BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 37

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
	READT 023/17
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 414
AGAINST	SONIA TAFILIPEPE Defendant
	READT 043/18
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 416
AGAINST	SONIA TAFILIPEPE Defendant
Hearing	14 August 2019, at Christchurch
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Ms C Sandelin, Member
Appearances:	Mr M Hodge, on behalf of the Committee Mr W Todd, on behalf of Ms Tafilipepe
Date of Decision: Recalled and reissued:	20 August 2019 30 August 2019

DECISION OF THE TRIBUNAL
(PENALTY)

Introduction

[1] In its decision issued on 10 May 2019 the Tribunal found charges brought by Complaints Assessment Committees 414 and 416 proved against Ms Tafilipepe ("the substantive decision").[1] The Tribunal has now heard submissions as to penalty.

Facts

[2] Both sets of charges were concerned with Ms Tafilipepe's conduct in relation to the sale of earthquake damaged properties following the Christchurch earthquakes in September 2010 and February 2011. Such properties were often sold on an "as is" basis, that is on the understanding that they were earthquake-damaged, to companies or persons who specialised in buying them to repair, for later sale or rental. Ms Tafilipepe maintained a list of buyers of "as is" properties, to whom she sent information as to "as is" properties. At that time, Ms Tafilipepe was the owner of three Mike Pero Real Estate (MPRE) franchises.

The 414 charge

[3] The charge brought by Complaints Assessment Committee 414 ("the 414 charge") related to an earthquake-damaged property in Christchurch. Ms Tafilipepe was asked by the owner's fiancée, Ms Cokojic, to visit the property. Ms Tafilipepe brought a person on her "as is" list, "Mr S", with her to the property on 16 May 2016. The Tribunal found that Ms Tafilipepe:

> [a] brought Mr S (whom the Tribunal found on the balance of probabilities to be, at least in part, a prospective purchaser) to the property without Ms Cokojic's prior consent or authority, in breach of her obligation to act in good faith and deal fairly under r 6.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules");[2]

---

1 *Complaints Assessment Committee 414 v Tafilipepe* [2019] 13 (Decision originally issued on 11 April 2019, then recalled and re-issued on 10 May 2019).

2 At paragraphs [24] and [28]

[b] misled Ms Cokojic as to Mr S's purpose for attending the property, by introducing him as an "EQC specialist" and not advising Ms Cokojic that he was a buyer of "as is" properties), in breach of her obligation not to mislead Ms Cokojic, or provide her with false information, under r 6.4;[3]

[c] provided Mr S with a copy of the Scope of Works for the property, enabled Mr S to obtain a general understanding of the property (by allowing him to be present at the property) and enabled him to become aware of Ms Cokojic's price expectation (by allowing him to be present during a discussion as to Ms Cokojic's price expectation), in breach of r 6.2;[4]

[d] marketed the property to Mr S without Ms Cokojic's written authority through an agency agreement, in breach of r 9.6; [5]

[e] lied to Ms Cokojic by telling her (after Ms Cokojic had contacted MPRE) that Mr S was a new agent working with her at the agency, in breach of r 6.4 (Ms Tafilipepe later also lied to MPRE, by saying that the person who accompanied her to the property was another salesperson from the agency);[6] and

[f] by her conduct (in particular, bringing Mr S to the property without properly informing Ms Cokojic who he was and the purpose of his being there, disclosing information to him without proper authorisation, and lying to Ms Cokojic about Mr S), brought the real estate industry into disrepute, in breach of r 6.3.[7]

[4] The Tribunal found that Ms Tafilipepe was guilty of misconduct under s 73(a) of the Act (disgraceful conduct) in respect of her lying to Ms Cokojic. In respect of the other elements of charge 414, the Tribunal found Ms Tafilipepe guilty of

---

3 At paragraph [32].
4 At paragraph [45].
5 At paragraphs [60] and [63].
6 At paragraph [65].
7 At paragraph [75].

unsatisfactory conduct under s 72 of the Act, assessed as being at the higher end of the scale of unsatisfactory conduct.[8]

The 416 charge

[5] This charge arose as a result of a complaint made to the Authority in mid-2016[9] that Ms Tafilipepe had contacted the owner of a property directly, and discussed the pricing of a property with a prospective purchaser, when she did not have an agency agreement in place giving her authority to do so. On 16 September 2016, the Authority's early Resolution Facilitator sent Ms Tafilipepe a compliance letter, reminding her of her obligations under s 126 of the Act (which provides that a licensee is not entitled to commission or expenses in connection with real estate agency work unless there is an agency agreement in place), and recommended that she review her practices to ensure she met her obligations as a licensee, under s 126 and rr 9.6 and 9.9 of the Rules.

