



## Introduction

[1] This is an appeal against a decision of the Real Estate Agents Disciplinary Tribunal's ("Tribunal") finding of unsatisfactory conduct on the part of Astrid Clark.

## Grounds of appeal

[2] The grounds are set out in the amended notice of appeal, namely:

- (a) The Tribunal erred in its interpretation of s 136 of the Real Estate Agents Act 2008 ("the Act") by finding that the appellant breached s 136 where no contractual document was supplied at any time by the appellant to a prospective party to the transaction in issue.
- (b) The Tribunal failed to have proper regard and/or misinterpreted s 136(3) of the Act, which provides that:

... the licensee must make the disclosure required by subsection (1) before or at the time the licensee provides the prospective party with any contractual documents that relate to the transaction.

Despite s 136(3), the Tribunal interpreted s 136 as requiring the appellant to provide written disclosure required by subsection (1) before any contractual documents were supplied by the appellant.

- (c) The Tribunal erred in its approach to interpretation by considering as a relevant factor consistency between the interpretation of s 136 of the Act, and the provision of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, being regulations promulgated pursuant to, and subordinate to, the Act.
- (d) Having expressed its view that the appellant gave "*very clear evidence*" to the effect that she had informed the complainant, Ms Lindsay, that the appellant's mother, Karen Clark, was "*an owner of the sections*", and having found, as a matter of fact that the appellant had disclosed orally to the complainant that Karen Clark

*“was part of the vendor company”*, the Tribunal erred in finding (if, in fact, it made such a finding) that the appellant’s disclosure was insufficiently clear so as to amount to unsatisfactory conduct pursuant to s 72(a) of the Act.

[3] By way of relief the appellant seeks:

- (a) the determination be reversed;
- (b) alternatively, that the decision on penalty be reserved and that the Court should substitute the decision of the Tribunal on penalty for an order for reprimand or censure of the appellant pursuant to s 93 of the Act;
- (c) the costs of this appeal.

[4] At the commencement of the hearing Mr Rea, for the appellant, sought leave to amend the notice of appeal by substituting a new paragraph 3(d) due to his concern that on one interpretation of the Tribunal’s decision, a finding of unsatisfactory conduct under s 72(a) may have been made when it was common ground between the parties that the Tribunal’s finding was, in fact, made in terms of s 72(b) of the Act. Section 72(b) is a general offence creating section which provides for a finding of unsatisfactory conduct where the licensee carries out real estate agency work that contravenes a provision of the Act or any regulations or rules made under the Act.

[5] Given that both parties had understood throughout the proceeding that the Tribunal’s finding related only to s 72(b) and not s 72(a), the application for leave to amend the notice of appeal was consented to by the respondent. I am satisfied there is no real ambiguity. The Tribunal’s decision, by repeatedly referencing s 136 and its contravention, plainly considered a finding of unsatisfactory conduct under s 72(b) rather than s 72(a). Accordingly, I made an order granting the leave to amend the notice of appeal in the fashion set above at [2] and [3].

[6] On the question of relief the appellant seeks that the Tribunal's determination be reversed and, in the alternative, the Tribunal's decision on penalty be reversed and an order for reprimand or censure substituted. However the appeal against penalty was abandoned at the appeal.

### **Issue**

[7] It was agreed that the primary issue on appeal is one of statutory interpretation and, in particular, s 136 of the Act.

[8] Section 136 imposes a duty on licensees to give disclosure in writing to prospective purchasers where the licensee, or any person related to the licensee, may benefit financially from the transaction (over and above any commission payable for the provision of real estate agency work). Thus the question is whether the appellant was subject to and breached the duty imposed by s 136 given she did not personally provide the prospective party with a contractual document notwithstanding that she was present when such a document was drawn up.

### **Background**

[9] The relevant facts are clearly and fully set out in the Tribunal's decision. The appellant was a salesperson contracted to a Christchurch real estate agency known as Karen Clark Real Estate Limited. Karen Clark, the appellant's mother, is also a licensed agent under the Act and the principal of Karen Clark Real Estate Limited.

