

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 54

READT 005/17

IN THE MATTER OF

An appeal under section 111 of the Real Estate Agents Act 2008

BETWEEN

TRUSTEES OF THE JS & AJ HAMILTON
FAMILY TRUST
Appellants

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 403)
First Respondent

AND

AMELIA (MARGARET) REEVE
Second Respondent

AND

FLEUR ALLINSON
Third Respondent

AND

KIM FRANKLIN
Fourth Respondent

On the papers

Tribunal:

Hon P J Andrews, Chairperson
Ms N Dangen, Member
Ms C Sandelin, Member

Submissions received from:

Mr J Hamilton, on behalf of the Appellants
Ms S Bishop, on behalf of the First
Respondent
Mr J Abbott, on behalf of the Fourth
Respondent

Date of Decision:

13 September 2017

DECISION OF THE TRIBUNAL

Introduction

[1] On 10 November 2016, Complaints Assessment Committee 403 (“the Committee”) found that each of the second, third, and fourth respondents had engaged in unsatisfactory conduct in respect of the sale of a property at Prebbleton, Christchurch (“the property”) (“the substantive decision”).¹ The appellants (trustees of the JS & AJ Hamilton Family Trust (“the Trust”) have appealed against the Committee’s penalty decision dated 20 January 2017 (the “penalty decision”).² The appeal focuses on the Committee’s orders in respect of relief sought by the trustees.

[2] The Tribunal has received submissions from the trustees, and on behalf of the first respondent, the Authority, and the fourth respondent, Mr Franklin. The third respondent, Ms Allinson, has taken no part in the appeal proceeding. Although she had earlier participated in the proceeding (by counsel), no submissions on appeal have been made by or on behalf of the second respondent, Ms Reeve. The Tribunal understands that neither Ms Reeve nor Ms Allinson is now engaged in the real estate industry.

Background facts

[3] The relevant events occurred in February and March 2016. Ms Reeve and Ms Allinson were at the relevant time employed as salespersons by Bellamy’s Real Estate Limited, in Christchurch (“the Agency”).³

[4] The trustees entered into a conditional sale and purchase agreement for the property on behalf of the Trust on 17 February (“the trustees’ agreement”). Ms Reeve drafted this agreement, and mistakenly named the purchaser as being the “JS & AJ Hamilton Trust”,⁴ rather than the trustees.

¹ *Complaint No: C13695, Decision finding of unsatisfactory conduct*, 10 November 2016

² *Complaint No: C13695, Decision finding unsatisfactory conduct*, 20 January 2017.

³ The Tribunal understands that neither Ms Reeve nor Ms Allinson now work in the real estate industry.

⁴ Albeit mis-stating the name of the Trust as “JA & AJ Hamilton Trust”.

[5] The property was marketed by the Agency as including curtains and blinds. However, curtains and blinds were not included in chattels listed in the trustees' agreement. At the time they entered into the agreement, and up until the agreement was settled, the trustees were not made aware that curtains and blinds were not to be included in the chattels, and did not discover that they had been taken until they took possession of the property. We will refer to the trustees' complaint regarding the curtains as "the curtains issue".⁵

[6] On 25 February (at which time the trustees' agreement remained conditional), a second, unconditional, sale and purchase agreement for the property was entered into between the vendors and two other potential purchasers ("the second agreement"). The second agreement was drafted by Ms Allinson, and did not contain any provision to the effect that it was a back-up offer and subject to the appellants' agreement not becoming unconditional. Mr Franklin reviewed the second agreement before it was signed, but did not notice the error.

[7] The trustees declared their agreement unconditional (through their solicitors) on 29 February. The trustees' solicitors advised the Agency of the confirmation on 1 March. On 3 March, Ms Reeve emailed a "Multi-offer disclosure/Real Estate Agents Authority Guide Acknowledgement form" ("the multi-offer form") to the trustees, with a request that they sign it and return to her.

[8] Both the trustees and the second purchasers asserted their right to complete the purchase. We will refer to the asserted rights to complete the purchase as "the sale agreements issue". Both parties instructed solicitors, and both lodged caveats to protect their interests. Following further correspondence and negotiations, the second purchasers withdrew their caveat, and the trustees settled with the vendors on 30 March.

[9] Shortly after settlement, the trustees complained to the Authority. They alleged that they were required to instruct solicitors to deal with the difficulties arising out of the sale agreements issue, and that they were required to buy curtains

⁵ We observe that there was some uncertainty as to which particular curtains had been removed. However, as the marketing of the property referred to "curtains" being within the included chattels, any such uncertainty is immaterial.

to replace those removed by the vendor. They alleged that in both respects they were required to incur costs as a result of the second to fourth respondents' conduct. They sought relief by way of reimbursement for the costs incurred.