[6] Between 22 September 2016 and 1 March 2017, Ms Tafilipepe sent emails to persons on her "as is" list (including Mr S), giving details of eight "as is" properties, including the addresses of the properties, appraisals, and vendors' price expectations. She did not have agency agreements in place for any of these properties.

[7] The Tribunal found that Ms Tafilipepe was marketing the properties, and that she was in breach of r 9.6 by marketing them without having authority to do so by way of an agency agreement. The Tribunal found that the breach was reckless (that is, Ms Tafilipepe knew that what she was doing was likely to breach r 9.6 but carried on regardless), and therefore guilty of misconduct under s 73(c)(iii) of the Act.[10]

[8] The Tribunal is now required to determine the appropriate penalty in respect of the findings of:

[a] misconduct under s 73(a) of the Act (lying to Ms Cokojic) (414 charge);

---

8 At paragraph [81].
9 After the conduct reflected in the 414 charge.
10 Tribunal's substantive decision, at paragraphs [111]–[112].

[b] misconduct under s 73(c)(iii) of the Act (marketing eight properties without an agency agreement in place, in reckless contravention of r 9.6) (416 charge); and

[c] unsatisfactory conduct under s 72 of the Act (breaches of rr 6.2, 6.3, 6.4 and 9.6) (414 charge).

Penalty principles

[9] 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."[11] 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.[12]

[10] Penalties for misconduct and unsatisfactory conduct are determined bearing in mind 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. 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.[13]

[11] 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] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act following a finding of unsatisfactory conduct

---

11 Section 3(1) of the Act.
12 Section 3(2).
13 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].

(these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);

[b] Impose a fine of up to $15,000;

[c] Order cancellation or suspension of the licensee's licence;

[12] In determining the appropriate penalty, the nature of the conduct 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 error or wrongdoing, and to accept responsibility for the conduct), and the practitioner's previous disciplinary history.[14]

Submissions

[13] Mr Hodge submitted for the Committee that the finding of disgraceful conduct under s 73(a) of the Act (lying to Ms Cokojic) was the most serious finding against Ms Tafilipepe. He submitted that consumers should be able to trust and have faith in licensees to act with honesty and integrity on real estate transactions.

[14] Mr Hodge accepted that Ms Tafilipepe's dishonesty was not an instance of lying for financial gain, or planned deception, but rather a panicked response to Ms Cokojic's raising an issue about Mr S. However, he submitted, Ms Tafilipepe's conduct during the proceedings demonstrated that she had limited insight into her conduct: she contended at the hearing of the charges that she lied in order to protect the agency's reputation, and that the impact of the lie was "minor".

[15] Mr Hodge further submitted that Ms Tafilipepe's second lie, in telling MPRE that the person with her at the property was another salesperson from the agency, was a further minimisation of her conduct, showing a failure to understand the importance

---

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

of acting with honesty and candour as a licensee, and a limited acceptance of responsibility.

[16] Mr Hodge referred to the Tribunal's finding that the finding of unsatisfactory conduct on the balance of the particulars of the 414 charge (breaches of rr 6.2, 6.3. 6.4 and 9.6) related to conduct at the higher end of the scale of unsatisfactory conduct. He submitted that the finding that Ms Tafilipepe had brought the industry into disrepute was a highly aggravating factor.

[17] With respect to the finding of misconduct (reckless contravention of r 9.6) on the 416 charge, Mr Hodge submitted that the purpose of r 9.6 is to ensure that vendor clients are protected by an agency agreement from the outset, and Ms Tafilipepe's conduct deprived the vendors concerned of this protection. He submitted that the fact that Ms Tafilipepe continued to market properties to persons on her "as is" list, despite having received compliance advice from the Authority, reflected an indifference towards compliance with the Rules and her obligations as a licensee. He submitted that the failure to have written agency agreement was a very serious matter, in particular in the circumstances of sales of earthquake-damaged properties after the Christchurch earthquakes.

[18] With reference to the submission for Ms Tafilipepe that her vendors of "as is" properties had agreed to her sharing details of the properties to people on her "as is" list, Mr Hodge acknowledged that vendors may reach such agreement with their salesperson. However, he submitted that it is important that vendor clients fully understand the process, from the outset. He submitted that in the absence of a written agency agreement, the protection given by the agreement is absent.

