BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 32

READT 060/18

IN THE MATTER OF	an appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	ERNEST ALBERT McNICHOLL and RETA CAROL McNICHOLL
AGAINST	THE REAL ESTATE AGENTS AUTHORITY (CAC 416) First Respondent
AND	MARK O'LOUGHLIN Second Respondent
On the papers	
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Mr N O'Connor, Member
Submissions received from:	Mr and Mrs McNicholl Ms A-R Davies, on behalf of the Authority Mrs K Parker, on behalf of Mr O'Loughlin
Date of Decision:	2 August 2019

DECISION OF THE TRIBUNAL
(PENALTY)

Introduction

[1] On 14 December 2018, Complaints Assessment Committee 416 ("the Committee") issued a decision in which it determined to take no further action on a complaint made against Mr O'Loughlin. Mr and Mrs McNicholl appealed to the Tribunal against that decision. They were joined in the appeal by Mr Stephen Gerald Cleaver, Ms Robyn Marie Fraser, and Mr Diego Thomas Lennon (together, "the appellants"). In its decision issued on 13 May 2019 the Tribunal allowed the appeal, and found that Mr O'Loughlin had engaged in unsatisfactory conduct.[1]

[2] Following the finding of unsatisfactory conduct, the Tribunal has received submissions as to penalty. The submissions filed by Mr and Mrs McNicholl are also on behalf of Mr Cleaver, and Ms Fraser and Mr Lennon.

Facts

[3] Mr O'Loughlin was the listing agent for the sale of apartments in a multi-level apartment complex in central Christchurch. The apartments were initially marketed off the plans, but Mr O'Loughlin also marketed apartments after the construction of the complex was completed. Mr O'Loughlin bought an apartment himself, which was tenanted.

[4] On 1 December 2017, the Authority received a complaint from Mr Lennon, on behalf of himself and the purchasers of seven other apartments. Five of the apartments had been bought off the plans. The other three (bought by Mr Lennon and Ms Fraser, Mr and Mrs McNicholl, and Mr Cleaver) had been bought after construction had been completed. Among other issues (not relevant to the appeal to the Tribunal), the complaint alleged that Mr O'Loughlin:

[a] had not accurately identified the allocated car parking spaces when he showed apartments to prospective purchasers; and

---

1 *McNicholl v Real Estate Agents Authority (CAC 416)* [2019] NZREADT 19.

[b] (notwithstanding that the apartments were advertised as having "smart wiring"), did not disclose that the complex's category 6 internet and telephone cabling ("the category 6 cabling") was incompatible with the fibre network available on the street.

[5] In its decision not to take further action, the Committee found that the issue of the carparks was illustrative of the problems that could arise when purchasing off plans. It found that requirements could, and did, change along the way, and that Mr O'Loughlin told purchasers, once the apartments were built, which carpark belonged to which apartment. It further found that the category 6 cabling used was the "gold standard in internet cabling", Mr O'Loughlin did not know of widespread internet issues, and those issues were beyond his control and responsibility.

[6] The Tribunal found that the Committee erred in reasoning on the basis that the appellants had bought their apartments off the plans, and finding that Mr O'Loughlin had shown the appellants their allocated carparks before they agreed to buy their respective apartments. The Tribunal also found that the Committee erred in finding that Mr O'Loughlin did not have knowledge of a building-wide issue of incompatibility between fibre and the category 6 cabling, and therefore did not breach any obligation as to disclosure of the incompatibility.[2]

[7] The Tribunal found that Mr O'Loughlin was guilty of unsatisfactory conduct under s 72 of the Act. First, he did not clearly identify to the appellants which carpark was allocated to the apartments they were interested in buying. While it would have been reasonable to use his own carpark as a reference point when he was marketing the apartments off the plans, that was not the case when marketing to the appellants after construction was completed. At that point, the only carpark Mr O'Loughlin should have shown to any of the appellants was that allocated to the apartment they were interested in buying.