[10] The trustees also alleged that Ms Reeve had wrongly required them to sign a retrospective multi-offer form, and had failed to pass on to them important information from the Earthquake Commission ("EQC") as to earthquake recovery work carried out after the Christchurch earthquakes, before they settled the purchase.

The substantive decision: breaches of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules")

The trustees' sale and purchase agreement, and the second sale and purchase agreement

[11] On the complaints which relate to the trustees' appeals against the Committee's orders for relief, the Committee first found that Ms Reeve had removed the curtains from the list of included chattels, without advising the trustees. The Committee found that it was "basic" that a licensee should draw a purchaser's attention to any change in the chattels being sold, and in failing to do so, Ms Reeve had breached r 5.1.⁶

[12] The Committee found that Ms Allinson's failure to include a clause recording that the second agreement was a back-up offer and subject to the trustees' offer failing to become unconditional was a very basic failure of the skill and care required of real estate salespeople, and that all reasonably competent licensees would be aware of the need to ensure that back-up offers are recorded as such. The Committee also found that Mr Franklin had failed to exercise care in supervising Ms Allinson, so as to ensure that the back-up clause was included.⁷

⁶ At paragraph 3.5.

⁷ The Tribunal notes that in the substantive decision, the Committee mistakenly believed Ms Allinson was in the first six months of practice as a real estate salesperson when she drafted the second agreement, and therefore subject to s 36(2A) of the Lawyers and Conveyancers Act 2006 from preparing a sale and purchase agreement. The Committee corrected this error in the penalty decision. However, the Committee found that Mr Franklin had failed to pick up Ms Allinson's error when correcting the second agreement: see penalty decision, at paragraph 3.10.

Other findings

[13] The Committee observed that it was legally incorrect to name the Trust, rather than the trustees, as purchaser. The Committee said this was a “basic error that no reasonably competent licensee should make”, and found Ms Reeve had breached r 5.1⁸

[14] The Committee found that Ms Reeve had breached r 5.1 by not making any further attempt to provide the EQC information to the trustees, after two failed email attempts.⁹

[15] The Committee noted that Ms Reeve appeared (at best) to be unsure about the intent of a multi-offer form and said in response to the complaint that the form should have been presented to the trustees “at the outset”. The Committee considered that Ms Reeve’s response “[made] no sense”, as the second agreement was signed eight days after the appellants’ agreement, and a multi-offer situation only occurs when more than one offer is presented at about the same time. This was a further breach of r 5.1.

The penalty decision (orders pursuant to s 93 of the Real Estate Agents Act 2008 (“the Act”))

[16] The Committee said in relation to Ms Reeve:¹⁰

While the errors she made errors in the drafting of [the trustees’ agreement] in failing to correctly record the trustees, failing to update the chattels list or draw [the trustees’] attention to it, failing to forward on the EQC information and retrospectively obtaining a multi-offer form (in a situation where such a form was not required) breached the Rules we consider that a a censure appropriately reflects the opinion of her peers as to her failures on this occasion.

[17] The Committee made no further penalty order against Ms Reeve. In reaching that conclusion, the Committee took into account that Ms Reeve was not party to the issues concerning the second agreement, and that she had recently retired from the industry after a lengthy career, with no record of any previous disciplinary findings

⁸ Substantive decision, at paragraph 3.3.

⁹ Substantive decision, at paragraphs 3.6 and 3.7.

¹⁰ Penalty decision, at paragraph 4.1.

against her. The Committee did not refer in its reasoning to the trustees' request for an order for reimbursement of the cost of curtains.

[18] The Committee censured Ms Allinson and ordered her to pay a fine of \$2,000 for her "significant breach" of r 5.1, which had a "real impact" on both the trustees and the second purchasers, and which could not be excused. The Committee took into account Ms Allinson's relative inexperience, the absence of any prior disciplinary finding against her, and that she asked Mr Franklin to check her work.¹¹ With regard to the trustees' claim for reimbursement of legal costs incurred in relation to the two sale agreements issue, the Committee ordered Ms Allinson to pay \$2,500 to the trustees and said:¹²

With respect to the legal bills submitted by [the trustees] we note that they are not itemised and that they include the services of a barrister. The submissions on behalf of the [second to fourth respondents] note that they are not satisfied that the fees are reasonable. We do not think that [the trustees] are entitled to be put back into the position that they would have been had the error not been made. They would still have incurred legal fees in the normal conveyancing transaction and accordingly we do not think it necessary to order payment to them of a sum equivalent to that claimed but we do order some payment by way of rectification of their position.