[10] The property in question was a section in the suburb of Bryndwr, Christchurch ("the property"). It was listed for sale by the appellant with Karen Clark Real Estate Limited.

[11] The vendor was Heathlea Caterers Limited, of which Karen Clark was a director and shareholder. For the purposes of these proceedings it is accepted that Karen Clark would have benefited financially from the sale of the property.

[12] On 9 October 2010 the appellant received an email from the complainant, Ms Lindsay. She expressed an interest in the property. The appellant responded by sending Ms Lindsay a site plan and further information. Ms Lindsay then called the appellant to arrange a viewing.

[13] Ms Lindsay viewed the property with the appellant at least once between 9 October and 16 October 2010.<sup>1</sup>

[14] The appellant's evidence was that she discussed issues in relation to the property with Ms Lindsay, including foundation and piling requirements and Ms Lindsay subsequently contacted her by telephone informing her she wished to make an offer.

[15] An appointment to draw up the offer was arranged for 17 October 2010. However, on the day in question the appellant was unwell. As a result, her mother drew up the offer. Although the appellant was present at the meeting throughout, and in particular during the discussions between Karen Clark and Ms Lindsay regarding the terms of the offer, she took no active part. She described herself as an observer.

### **The Tribunal's decision**

[16] On 20 May 2013 the Tribunal, on the prosecution of the Real Estate Agents Authority, heard evidence from Ms Lindsay, Astrid Clark and Karen Clark. Astrid Clark and Karen Clark each faced one charge of misconduct in terms of s 73(c)(i) of the Act which alleged a wilful or reckless contravention of the Act. The contravention relied upon was a breach of s 136 of the Act and also r 6.4 of the Real Estate Agents (Professional Conduct and Client Care) Rules 2009.<sup>2</sup>

[17] The particulars of the breaches alleged against Karen Clark were that she failed to disclose before or at the time of providing the sale and purchase agreement that she held an interest in the property.

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<sup>1</sup> There was a factual dispute before the Tribunal as to whether there was one viewing or two.

<sup>2</sup> Rule 6.4 provides that a licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

[18] The particulars in relation to the charge against Astrid Clark were that as the listing agent for the property she failed to disclose that Karen Clark, as a person related to the licensee, might benefit financially from the sale of the property.

[19] After reciting the facts, the Tribunal in a full and detailed decision found that in respect of both defendants there had been a breach of s 136 of the Act but that it was not deliberate and thus misconduct in terms of s 73(c) was not made out. Instead the Tribunal determined that both defendants were guilty of unsatisfactory conduct in terms of s 72(b). The Tribunal found as a fact that while neither defendant provided the required disclosure in writing, both had made oral disclosure.

[20] The Tribunal agreed with the prosecutor that the duty imposed by s 136 does not crystallise only at the point at which a contractual document is presented; but rather the duty is an ongoing one which must be met, at the latest, at the time a contract is presented. As the Tribunal observed, any argument that a licensee is under no duty of disclosure up to the point at which a contract is presented runs contrary to the purpose of the disclosure provisions of the Act. Neither could it be consistent with the duty under r 6.4 not to withhold information that should by law or fairness be provided to a customer or client. The Tribunal observed that the clear purpose of the duty is to ensure customers are made aware, when dealing with licensees who stand to benefit from transactions, that such is the case.

### **Statutory provisions**

[21] The relevant statutory provisions are ss 4(1), 136 and 137 of the Act which are reproduced below.

#### **4(1) Interpretation**

**contractual document**, in relation to a transaction, means a document that contains or records an agreement or a proposed agreement to enter into or effect the transaction, and includes a document that contains or records an offer that, on its acceptance, gives rise to such an agreement

**136 Disclosure of other benefits that licensee stands to gain from transaction**

(1) A licensee who carries 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.