[8] The Tribunal found that Mr O'Loughlin, at the least, created confusion by not making it sufficiently clear that he was showing them his own carpark, not the carpark allocated to the apartment they were interested in. While not satisfied that Mr

---

2 At [47].

O'Loughlin had deliberately misled the appellants as to the carparks, the Tribunal found that his conduct in not making it clear which carpark was allocated to their apartment fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee.[3]

[9] Secondly, the Tribunal found that Mr O'Loughlin was advised by his property manager on 29 November 2016 that there was a problem with internet connectivity that extended beyond his own apartment and affected "each individual apartment", and that "14 different owners" would be "getting holes made in walls to get connections made". This advice was given to him well before any of the appellants bought their own apartments. While the property manager provided a "fix" for the tenant of Mr O'Loughlin's apartment, that was temporary, and in respect of that apartment only.

[10] The Tribunal found that Mr O'Loughlin was aware of the incompatibility issue between fibre and the apartment complex's category 6 cabling, and was obliged to make prospective purchasers aware of it. The fact that the problem was another person's fault or responsibility did not absolve him from meeting his obligations. Mr O'Loughlin should in fairness have provided information as to the incompatibility to the appellants when he marketed the apartments to them. His failure to do so was a breach of his obligation under r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, and fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee.[4]

Sentencing principles

[11] 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."[5] The Act achieves these purposes by regulating agents, branch managers, and salespersons, raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.[6]

---

3 At [31]–[32].
4 At [38]–[45].
5 Section 3(1) of the Act.
6 Section 3(2).

[12] These purposes are best met by penalties for misconduct and unsatisfactory conduct being determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection and maintenance of confidence in the industry, and the need for deterrence.

[13] 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.[7]

[14] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. Where a licensee is found guilty of unsatisfactory conduct, the orders the Tribunal may make are limited to those that a Complaints Assessment Committee may make under s 93 of the Act. These include (as may be relevant to the present matter) censuring or reprimanding Mr O'Loughlin (s 93(1)(a)), ordering him to apologise to the appellants (s 93(1)(c)), ordering him to undergo training or education (s 93(1)(d)), ordering him to rectify his error or omission, or provide relief from the consequences of the error or omission (s 93(1)(f)), and ordering him to pay a fine of up to $10,000 (s 93(1)(g)).

Submissions

Appellants

[15] Mr and Mrs McNicholl submitted that the Tribunal should order that Mr O'Loughlin formally acknowledge that he misled the appellants in relation to telephone and internet capabilities, and that he misled them as to which carpark was allocated to them. They submitted that a number of further orders should also be made:

---

[7] See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128] and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

[a] that Mr O'Loughlin transfer the carpark allocated to his apartment to Mr and Mrs McNicholl, and take the carpark allocated to their apartment in exchange;

[b] that Mr O'Loughlin pay Mr Cleaver $10,000 as compensation for anticipated loss in resale value, or in the alternative, an order that Mr O'Loughlin further transfer the (covered) carpark formerly allocated to Mr and Mrs McNicholl's apartment to Mr Cleaver, and take the (uncovered) carpark allocated to Mr Cleaver's apartment in exchange;

[c] that Mr O'Loughlin pay each of Mr and Mrs McNicholl, Mr Cleaver, and Mr Lennon and Ms Fraser $7,500 (a total of $22,500) "by way of compensation for the stress, anxiety and frustration and for having had to live with a very limited internet service"; and

[d] that Mr O'Loughlin pay Mr Lennon and Ms Fraser $1,088.90, in respect of the additional costs over and above what they would have been required to pay for internet services, had fibre been available.

[16] Mr and Mrs McNicholl did not set out any submissions as to the Tribunal's jurisdiction to make the orders sought.

Mr O'Loughlin

[17] Mrs Parker submitted that the Tribunal did not find that Mr O'Loughlin deliberately misled the appellants as to the carparks allocated to their apartments, or as to the incompatible category 6 cabling. She submitted that in the light of the fact that the Tribunal's decision has been published and is publicly available, it is difficult to understand what "written acknowledgement" the appellants seek.

[18] She submitted that Mr O'Loughlin appreciates that this has been a very difficult and stressful situation for the appellants and recorded that he "would like to take the opportunity to sincerely apologise to the appellants for the stress and frustration they had experienced in relation to their purchase". She submitted that Mr O'Loughlin

acknowledges that it would have been prudent to have taken steps to ensure that he made the car parking arrangements clear to the appellants, and to have passed on information as to the incompatibility issue between the Category 6 cabling and fibre.