[19] The Committee recorded Mr Franklin's acceptance that he had failed to notice the omission of the back-up clause from the second agreement and had apologised to the trustees. Further, as soon as the error with the second agreement was discovered, Mr Franklin had taken full responsibility for it, and had taken what steps he could to put it right, including paying the legal costs of the second purchasers (\$1,000).

[20] The Committee took into account Mr Franklin's lack of any previous disciplinary findings, the efforts he had made to "sort the situation out" for the trustees, his payment to the second purchasers, and his offer to pay the trustees \$900 towards their legal costs. Mr Franklin was censured and fined \$1,500. He was also ordered to pay the trustees \$1,900 towards their legal costs (which included the \$900 already offered).¹³

¹¹ Penalty decision, at paragraph 4.5.

¹² Penalty decision, at paragraph 4.6.

¹³ Penalty decision, at paragraph 4.9.

Approach to appeals against Complaints Assessment Committees' penalty orders

[21] As his Honour Woodhouse J said in his judgment in *Morton-Jones v Real Estate Agents Authority*,¹⁴ an appeal against a Complaints Assessment Committee's penalty orders is an appeal against the exercise of a discretionary power. As such, an appellant must establish that the Committee made an error of law or principle, considered irrelevant matters, failed to consider relevant matters, or was plainly wrong.

[22] Section 93 of the Act provides, as relevant to the present case, that a Complaints Assessment Committee may:

- ...
- (a) make an order censuring or reprimanding a licensee
- ...
- (f) order the licensee—
 - (i) to rectify, at his or her own expense, any error or omission; or
 - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission
- (g) order the licensee to pay the Authority a fine not exceeding \$10,000 ...
- ...

[23] We note, first, that the purpose of the Act is 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.”¹⁵ The Act achieves these purposes by:¹⁶

- (a) regulating agents, branch managers, and salespersons:
- (b) raising industry standards:
- (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

¹⁴ *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [86].

¹⁵ Section 3(1) of the Act.

¹⁶ Section 3(2).

[24] Secondly, a Committee’s power under s 93(1)(f) of the Act to make orders to “rectify any error or omission” (“a s 93(1)(f) order”) must be distinguished from the Tribunal’s power under s 110(g), after a finding of misconduct, to make:

...

(g) where it appears to the Tribunal that any person has suffered loss by reason of a 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. ...

[25] Thirdly, a s 93(1)(f) order is discretionary. A Committee “may” make such an order, and it may order relief “in whole or in part”. Accordingly, a Committee may make a s 93(1)(f) order in such quantum as it considers, in its discretion, to be appropriate.

[26] His Honour Brewer J considered a Committee’s power to make s 93(1)(f) orders in his judgment in *Quin v Real Estate Agents Authority*.¹⁷ The following paragraphs for the judgment encapsulate His Honour’s reasoning:

[44] The primary focus of the [Act] is not, therefore, the provision of a forum in which complainants can seek monetary compensation. Its focus is the regulation of the real estate industry so as to promote and protect the interests of consumers. This includes conferring on regulators power to grant consumers relief from harm, resulting from licensees acting contrary to the standards required of them.

...

[56] There is nothing in the [Act] which demonstrates that Parliament intended to confer on a Committee or the Tribunal a general power to order a licensee to compensate a claimant for any and all loss or harm to the complainant resulting from a real estate transaction in which the licensee acted below the standard expected. That would be a sweeping change to the obligations of a licensee. It could result in liability being imposed beyond that which would be available under the general law. ...

...

[63] There will be occasions when the passage of time will mean that a complainant has had to rectify the error or omission, before the case comes before a Committee or the Tribunal. In those situations rectification, or the taking of steps, might require the licensee to reimburse the complainant and orders to that effect would be within the ambit of s 93.

...

[65] I conclude that the [Act] gives a Committee the power to order a licensee to rectify an error or omission, or to take steps to provide relief from

¹⁷ *Quin v Real Estate Agents Authority*, [2012] NZHC 3557.

its consequences, where the error or omission resulted from the licensee's unsatisfactory conduct. Whatever is ordered would be at the licensee's expense. ... the power would extend to requiring the licensee to reimburse the complainant.

[66] However, the [Act] does not give a Committee the power to order a licensee to pay compensatory damages, either by way of indemnity or for loss of expectation. ...

