

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 7

READT 038/16

IN THE MATTER OF

A charge laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY

COMPLAINTS ASSESSMENT
COMMITTEE 403

AGAINST

DAMON ELIA
Defendant

Hearing:

9 February 2017, at Auckland

Tribunal:

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

Appearances:

Ms Earl, on behalf of the Committee
Mr Elia, in person

Date of Decision:

20 February 2017

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] Mr Elia has admitted a charge brought by Complaints Assessment Committee 403 (“the Committee”) of misconduct pursuant to s 73(a) (disgraceful conduct) of the Real Estate Agents Act 2008 (“the Act”).

Factual background

[2] The penalty hearing has proceeded on the basis of an agreed Summary of Facts. The following outline of the relevant events (which occurred between 26 October and 5 November 2014) is taken largely from the Summary of Facts:

- [a] At the time of the relevant events Mr Elia was a licensed salesperson working for Bayleys Real Estate limited (“the Agency”). He was the listing agent for a property at Sandringham, Auckland (“the property”), scheduled for sale by auction on 5 November.
- [b] Mr and Mrs B were potential purchasers. Mrs B attended an Open Home at the property on 26 October.
- [c] At 3.28 pm on 28 October Mrs B sent an email to Mr Elia, asking for information about the property, including a rental appraisal. Mr Elia responded at 4.39 pm advising her, among other things, that he did not have a rental appraisal but would organise one for her. At 6.31 pm Mrs B sent Mr Elia an email saying that he could “hold on to the rental appraisal for the moment” if he liked, and that she “[didn’t] want to put [him] to trouble unnecessarily”. At 8.11 pm Mr Elia responded to Mrs B saying “For what it’s worth, I would estimate the rental to be around \$900-\$950 per week ... that’s just my opinion”.
- [d] At 8.58 am on 31 October Mrs B told Mr Elia in an email that she would like a rental appraisal, after all. She asked that he arrange it and email it to her as soon as possible. Mr Elia responded at 9.20 am “I arranged a rental appraisal yesterday in preparation (see attached)”.

[e] The rental appraisal attached to Mr Elia's email was not prepared specifically for the property, in response to Mrs B's request. Rental appraisals at the Agency were prepared by a separate property management team. Mr Elia had a rental appraisal for a different property, prepared by the Agency's residential property manager, in Word format. Rather than arrange for a genuine rental appraisal to be prepared, Mr Elia altered the appraisal for the different property so that it appeared to have been prepared by the residential property manager for the property. It was this document that was attached to Mr Elia's email at 9.20 am.

[f] Mrs B discovered that the rental appraisal sent by Mr Elia was false when she telephoned the Agency with a query concerning it. She was told that the author of the appraisal sent to her had left the Agency some months previously. Mrs B indicated to Mr Elia that she would make a formal complaint to the Agency. Further contact with Mr and Mrs B was through one of Mr Elia's colleagues.

[g] The property was sold at auction on 5 November. Mr and Mrs B were not the purchasers.

[3] Mr and Mrs B's complaint was dealt with following the Agency's in-house complaints procedure, as a result of which Mr Elia was suspended from practising for three months. The Agency did not report the matter to the Real Estate Agents Authority ("the Authority").

[4] A complaint was made to the Authority on 9 June 2015. On 24 November 2015 the Committee considered the complaint and decided to inquire into it. The Committee held a hearing on the papers on 4 August 2016 and decided that a charge of misconduct should be laid. The charge was laid on 5 August 2016. Mr Elia admitted the charge in his response to the charge dated 30 August 2016.

Submissions

[5] Ms Earl submitted for the Committee that the starting point for the penalty to be imposed must be cancellation of Mr Elia's licence. She submitted that where dishonesty is involved, as it is in the present case, particular emphasis must be given to the Act's purpose of protecting the public, and to the licensee's fitness to practise.¹ Ms Earl referred to the judgment of Woodhouse J in the High Court in *Morton-Jones v The Real Estate Agents Authority*, in which his Honour referred to "the fundamental requirement of protection of the community, and the requirement that, in most cases involving dishonesty, the proper penalty in a disciplinary proceeding is cancellation of the licence."² She submitted that there is nothing on the facts of this case that would take it out of the category where cancellation is appropriate.