[19] Mrs Parker submitted that it is not open to the Tribunal to make any of the orders sought in respect of the carparks. She submitted that neither Mr and Mrs McNicholl nor Mr Cleaver had established that they had suffered any loss in relation to the carparks allocated to them, or that any loss (if established) was caused by Mr O'Loughlin.

[20] Referring to the judgment of his Honour Justice Brewer in *Quin v Real Estate Agents Authority,* Mrs Parker further submitted that s 93(1)(f) of the Act does not provide a general power to order a licensee to pay damages to compensate a complainant for any and all loss or harm, either by way of indemnity or for loss of expectation.[8] She referred to the submission made by Mr and Mrs McNicholl at the substantive hearing, that had it been clear to them which carpark was theirs, "there is a good chance they would have walked away from the purchase". She submitted that a denial of the opportunity not to purchase the property as a consequence of an error or omission cannot lead to relief which is recoverable under s 93(1)(f).

[21] Mrs Parker submitted that the appellants' request for compensation for "stress, anxiety, and frustration" of $7,500 each is a claim for general damages, and directly contrary to *Quin*. She further submitted that it is not open to the Tribunal to order a payment to Mr Lennon and Ms Fraser for "additional costs". She submitted that Mr O'Loughlin did not make any representation that "high speed fibre internet" would be available at the complex, and Mr O'Loughlin was not responsible for Mr Lennon's and Ms Fraser's decision to enter into the contract they did for the provision of internet services.

[22] Mrs Parker further submitted that even if it were open to the Tribunal to do so, it would be inappropriate for the Tribunal to exercise a discretion to order Mr O'Loughlin to pay relief, because of the high value of the orders sought in comparison to the Tribunal's findings as to Mr O'Loughlin's culpability, the culpability of other

---

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

parties (vendor and/or developer), the complexity of causation issues, and contributory negligence on the part of the appellants and/or their solicitors (in failing to make further enquiries regarding the carparks), and the existence of other remedies at general law.

[23] Regarding the issue of incompatibility between the category 6 cabling and fibre, Mrs Parker noted that the Tribunal did not find that Mr O'Loughlin represented that a particular "type" of internet was available at the complex. She submitted that there did not appear to be any suggestion that the appellants would not have bought their apartments had they been aware that fibre internet was not available at the complex (because it was incompatible with the category 6 cabling). She further submitted that fibre internet has now been in place at the complex for almost a year, and any issue has now been resolved.

[24] Mrs Parker submitted that the Tribunal's findings represent a reasonably low level of culpability, and the appropriate penalty would be an order for Mr O'Loughlin to be censured or reprimanded, and/or an order that he complete further education or training. She submitted that the Tribunal should take into account that Mr O'Loughlin had learned valuable lessons from the experience of the complaint and the appeal, and has made changes to his business and practice, by:

[a] instituting a checklist system to ensure that documents and information to be passed on to purchasers is updated;

[b] asking that all communications between developers and purchasers if copied to him so he is aware of any changes to the development;

[c] asking developers to number carparks consistently with apartment numbers; and

[d] asking developers to supply information about wiring and fibre network for him to pass on to purchasers.

[25] Mrs Parker also submitted that Mr O'Loughlin has not previously been disciplined.

The Authority

[26] Ms Davies submitted for the Authority that it is well-established that the Tribunal cannot order compensatory damages where a licensee has been found guilty of unsatisfactory conduct (as opposed to misconduct). She submitted that the Tribunal has no ability to award the appellants the compensation they sought for "stress, anxiety, and frustration", or for a perceived loss of value.

[27] Ms Davies further submitted that the power to order relief under s 93(1)(f) of the Act does not empower a Committee, or the Tribunal, to effect changes to legal title in order to rectify an error or omission, and that the Tribunal cannot order Mr O'Loughlin to exchange carparks with the appellants. She submitted that this limitation is consistent with the purpose of the complaints regime being the regulation of the real estate industry so as to promote and protect the interests of consumers, as opposed to providing a forum in which complainants can seek monetary compensation or other orders typically available in civil proceedings.