(2) Subsection (1) does not apply to any matter disclosed under section 128 or 134.

(3) The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.

(4) For the purposes of this section, an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect of the transaction.

(5) A contract entered into in contravention of this section may not be cancelled merely because of that contravention.

**137 Meaning of licensee and person related to licensee in sections 134 to 136**

(1) In sections 134 to 136, licensee includes, in the case of an agent that is a company, every officer and shareholder of the company.

(2) For the purposes of sections 134 to 136, a person is related to a licensee if the person is—

(a) a partner of the licensee under a partnership agreement;

(b) an employee of the licensee;

(c) a branch manager or salesperson engaged by the licensee;

(d) the licensee's spouse or civil union partner;

(e) the licensee's de facto partner;

(f) a child, grandchild, brother, sister, nephew, or niece of the licensee or of any person referred to in paragraphs (d) or (e);

(g) any other child who is being, or is to be, cared for on a continuous basis by the licensee or any person referred to in paragraph (d) or (e);

- (h) a grandparent, parent, uncle, or aunt of the licensee or of any person referred to in paragraph (d) or (e);
- (i) an entity that has an interest in the licensee or an entity (not being an entity listed on the New Zealand Stock Exchange) in which the licensee has an interest.

## **Issue**

[22] The issue on appeal is narrow. It is whether the Tribunal was correct to find, as it did:<sup>3</sup>

The duty imposed by s 136 does not crystallise only at the point at which a contractual document is presented; but rather, the duty is an on-going one, which must be met, at the latest, by the time a contract is presented.

[23] There was a further submission, not pursued on appeal, as to whether the appellant might, alternatively, attract liability as a party to her mother's breach under s 136 of the Act.

## **Appellant's submissions**

[24] In helpful written submissions, carefully developed orally by Mr Rea, the appellant submitted the Tribunal erred in its finding.

[25] Mr Rea submitted it is not a breach of s 136 where the licensee concerned does not, in fact, ever present a contractual document. The reference in s 136(3) to "at the latest" can only practically mean that until the contractual documents are provided by the licensee written disclosure to the prospective party need not be given by the licensee.

[26] It was further submitted that, as in the present case, where a licensee's involvement in real estate agency work is preliminary only and does not develop to the point of presenting a contractual document, the obligation to give written disclosure does not arise. If the contractual documents are provided by a different licensee within the same licensed agency, it is the obligation of that licensee to comply with s 136 and to give written disclosure at that time, on behalf of the agency, if it had not been given earlier.

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<sup>3</sup> *REAA v Clark* [2013] NZREADT 62 at [61].

[27] Thus because the relevant contractual document was provided by Karen Clark and not the appellant, there was no breach by the appellant of s 136.

[28] In terms of timing, Mr Rea submitted that the s 136(3) requirement on the licensee to make disclosure must be before the time the licensee provides the prospective party with any contractual documents. He submitted that this can only sensibly mean that until such documents are provided by the licensee the obligation to make written disclosure does not arise.

[29] In anticipation of an argument by the respondent that this interpretation could lead to an abuse by licensees seeking to circumvent the written disclosure requirement by involving a different licensee (not related to the party obtaining a financial benefit), Mr Rea submitted that such a device would still be caught through other mechanisms in the Act or under the Rules.

### **Respondent's submissions**

[30] Mr Clancy, for the respondent, filed clear and comprehensive submissions which he developed orally. He submitted that because the appellant carried out real estate agency work in respect of the transaction and because her mother stood to benefit financially from the transaction, the appellant was subject to and caught by the duty imposed by s 136(1).

[31] Under s 136(3) the appellant was required to comply with that duty by making written disclosure of her mother's interest before, or at the latest, at the time Ms Lindsay was provided with a contractual document, irrespective of whether the contractual documents were provided by the appellant personally or by another licensee.