[6] Ms Earl submitted that the relevant factors to be taken into account are that Mr Elia's conduct was calculated in order to achieve a sale and the consequent commission, he was in a position of trust as regards Mr and Mrs B, they were entitled to rely on what he provided to them, and he misled them. She submitted that it is irrelevant that Mr and Mrs B did not suffer any actual loss.

[7] Ms Earl acknowledged that there are personal factors that weigh in Mr Elia's favour. He admitted his wrongdoing very early (although, she submitted, it would have been difficult for him not to do so), and he has no disciplinary history. Ms Earl accepted that Mr Elia had been suspended from practice by the Agency, and that this is a factor that may be taken into account, but submitted that this was not a voluntary suspension, so carries less weight. However, she submitted that the purposes and principles of the Act must predominate.

[8] Mr Elia submitted that the Committee's submissions had focussed on labelling his conduct as "fraud". He submitted that the Tribunal must look at what actually happened regarding Mr and Mrs B, and his own motivation.

¹ A person who has been convicted of a crime of dishonesty within 10 years of applying for a licence is not eligible to hold a licence: s 37(1)(a) of the Act.

² *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [101].

[9] Mr Elia accepted that he could have prepared an informal appraisal for Mr and Mrs B, but submitted that he had already given them an informal appraisal, in his email at 8.11 pm on 28 October.

[10] Mr Elia said that at that time the Agency's property management team was new, and had a slow turnaround. When he looked at the appraisal he had on 31 October he saw it was a word document and, as he was in a real hurry and wanted to help Mr and Mrs B quickly, he took a shortcut. He said that at the time he had three busy listings, each in the final stages, and although he was in a business partnership he was doing the bulk of the work with lots of buyers. Mr Elia did not suggest what he did was not wrong, but said that he was concerned about the fact that he had not noticed Mr and Mrs B's first email contact regarding the property. For that reason, he considered that he should respond to any query as soon as possible.

[11] Mr Elia submitted that the Committee's submission that he was "out to achieve a sale and the commission" was wrong. He submitted that the marketing records show that 140 groups had gone through the property, and multiple buyers were expected at the auction. He submitted that there was no shortage of buyers, and he was not relying on Mr and Mrs B to receive a commission.

[12] Mr Elia said that when Mr and Mrs B complained to the Agency, he admitted that he had provided the appraisal document, and his suspension was a mutual decision between himself and the Agency. He said that the suspension was at a real cost to himself and his family. Apart from the immediate loss of income, it took time to regain traction in his work, making the real impact of the suspension more like five months' loss of income. He said that at end of the three months Mr and Mrs B indicated they were satisfied with the outcome, and would not take it further. He said that the complaint to the Authority (some months later) was made anonymously.

[13] Mr Elia advised the Tribunal that he had continued working for the Agency until June 2016 (well after the suspension ended). He is now with a different agency, which is aware of what occurred.

[14] As to personal factors, Mr Elia advised that he has no previous disciplinary history, and no complaints have previously been made against him. He said that he is the primary income earner for his family, and cancellation of his licence or suspension will have a huge impact. He said he had been under enormous stress as a result of the disciplinary process.

Our assessment

[15] As a preliminary comment, we record our concern that the Agency did not report to the Authority when it received Mr and Mrs B's complaint. However, we acknowledge that the Agency took the matter seriously, and took steps to uphold the relevant professional obligations. It followed up the complaint with Mr Elia and following his admission, dealt with his wrongdoing by suspending him from practice. We were advised that Mr and Mrs B were satisfied with the process.

[16] It may well be that Mr Elia was under pressure to get a rental appraisal to Mr and Mrs B very quickly, as the auction was being held only a few days later. This does not excuse him, and none of the other factors going on in his business at the time detract from the fact that he altered the appraisal document. There were other options available to him for dealing with his predicament.

[17] We accept that cancellation is the starting point for penalty where there has been dishonest behaviour. However, it is not necessarily the end point. In this case, as in any penalty determination, we must take into account the relevant purposes and principles as to penalty in the context of professional disciplinary proceedings.