[28] Similarly, Ms Davies submitted that the request by Mr Lennon and Ms Fraser for compensation for the use of a different internet system is essentially a claim for compensatory damages, rather than an order requiring Mr O'Loughlin to rectify an error or omission, and therefore outside the ambit of s 93(1)(f). Ms Davies also submitted that the issues with fibre in the complex (which led to Mr Lennon and Ms Fraser obtaining internet service by other means) were not a consequence of Mr O'Loughlin's failure to disclose the incompatibility issue. She submitted that those issues existed regardless of Mr O'Loughlin's conduct.

[29] Ms Davies submitted that it would be open to the Tribunal to order Mr O'Loughlin to make a formal apology to the appellants for his conduct, but that an order requiring him to formally acknowledge that he misled the appellants would be inconsistent with the Tribunal's findings that he did not intentionally mislead them either as to the carparks or the fibre incompatibility issue.

[30] Ms Davies referred the Tribunal to three previous Tribunal penalty decisions relating to a failure to disclose information regarding properties being marketed. She submitted that it would be consistent with the outcome reached in those cases for the tribunal to censure Mr O'Loughlin, and order him to pay a fine in the lower to lower-middle range.

Discussion

(a) Order sought by appellants that Mr O'Loughlin formally acknowledge that he misled the appellants as to the carparks and internet issues

[31] The Tribunal's findings are recorded in the Tribunal's decision in which it found that Mr O'Loughlin engaged in unsatisfactory conduct. That decision is publicly available. The Tribunal did not find that he deliberately misled the appellants regarding the carparks allocated to their apartments, or in failing to advise them of the incompatibility between the category 6 wiring and the available fibre.

[32] We accept Ms Davies' submission that the acknowledgement sought by the appellants would be inconsistent with the Tribunal's findings. In any event, s 93 does not provide any power to require a licensee to "formally acknowledge" conduct.

[33] Under s 93(1)(c) of the Act, a licensee may be ordered to apologise to a complainant. We have recorded Mrs Parker's statement of an apology on behalf of Mr O'Loughlin. However, it is appropriate in this case that an order is made that a written apology is made by Mr O'Loughlin, himself.

(b) Orders sought by the appellants for monetary compensation and for exchange of carparks

[34] The only possible power under which the orders sought could be made is that conferred in s 93(1)(f) of the Act, under which the Tribunal may order a licensee:

> to rectify, at his or her or its own expense, any error or omission; or
>
> 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:

Quin v Real Estate Agents Authority[9]

[35] In *Quin*, his Honour Justice Brewer considered the interpretation of s 93(1)(f). After referring to the purposes of the Act, his Honour said:

> [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 powers to grant consumers relief from harm, resulting from licensees acting contrary to the standards required of them.
>
> …
>
> [55] 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 complainant 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.
>
> …
>
> [58] In my view the wording of ss 93 and 110 makes it clear that a limited jurisdiction is conferred. Section 93(1)(f) does not empower a Committee to order a licensee to make payments in the nature of compensatory damages, that is a power which is given to the Tribunal under s 110, but to a limit of $100,000.
>
> …
>
> [65] … 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 its consequences, where the error or omission resulted from the licensee's unsatisfactory conduct. Whatever is ordered would be at the licensee's expense. In situations where a complainant has already done what was necessary to rectify the error, or to provide relief from its consequences, 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. …

[36] Justice Brewer went on to provide examples of where a licensee might be ordered to take actions to rectify or put right or correct an error or omission, or, where rectification is not practicable, to provide relief from the consequences of an error or omission. One example was where a licensee assured prospective purchasers that the vendor would permit early possession of a property and the purchasers, in reliance on that assurance, contracted to sell their existing home with settlement before that of the

---

9 *Quin*, above fn 9.

property they were purchasing. If early possession was not in fact available, contrary to the licensee's assurances, the licensee could be directed to try to negotiate for early possession, meeting any additional payment required, or to arrange alternative accommodation, at the licensee's expense.

[37] A further example was where a licensee misrepresented that a particular chattel was included in the price for the property. A licensee might be ordered to negotiate its purchase, at the licensee's expense, or supply a similar chattel, again at the licensee's expense.

