

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 64

READT 045/15

UNDER THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF CHARGES LAID UNDER SECTION 91 OF THE ACT
BETWEEN COMPLAINTS ASSESSMENT COMMITTEE
401
AND MICHAEL BLACK
First defendant
AND LAWRENCE WONG
Second defendant

Tribunal: Ms K Davenport QC – Deputy Chairperson
Hon P Andrews – Chairperson
Mr G Denley – Member

Appearances: Mr M J Hodge for the Complaints Assessment Committee
Mr M Black in person
Mr P McDonald for Mr Lawrence Wong

Penalty Decision: 23 September 2016

PENALTY DECISION OF THE TRIBUNAL

[1] Mr Black and Mr Wong faced charges brought by the Complaints Assessment Committee arising out of their actions in attempting to coerce Mr Ian Smith to make a commission payment to them. The full particulars of the charges and the Tribunal's reasons are set out in the Tribunal's decision of 22 June 2016.

[2] In summary Mr Black and Mr Wong threatened to bring a disciplinary complaint against Mr Smith unless he agreed to pay them commission. Mr Black and Mr Wong were found guilty of misconduct. The Tribunal has now received penalty submissions from the Complaints Assessment Committee and Mr Wong's counsel. The relevant potential penalties are contained in s 110 of the Act.

Summary of Orders

[3] The orders that the Tribunal may make are:

- (i) An order cancelling the licence of the licensee.
- (ii) An order suspending the licence for a period not exceeding 24 months.
- (iii) An order that the licensee not perform any supervisory functions.
- (iv) An order that the licensee who is an individual pay a fine not exceeding \$15,000.
- (v) An order for compensation.

[4] The principles of sentencing are well established and can be summarised as follows:

Principles of Sentencing

[5] The Tribunal must consider a number of matters when considering imposition of a penalty as set out in *Real Estate Agents Authority v Lum-on* [2012] NZREADT 47.

[6] A penalty must fulfil the following functions. They are:

[a] Protecting the public

Section 3 of the Real Estate Agents Act provides that this is one of the purposes of the Act.

[b] Maintenance of professional standards

This was emphasised in *Taylor v The General Medical Council* and *Dentice v The Valuers Registration Board*.

[c] Punishment

While most cases stress that a penalty in a professional discipline case is about the maintenance of standards and protection of the public there is also an element of

punishment – such as in the imposition of a fine or censure. See for example the discussion by *Dowsett J in Clyne v NSW Bar Association* and *Lang J in Patel v Complaints Assessment Committee*).

The Tribunal recently reaffirmed that the purpose of disciplinary proceedings is not primarily to punish.

[d] Rehabilitation of the Agent

Where appropriate, rehabilitation of the agent must be considered.

Discussion

[7] The Tribunal understand that neither Mr Black nor Mr Wong are currently working as real estate agents. Mr Wong has retired.

[8] In determining what penalties are appropriate the Tribunal must take cognizance of the fact that disciplinary penalties are for the maintenance of professional standards and to maintain public confidence in the real estate profession. Actions such as those of the defendants in pursuing Mr Smith for money and threatening a disciplinary procedure despite clear advice to the contrary from their manager are examples of the types of behaviour that cause the public to mistrust real estate agents. This is why there is a need for an open disciplinary process which reinforces the need for maintenance of appropriate standard.

[9] The Complaints Assessment Committee submits that the appropriate penalty for these charges is a period of suspension from four to six months depending on any mitigating factors that the Tribunal takes into account in either licensee's favour.

[10] The Committee submits that despite the fact that neither agent has a current licence it is still appropriate to make an order that the agents would be suspended were they still practising.

[11] The Committee also sought a fine at the upper end of the scale suggesting a fine of more than \$4,000 to \$6,000.

[12] Mr Black has made no submissions. Mr Wong through his counsel has made limited submissions. Mr McDonald submitted that Mr Wong is entitled to credit for 26 years as an agent without disciplinary issues. Mr McDonald also submitted that Mr Wong is of limited means. He has one rental property and no other income. He submits that “if, as appears to be the case significant fines are predicated upon high income(s) real estate agents, the prediction has no application in the case of Mr Wong”.

Discussion

[13] In determining the appropriate penalty for Mr Black and Mr Wong the Tribunal has to consider the principles of sentencing and weigh the severity of the conduct against the particular circumstances of each of the two respondents.

[14] Unfortunately in the case of Mr Black is very difficult to do this given the complete absence of any information about him. The best that the Tribunal can do is to assume that as he is no longer working as a real estate agent he could not be said to be a threat or concern to public safety.

[15] Mr Wong is retired and living on a relatively modest income.

[16] The Tribunal consider that the conduct of Messrs Black and Wong is in the mid-range of severity for findings of misconduct. The agents persisted in their conduct for some time and in the face of clear direction from their manager that the actions that they were taking were wrong. Both men had an opportunity to reflect on their conduct given the comments of their manager. They chose not to stop this behaviour.

[17] For this misconduct the Tribunal consider that a period of suspension is appropriate. The Tribunal is required to impose the least restrictive penalty on any agent that still ensures protection of the public and maintenance of public standards. Mr Black and Mr Wong did not actually receive any money from Mr Smith so the extortion was threatened rather than actual. This fact appears to take their conduct out of the category of conduct that would warrant an immediate cancellation of their licence into conduct that requires a period of suspension. Suspension is a significant penalty, even in these circumstances where the agents are no longer practising. However given the modest financial circumstances of Mr Wong, and the unknown financial circumstances of Mr Black, the Tribunal consider that a longer period of suspension and a lower fine is the appropriate balance to strike in this case.

[18] A suspension also gives Mr Black the opportunity to re-enter the profession at a later date after a period of reflection and rehabilitation.

[19] The Tribunal impose the same penalty on each agent because to some extent each blamed the other for the situation that they found themselves in and the Tribunal were not able to determine the respective culpability of each agent.

[20] Accordingly the Tribunal impose the following penalties on Mr Black and Mr Wong:

- (a) Suspend Mr Black and Mr Wong pursuant to s 110(2)(c) for a period of eight months from the date of this decision.
- (b) Mr Black and Mr Wong are fined the sum of \$1,500 each, to be paid within 28 days of the date of this decision.
- (c) Mr Black and Mr Wong are censured.

[21] The Tribunal draws to the parties' attention the appeal provisions of s 116 of the Real Estate Agents Act 2008.

Ms K Davenport QC
Deputy Chairperson

Hon P Andrews
Chairperson

Mr G Denley
Member