[32] In failing to ensure Ms Lindsay was given written notice prior to signing the offer, Mr Clancy submitted the appellant breached s 136 and the Tribunal's decision in finding unsatisfactory conduct was available to it on the evidence.

[33] Mr Clancy described the legislative history of the Bill<sup>4</sup> the gestation of which lead to the passing of the Real Estate Agents Act 2008 and the emphasis, he submitted, which Parliament had placed on consumer protection.

[34] Mr Clancy submitted that the clear purpose of the duty created under s 136 is to protect real estate consumers by ensuring they are made aware of information which may be relevant to the negotiations and, ultimately, their decision as to whether to enter into a real estate transaction or be bound by the provisions of a contractual document.

[35] Mr Clancy submitted that the duty under s 136 was an enduring one which did not crystallise only at the point when a contractual document was presented. Rather, it continued to a point, at the latest, when a contractual document was presented.

[36] He submitted that if the appellant's interpretation of s 136 was correct it would permit one licensee to conduct all negotiations with a purchaser without disclosing any potential financial benefit provided another individual licensee actually presented the documents. As a consequence disclosure might never be provided and yet s 136 would not be breached depending on the identity of the person providing the contractual document. This, it was submitted, could not have been the intention of Parliament when passing s 136.

## **Decision**

[37] It was common ground that in terms of s 136 the appellant was carrying out real estate agency work in respect of a transaction and that Karen Clark was related to the appellant by reason of being her parent.<sup>5</sup> It was also common ground that the offer drawn up on 17 October 2010 was a contractual document as defined by s 4.

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<sup>4</sup> Real Estate Agents Bill 2008.

<sup>5</sup> Real Estate Agents Act 2008, s 137(2)(h).

[38] The central question is whether written disclosure of a possible financial benefit to the licensee was required to be made by the appellant when the contractual documents were provided by a different individual licensee within the same licensed agency.

[39] The legislative context and background to the Act provides a useful perspective when examining the meaning and purpose of s 136.

[40] One of the primary purposes of reforming the legislation was to promote consumer protection. This is apparent from the introduction of the Real Estate Agents Bill, the commentary on the Bill by the Justice and Electoral Select Committee and the purpose of the Act as set out in s 3.

[41] Indeed, it was the Justice and Electoral Select Committee which recommended emphasis be placed on the promotion of public confidence in the performance of real estate agents and their work.

[42] This recommendation is now encapsulated in s 3 which provides:

### **3 Purpose of Act**

- (1) The purpose of this 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.
- (2) The Act achieves its purpose by—
  - (a) regulating agents, branch managers, and salespersons:
  - (b) raising industry standards:
  - (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[43] Against this background it is significant that in the 1976 Act there was no equivalent to s 136. The new provision is entirely consistent with the stated purposes of reform and in particular the promotion of increased consumer protection through transparency and disclosure, particularly in the context of licensees where there is a personal or related party interest in the property being sold.

[44] Applying a purposive approach, once a transaction is in contemplation, a licensee carrying out real estate agency work is obliged to disclose in writing any personal interest in the property. Disclosure must be made, at the latest, by the time the contractual documents are provided. I agree with the Tribunal that the duty is an ongoing one which crystallises, at the latest, at the time the contractual document is provided to the prospective party.

[45] In considering the duty of disclosure imposed, it is important to recognise the different purposes and effects of s 136(1) and (3). Section 136(1) creates the duty to disclose. It requires:

A licensee who carries out real estate agency work in respect of a transaction ... to make the disclosure in writing to every prospective party to the transaction.

[46] Its purpose is plain. It is designed to protect prospective purchasers through transparency. Prospective purchasers are entitled to be aware of the identity of those they are dealing with. Are they dealing with the owner or someone related to the owner or is this a normal, commercial arm's length transaction? Such disclosure permits the prospective purchaser to assess the weight to be given to representations made by the salesperson. It assists the prospective purchaser in making an informed decision as to the way they conduct themselves in negotiations.