The issues

Legal costs

(a) Submissions

[27] The trustees submitted that the Committee was wrong to reduce their claim for legal costs on the basis that their solicitors' costs were not itemised, and included conveyancing fees. They submitted that the solicitors' account was fully itemised, and they submitted an invoice from the solicitors for the conveyancing costs (\$2,747). They further submitted that there was no evidence that the sale agreements issue would have been resolved without the assistance of lawyers, and that instructing a barrister was necessary to protect their position.

[28] Mr Abbott submitted for Mr Franklin that the Committee had carefully considered the quantum of relief, taking into account the nature of the conduct, the circumstances in which it arose, Mr Franklin's immediate assumption of responsibility, and subsequent efforts to resolve the matter, resulting in it being resolved in a short period of time. He further submitted that the trustees' claim for full reimbursement is unreasonable, unjustified by the trustees, and could in any event be claimed by the trustees in other processes.

[29] Ms Bishop submitted for the Authority that there was no evidence that their claim excluded conveyancing costs, and there was an obvious disparity between the legal costs claimed by the trustees and the second purchasers, respectively. Ms Bishop also recorded that the issue of the two sale and purchase agreements was resolved in approximately one week.

(b) Discussion

[30] It was not disputed that a s 93(1)(f) order could be made in respect of the trustees' legal costs relating to the sale agreements issue. Ms Allinson's error in drafting the second agreement was, as the Committee said, a "basic error", which could not be excused. Further, Mr Franklin had not exercised due "skill, care, competence, and diligence" (as required under r 5.1) when checking Ms Allinson's draft agreement. The error was a significant breach of the Rules and it had a real impact on both the trustees and the second purchasers, both of whom instructed solicitors in order to rectify the situation. A s 93(1)(f) order was appropriate.

[31] The dispute was as to the quantum of the order. The Committee's order of \$4,400 (in total, against Ms Allinson and Mr Franklin) was slightly more than half of the trustees' claim (\$8,996). The trustees argued that the Committee's order was insufficient, and wrong, and counsel for the Authority and Mr Franklin argued that it should not exceed that figure.

[32] We note, first, that one of the grounds on which the Committee reduced the quantum of the order was its assumption that the trustees' claim included normal conveyancing costs.¹⁸ We accept that the trustees cannot be reimbursed for normal conveyancing costs, but the trustees have provided the Tribunal with an invoice for those costs (\$2,747). The Committee's assumption was, therefore, incorrect.

[33] Secondly, the Committee said that the legal bills were not itemised. Having perused the relevant accounts, we are satisfied that they were itemised in the normal manner for solicitors' invoices.

[34] There is a vast difference between the trustees' legal costs, and those of the second purchasers. While the difference does not in and of itself prove that the trustees' costs were excessive, it is a relevant factor in determining the appropriate order. Further, it was not submitted for the trustees that the work required to be done by their solicitors, and the instructed barrister, were significantly more complex than those required of the second purchasers' solicitors.

¹⁸ Penalty decision, at paragraph 4.6.

[35] Except in relation to any reduction in the order to account for conveyancing costs, we are not persuaded that the Committee erred in its order. However, we are satisfied that the order should be increased to allow for the fact that it should not have been reduced to account for conveyancing costs.

[36] We have concluded that the appropriate order is that the trustees are to be reimbursed in the sum of \$5,500. The increase of \$1,100 from the Committee's order is to be apportioned equally between Ms Allinson and Mr Franklin.

The curtains issue

(a) Submissions

[37] The trustees referred to the submissions for both Mr Franklin and the Committee, that they and the vendors had reached an agreement with the vendors at the pre-settlement inspection of the property. This submission was based on Ms Reeve's response to their complaint. The trustees said that no such agreement was reached. They did not know when the curtains were removed from the sale and purchase agreement, and they were surprised to find, when they took possession, that the curtains had been taken. They submitted that the cost of replacing curtains was directly caused by Ms Reeve's error in deleting the relevant provision, and her omission in failing to advise them.

[38] Mr Abbott submitted that as the finding of unsatisfactory conduct was made against Ms Reeve, not Mr Franklin, Mr Franklin could not be held responsible for the costs of replacing the curtains.

[39] Ms Bishop submitted that the Committee's decision not to make an order for reimbursement of the cost of the curtains was appropriate and consistent with the principles set out by his Honour Brewer J in his judgment in *Quin*.¹⁹ She further submitted that any issue of compensation for chattels was best resolved by negotiation between the trustees and vendors at the time of settlement (and referred

¹⁹ *Quin v Real Estate Agents Authority*, above n 17.

to Ms Reeve's assertion that an agreement had been reached), or by using remedies available under general law.