[38] In *Quin*, the licensee represented to the prospective purchasers of a property that its boundary was along a fence line. In fact, none of the fence line, or a driveway running from a gateway along the fence line, was within the property. The licensee failed to alert the purchasers to the difficulties as to access to the property. A Complaints Assessment Committee found the licensee guilty of unsatisfactory conduct, and the purchasers sought relief by way of (among other things) a contribution to the cost of creating a new driveway.

[39] Justice Brewer found that the "consequence" of the licensee's error or omission was that they bought a property they would not have bought, had they been aware of the true location of the boundary and the access difficulties.[10] He considered that there were steps the licensee could have been ordered to take to provide relief from those consequences, by putting the property back on the market and re-selling it. The licensee would have borne the costs involved. However, any loss on re-sale would not be the responsibility of the licensee, under s 93(1)(f) (although the purchasers would still have their rights under the general law).

[40] The purchasers elected to keep the property, not re-sell it. They paid the costs involved in developing it to achieve the result they had expected when they bought it. His Honour held that that cost did not come within the ambit of s 93(1)(f). The steps they took could not be said to be to provide relief from the consequence of the licensee's error or omission (which was that they were denied the opportunity not to

---

10 At [69].

buy the property in the first place). The relief they sought came under a different doctrine of law.

Examples of the application of Quin

[41] In *Tan v Real Estate Agents Authority (CAC 20005)*,[11] a licensee misrepresented to a prospective purchaser that a property comprised two dwelling-houses, when it could not be used legally as two dwellings. The Tribunal upheld a Complaints Assessment Committee's decision that the cost of converting the property into a single legal unit was not rectification of the licensee's error, and accepted that the only remedy available to the purchaser was damages representing the difference between the price paid for the property and its actual market value at the time of sale. Such damages could not be ordered under s 93(1)(f).

[42] In *Trustees of the JS & AJ Hamilton Family Trust v Real Estate Agents Authority (CAC 403)*,[12] the Tribunal ordered payments by way of relief under s 93(1)(f)(ii) in respect of two errors by licensees. The first was a misrepresentation that curtains were included in the chattels sold with a property, in respect of which the licensee was ordered to pay 50 percent of the cost for new curtains. The second was an error in preparing an agreement for sale and purchase by which a second purchaser entered into an unconditional agreement while an earlier agreement with the trustees was conditional, without including a provision that the second agreement was a back-up agreement, subject to the earlier agreement not being made unconditional. The Tribunal's order related to the additional legal costs incurred by the trustees when both they and the second purchaser asserted their right to complete the purchase.

The appellants' requests

(a) Requests for financial compensation

[43] It is important to remember that the focus of the Act is on the regulation of the real estate industry, so as to achieve the purposes of the Act of promoting and

---

11 *Tan v Real Estate Agents Authority (CAC 20005)* [2015] NZREADT 12.

12 *Trustees of the JS & AJ Hamilton Family Trust v Real Estate Agents Authority (CAC 403)* [2017] NZREADT 54.

protecting the interests of consumers. The focus is not on providing a forum in which complainants can seek monetary compensation.

[44] As is made clear in *Quin*, the Tribunal does not have any power to make an order that a licensee pay financial compensation following a finding of unsatisfactory conduct. Accordingly, the Tribunal has no power to make the order sought for payments of $7,500 to each of Mr and Mrs McNicholl, Mr Cleaver, and Mr Lennon and Ms Fraser as compensation for stress, anxiety, and frustration. It is also clear from *Quin* that the Tribunal does not have the power to make the alternative order sought by Mr Cleaver for a payment of $10,000 as compensation for an anticipated loss of resale value.

(b) Request for reimbursement of additional costs for internet access

[45] We accept the submissions made by Mrs Parker and Ms Davies that it cannot be said that Mr Lennon's and Ms Fraser's "additional costs" were a "consequence" of Mr O'Loughlin's failure to advise them that the category 6 cabling was incompatible with fibre. That issue existed regardless of whether Mr O'Loughlin did or did not advise prospective purchasers of it. The choice for a prospective purchaser told of the issue was whether to buy the property or not.

[46] Having bought the property, Mr Lennon's and Ms Fraser's additional costs are of the same nature as the expenditure incurred by the purchasers in *Quin*, in constructing access. As was the case for that expenditure, Mr Lennon's and Ms Fraser's expenditure is not within the ambit of an order under s 93(1)(f).