[47] Section 136(3), in contrast, has an entirely distinct and different purpose. It defines the time by which the licensee must make the disclosure, i.e. before or at the time the licensee provides the contractual documents. Thus, once a specific transaction is in contemplation, a licensee carrying out real estate agency work is obliged to disclose in writing any personal interest in the property. As the respondent submitted, this section does not limit the duty to the licensee who actually presents the contractual documents. If it had been Parliament's intention to

restrict the duty of disclosure only to those licensees who actually present contractual documents, it is expected that the statutory language would have reflected that intention.

[48] The effect of s 136(3) is plain. It defines the period within which disclosure must be made culminating, at the latest, at the time the licensee provides the prospective party with any contractual documents. Obviously disclosure made after the contractual documents are presented would have the effect of removing, or at the very least minimising, the value or benefit of the disclosure to the prospective purchaser.

[49] In coming to that conclusion I do not overlook the use of the definite article preceding both references to “licensee” in s 136(3). This supports the appellant’s interpretation that the obligation to disclose falls on the same licensee who provides the contractual documents. However, s 136(3) must be read with s 136(1) which creates the duty. The first reference to licensee in s 136(1) is qualified by the use of the indefinite article. This is designed to capture any licensee carrying out real estate agency work in respect of a transaction. The use of the definite article in the next reference to licensee in s 136(1) must be referable back to the licensee carrying out real estate work. Thus the use of the definite article in s 136(3) operates to impose the obligation to disclose by licensees beyond the licensee providing the contractual documents.

[50] The wider interpretation promoted by the respondent meets the legislative purpose of consumer protection and transparency because a prospective purchaser, in the interests of transparency, is entitled to know whether a person related to the licensee may benefit financially from the transaction.

[51] Furthermore, the reference in s 136(1) and (3) is to a “prospective party”. If the appellant’s submission that the duty only crystallises when the contractual document is provided there would be no need for the word “prospective”. The use of the word “prospective” identifies any person who, in the context of a licensee carrying out real estate agency work, may subsequently be a party to the transaction.

[52] I find the Tribunal was correct to find the appellant was subject to and breached the duty of written disclosure imposed by s 136. It follows that in respect of grounds of appeal 3(a) to 3(c), I find against the appellant.

[53] Ground 3(d) is that the Tribunal erred in finding (if, in fact, it made such a finding) that the appellant's disclosure was insufficiently clear so as to amount to unsatisfactory conduct pursuant to s 72(a) of the Act. This ground was not advanced in argument on the appeal. The appellant points to an apparent contradiction in the findings of the Tribunal that the appellant gave "very clear evidence" in relation to informing Ms Lindsay of Karen Clark's interest in the property and, on the other hand, finding the appellant should not have allowed the complainant to be in any way unclear with whom she was dealing. The Tribunal's conclusion was made in the context of the penultimate paragraph<sup>6</sup> of the Tribunal's decision where the Tribunal inferred that had there been written disclosure of Karen Clark's interest there would not have been room for any lack of clarity. I agree with the Tribunal.

[54] As something of an aside, but supportive of the wider policy considerations implicit in s 136, I note the Tribunal found as a matter of fact that both the appellant and her mother gave Ms Lindsay oral advice that Karen Clark might benefit financially from the transaction. Their liability under the Act arose from their failure to do so in writing. It thus follows that both appellant and her mother, as industry professionals, understood the moral need to alert Ms Lindsay of the potential benefit to Karen Clark even if they did not know of the specific requirements imposed on them by s 136. This lends further support to the policy imperatives implicit in the obligations created by s 136.

## **Result**

[55] I find:

- (a) The Tribunal did not err in finding the appellant was in breach of s 136. The appeal is dismissed.

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<sup>6</sup> *REAA v Clark*, above n 3, at [78].

- (b) Costs are ordered on a scale 2B basis with disbursements as fixed by the Registrar.

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**Moore J**

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