[18] The principal 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.”³ The Act achieves these purposes by:⁴

- (a) Regulating agents, branch managers, and salespersons:
- (b) Raising industry standards:

³ Section 3(1) of the Act.

⁴ Section 3(2).

- (c) Providing accountability through a disciplinary process that is independent, transparent, and effective.

[19] These purposes are best met by penalties being determined by taking into account the need to maintain a high standard of conduct in the industry, the need for consumer protection, the maintenance of confidence in the industry, and the need for deterrence.

[20] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.⁵

[21] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case the Tribunal may:

- [a] Impose a fine of up to \$15,000;
- [b] Order cancellation or suspension of the licensee's licence;
- [c] Order that a licensee's employment (or engagement if the licensee is an independent contractor) be terminated and that no agent may employ or engage the licensee;

[22] In determining the appropriate penalty for misconduct, the nature of the misconduct will be considered along with other factors. In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* (in relation to a lawyer), the High Court noted that the "ultimate issue" is as to the practitioner's fitness to practise, and factors which will inform this decision include the nature and gravity of the charges, the manner in which the practitioner has responded to the charges (such as the practitioner's willingness to co-operate in the investigation, to acknowledge

⁵ See, for example, *Complaints Assessment Committee 10012 v Khan* [2011] NZREADT 11; *Complaints Assessment Committee 10063 v Raj* [2013] NZREADT 52; *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30.

error or wrongdoing, and to accept responsibility for the conduct), and the practitioner's previous disciplinary history.⁶

[23] Ms Earl referred us to *Morton-Jones v The Real Estate Agents Authority*.⁷ It is not necessary to set out the aspects of Mr Morton-Jones' conduct that led his Honour to conclude that that was a case of serious dishonesty which justified an order for cancellation. It suffices to say that Mr Morton-Jones' conduct must properly be seen as being at or close to the most serious level of dishonesty.

[24] We were referred to penalty decisions which, it was submitted, might be of assistance in determining penalty in this case.⁸ Ms Earl acknowledged that none of them was on all fours. Although its factual circumstances bear little resemblance to the present case, the decision which offers us some (limited) guidance is *Complaints Assessment Committee 20002 v Gollins*.⁹ Mr Gollins had had a client sign and back-date an agency agreement, in order to protect his commission on a transaction. The Tribunal censured him and ordered him to pay a fine of \$10,000.

[25] While the primary focus must be on Mr Elia's conduct (and as we have already noted, the exigencies of the circumstances in which he was asked to provide a rental appraisal do not excuse it), we take the mitigating factors referred to earlier into account. The most significant of these is the suspension for three months imposed by the Agency. Mr Elia's prompt acknowledgment of his wrongdoing and his unblemished record (there having been no record of any disciplinary concerns either before or after his dealings with Mr and Mrs B) are also important factors.

[26] We have approached the determination of penalty by taking into account all of the relevant purposes and principles of penalty and the factors set out above. We have asked ourselves what penalty would be imposed if Mr Elia had not been suspended by the Agency.

⁶ *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] NZHC 83; [2013] 3 NZLR 103, at [185]–[189].

⁷ See fn 2.

⁸ *Complaints Assessment Committee 306 v Zhou and She* [2016] NZREADT 12; *Complaints Assessment Committee (CAC 20002) v Brar* [2015] NZREADT 59; and *Complaints Assessment Committee CAC 20002) v Gollins* [2015] NZREADT 2.

⁹ See fn 8.

[27] We have concluded that cancellation of Mr Elia's licence is not the appropriate penalty. However, this is not a case where the penalty should not include suspension. In the absence of the Agency's suspension, we would have ordered suspension of Mr Elia's licence for three months. As Mr Elia has already, in effect, served the term of suspension we would have ordered, we see no need to impose a further suspension. Rather, the appropriate penalty is that Mr Elia is censured and ordered to pay a fine.

Outcome

[28] We censure Mr Elia. We order that he is to pay a fine of \$6,000. The fine is to be paid to the Registrar of the Authority within 20 working days of the date of this decision.

[29] 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.

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member