtown Apartments Limited and Anor*², paragraphs 49 – 54.

[17] The full range of penalties available to the Tribunal are set out in s 110 of the Act as follows:

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

- (1) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that it has been proved on the balance of probabilities that the licensee has been guilty of misconduct, it may, if it thinks fit, make 1 or more of the orders specified in subsection (2).
- (2) The orders are as follows:
 - (a) 1 or more of the orders that can be made by a Committee under section 93:
 - (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:
 - (d) an order that a licensee not perform any supervisory functions until authorised by the Board to do so:
 - (e) an order, in the case of a licensee who is an employee or independent contractor, or former employee or former independent contractor, that any current employment or engagement of that person by a licensee be terminated and that no agent employ or engage that person in connection with real estate agency work:
 - (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.

¹ [2009] 1 NZLR 1

² [2010] NZ READT 06

- (3) The making of an order under this section for the payment of compensation to any person does not affect the right (if any) of that person to recover damages in respect of the same loss, but any sum ordered to be paid under this section, and the effect of any order made under this section for the reduction, cancellation, or refund of fees, must be taken into account in assessing any such damages.
- (4) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that the licensee, although not guilty of misconduct, has engaged in unsatisfactory conduct, the Tribunal may make any of the orders that a Complaints Assessment Committee may make under section 93".

[18] The Tribunal is of the view that the conduct of the defendant is a serious breach of the rules; it was misleading to consumers and obviously had the potential to compromise the vendor's marketing of the property. It was apparently done to assist a property developer friend of the defendant who the defendant has declined to identify so there was at least potential for some indirect financial benefit on the defendant's part although that has not been clearly established to the satisfaction of the Tribunal.

[19] We are satisfied that the misconduct of the defendant warrants a stern response to ensure that appropriate standards of conduct are maintained in the real estate industry and it is the Committee's submission that a fine at the upper end of the range or a suspension of the defendant's licence are within the available range.

[20] The Tribunal is satisfied that a deterrent penalty is warranted in this case and agrees with the dictum of Lang J in *Patel v Dentists Disciplinary Tribunal*³ where he held that:

"Disciplinary proceedings inevitably involve issues of deterrence and penalties and are designed in part to deter both the offender and others in the profession from offending in a like manner in the future".

[21] The Tribunal considers that there a number of matters in mitigation of penalty that we can take into account.

[22] The defendant is of course entitled to some discount on the basis of his admission and we are also of the view that his conduct involved a degree of naivety, partly because of his ethnicity and his difficulty with language and also the fact that his advertisements were as he said directed primarily towards the Chinese community in Auckland. We are also prepared to take into account on the defendant's behalf the unfortunate lack of support he has received from his employers.

[23] We are given to understand that the defendant has relatively limited means and so we prefer not to impose a monetary penalty but to impose a term of suspension of his salesperson's licence.

[24] The Tribunal has taken a starting point of suspension of the defendant's salesperson's licence for 12 months with a discount of four months for his admission and a further two months for the other mitigating circumstances leaving a final period of suspension of six months to take effect one month from the date of issue of this decision.

³ HC Auckland, CIV 2007-404-1818, 13 August 2007

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

DATED at WELLINGTON this 27th day of May 2011

Judge Michael Hobbs
Chairman

Mr J Gaukrodger
Member

Mr G Denley
Member