(c) Request for order for exchange of carparks

[47] We reject this request for three reasons. First, Mr O'Loughlin's error was not clarifying which carpark was allocated to Mr and Mrs McNicholl's apartment. This did not cause them the loss of a carpark. Rather their loss was the expectation that they would have a different carpark from that which they were allocated. It is clear from *Quin* that such a loss cannot be the subject of an order for relief under s 93(1)(f).

[48] Secondly, the title for Mr and Mrs McNicholl's apartment encompasses both the apartment itself and the carpark. That is, the carpark is not on a separate title. The exchange of allocated carparks between Mr and Mrs McNicholl's apartment and Mr O'Loughlin's apartment would require changes to the legal title of their apartment and, we assume, to the title to Mr O'Loughlin's apartment. We have concluded that s 93(1)(f) does not give the Tribunal power to order a licensee to effect changes to the legal title to a property, or properties, in order to provide relief from the consequences of an error or omission on the part of the licensee.

[49] Thirdly, even if s 93(1)(f) did give the Tribunal that power, we would not have considered it appropriate in this case to make such an order. We were not provided with any submissions as to whether in fact the necessary changes to the legal titles are legally possible, or practicable. In the absence of such information, we would not be prepared to make an order, given the uncertainty as to what might be required, and at what cost.

(c) Penalty orders

[50] It is appropriate to make an order for Mr O'Loughlin to be censured for his unsatisfactory conduct.

[51] Ms Davies referred us to two cases in which penalty orders were made after findings of unsatisfactory conduct on the grounds of failures in disclosure. We discuss these below. We add that we do not consider that the third case referred to by Ms Davies (*McCarthy v Real Estate Agents Authority (CAC 20007)*),[13] is of assistance, because of its particular circumstances.

[52] In *Li v Real Estate Agents Authority (CAC 408)*,[14] the licensee did not look at, and did not ask the vendors about, one wall of a property she was marketing. The wall had weathertightness issues. The licensee's unsatisfactory conduct was assessed as being at the high end of the spectrum of such conduct. She was censured, ordered to make a written apology, and to pay a fine of $7,000.

---

13 *McCarthy v Real Estate Agents Authority (CAC 20007)* [2014] NZREADT 94.
14 *Li v Real Estate Agents Authority (CAC 408)* [2017] NZREADT 33.

[53] In *Complaints Assessment Committee 302 v Crockett*,[15] the licensee became aware while marketing a property that there was a potential risk of weathertightness issues for the property, due to the nature of its construction and cladding. She did not disclose this to the eventual purchaser. She was censured and ordered to pay a fine of $2,500.

[54] We have concluded that Mr O'Loughlin's conduct in the present case is at the mid-level of unsatisfactory conduct. It is more serious than that of the licensee in *Crockett*, because it involved two aspects of marketing: his failure to identify the allocated carparks and his failure to disclose the incompatibility between the category 6 cabling and the available fibre. It is, however, less serious than that of the licensee in *Li*.

[55] We have recorded Mrs Parker's submission that Mr O'Loughlin has no previous disciplinary history. We note his statement to the Committee in response to the complaint, that he started working in real estate in 1996. He has therefore had a lengthy involvement in the industry, without any disciplinary findings against him. We have also recorded Mrs Parker's submissions as to the steps Mr O'Loughlin has taken to change his business and practice, as a result of the complaint and the appeal.

[56] We have taken both of these submissions into account in determining the appropriate penalty orders.

Orders

[57] We order as follows:

[a] Mr O'Loughlin is censured and ordered to pay a fine of $3,500. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[b] Mr O'Loughlin is ordered to make apologies in writing addressed to (i) Mr and Mrs McNicholl, (ii) Mr Lennon and Ms Fraser, and (iii) Mr Cleaver

---

15 *Complaints Assessment Committee 302 v Crockett* [2017] NZREADT 19.

within 20 working days of the date of this decision. The form of the apologies is to be approved by the Authority.

[58] In the light of the steps taken by Mr O'Loughlin to improve his business and practice, we do not consider it necessary to order him to complete specified further training.

[59] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

_____
Hon P J Andrews
Chairperson

_____
Mr G Denley
Member

_____
Mr N O'Connor
Member