(b) Discussion

[40] We have, above, observed that the Committee did not refer to the curtains issue in its reasoning as to the orders to make following the finding of unsatisfactory conduct against Ms Reeve. The Committee did not in fact make any decision, either for an order or against reimbursement.

[41] We observe that in *Quin*, the factual background was a discrepancy between a boundary, as pointed out by the licensee, and the actual boundary, as discovered by the purchaser after settlement. In order to proceed with the proposed construction of a building, the purchaser had to create a new access way to the property. His Honour Brewer J held that the licensee's omission was the failure to properly put the purchasers on guard as to the location of the boundary, the consequence of which was that they bought a property which, on their evidence, they would not have purchased had they known the true location of the boundary. He held that the Complaints Assessment Committee could not in those circumstances make a s 93(1)(f) order.

[42] His Honour did not set any bright line as to what could properly be ordered by way of rectification of an error or omission under s. 93(1)(f), and what would be compensatory damages, and therefore could not be the subject of an order. However, his Honour gave two examples of cases where a s 93(1)(f) order could be made:

[61] To take an example, suppose a licensee assured prospective purchasers that the vendor would permit them to take early possession of a residential property. In reliance, the purchasers contracted to sell their own home with a settlement date a month before that of the purchase. The licensee then explained that early possession was not available and that he had just assumed that the vendor would be receptive to such a course. If this was classified as unsatisfactory conduct then under s 93(1)(f)(i) a Committee could order the licensee to see if he could reach agreement with the vendor to allow early possession in return for a reasonable payment, which would be at the licensee's expense. If that rectification was not practicable, the licensee might be ordered under s 93(1)(f)(ii) to arrange suitable alternative accommodation, and storage, for the relevant period, again at the licensee's expense.

[62] Another example would be if the licensee, through unsatisfactory conduct, represented that a chattel was included in the price when it was not. A s 93(1)(f)(i) order might be that the licensee negotiate its purchase, at his own expense. A s 93(1)(f)(ii) order might be that the licensee, at his own expense, supply a similar chattel.

[43] The trustees' claim for the cost of purchasing new curtains falls directly within the type of case in which his Honour envisaged a S 93(1)(f) order being made. In the present case, as the curtains had been removed when the trustees took possession, the relevant order is for reimbursement under s 93(1)(f)(ii). We therefore proceed on the basis that an order for reimbursement could have been made in this case.

[44] The trustees submitted quotes they had received for the curtains. The middle quote was \$3,200 (including GST). It is appropriate to proceed on the basis of that quote. We do not consider that an order should be made for the trustees to be reimbursed for the full \$3,200. We take into account that:

- [a] The trustees could have raised the point with the vendors on settlement, but did not;
- [b] The trustees' solicitors could be expected to have gone through the sale and purchase agreement, and pointed out that there was no provision for the curtains to be included, and apparently did not; and
- [c] (As relevant to any disciplinary order made by a Committee or the Tribunal), Ms Reeve had an unblemished record over long career in the real estate industry.

[45] We are satisfied that the Committee was wrong in law to fail to make (or even consider) a s 93(1)(f) order in respect of the curtains. We have concluded that the appropriate order to make in respect of the curtains is that Ms Reeve is to reimburse the trustees for half of the mid-range quotation for the curtains.

The findings against Ms Reeve and Ms Allinson

[46] We have recorded earlier our understanding that neither Ms Reeve nor Ms Allinson is now engaged in the real estate industry. However, pursuant to ss 71 and

4 (definition of “former licensee”) of the Act they remain, as former licensees, subject to its disciplinary provisions. The fact that the Tribunal has not received submissions on the appeal from them, or on their behalf, does not preclude the Tribunal from making orders against them.

Outcome

[47] The trustees’ appeal is allowed to the following extent:

[a] Ms Reeve is ordered to provide relief, in part, to the trustees for the consequences of the error or omission by paying the sum of \$1,600 (being half of the mid-range quote) to the Authority (for forwarding to the trustees) within 20 working days of the date of this decision

[b] Ms Allinson and Mr Franklin are each ordered to provide additional relief, in part, to the trustees for their errors or omissions by each paying the sum of \$550 to the Authority (for forwarding to the trustees) within 20 working days of the date of this decision.

[48] Pursuant to s 113 of the Act, the Tribunal draws the parties’ attention to s 116 of the Act, 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.

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member