[19] Mr Hodge accepted that there were positive factors relating to the assessment of penalty in the steps Ms Tafilipepe had taken as to training since the offending. He accepted that a penalty short of cancellation is appropriate. He acknowledged that an order for suspension would have a serious effect on Ms Tafilipepe, her family, and her employees. However, he submitted that while it is appropriate to consider the impact of a penalty on people affected by it, that should not be permitted to dominate over other relevant factors. He submitted that the appropriate penalty would be an order for

censure, a fine in the order of $3,000 to $4,000, and an order for suspension for a period of nine to twelve months.

[20] In relation to the 414 charge, Mr Todd submitted that the risk of Mr S purchasing Ms Cokojic's property was apparent only, and there was never any real risk of his taking advantage of an advance viewing. He noted Ms Cokojic's evidence that Mr S never made an offer to buy the property, and that the property was subsequently sold to a third party.

[21] Mr Todd submitted that Ms Cokojic was upset after receiving Ms Tafilipepe's appraisal, but did not suffer any adverse consequences beyond that upset, as a result of Ms Tafilipepe's conduct.

[22] In relation to the 416 charge, Mr Todd submitted that the vendors of the eight properties were known to Ms Tafilipepe, were "vulnerable" (in particular, by being the owners of damaged properties), and had instructed her to send the information that she subsequently sent to her "as is" buyers. He submitted that Ms Tafilipepe would have obtained a written agency agreement before proceeding any further with any of the properties. However, none of the potential sales had progressed beyond the initial contact with the persons on her "as is" list.

[23] Mr Todd submitted that as none of the potential vendors had been spoken to in the investigation by Complaints Assessment Committee 416, it was not possible to discern any adverse consequence of Ms Tafilipepe's conduct, whether financial or otherwise. If anything, he submitted, Ms Tafilipepe would have enhanced her own and the real estate industry's standing by assisting the vendors by providing details of their properties to people identified as possibly having an interest in buying them.

[24] Mr Todd submitted that Ms Tafilipepe had made changes in her practice since the events during 2016. In November 2016, she completed Unit Standard 23136 "Demonstrate knowledge of misleading and deceiving conduct and misrepresentation". Mr Todd submitted that completing this course shows that Ms Tafilipepe understood that she had done the wrong thing, and was keen to behave in a manner which provided greater protection to her clients. He further submitted that Ms

Tafilipepe now attends a number of training sessions, conferences, and presentations for the purposes of professional development and to meet her non-verifiable and verifiable Continuing Education requirements.

[25] Mr Todd also submitted that Ms Tafilipepe assists people who wish to become real estate salespeople by assisting them with the papers they have to complete. He submitted that this has provided her with a much stronger knowledge of real estate law and practice. He also submitted that she passes this knowledge on to her staff, by taking time each week to train her staff on procedural, compliance, and legal matters.

[26] Mr Todd outlined Ms Tafilipepe's present agency commitments. He submitted that she is a sought-after real estate agent, with a high number of listings with a lot of repeat and referral business, reflecting the expertise and professionalism she brings to her work.

[27] Mr Todd submitted that an order for suspension would have a serious financial impact on Ms Tafilipepe, as a single mother with two dependent children. After the events leading to the 414 and 416 charges, Ms Tafilipepe established a new agency (Dynamic Realty) with her partner. Her partner is currently in India and, pursuant to cultural expectations, Ms Tafilipepe has taken on the responsibility of providing financial support to his family. She has also committed to financial support of her mother and step-father.

[28] Mr Todd submitted that an order for suspension would also have a serious impact on the employees of Dynamic Realty (four administrative staff, four salespersons, and a sign installer). He submitted that if Ms Tafilipepe were to be suspended from practice there would be insufficient income to support the administrative staff, three of the salespersons, and the sign installer, and to pay business expenses for the agency.

[29] Mr Todd also referred to Ms Tafilipepe's contributions to the Bone Marrow Cancer Trust, and her commitment to making charitable donations from commissions received from sales by the agency. He also provided a bundle of character references and testimonials from clients and customers, employees, and others.

[30] With respect to the penalty to be imposed in this case, Mr Todd submitted that Ms Tafilipepe was stripped of her MPRE franchises, which she had bought at significant cost, and for which she had not been repaid, when her engagement with MPRE was terminated. He also submitted that she was subject to a restraint of trade for four months after her engagement with MPRE was terminated. While acknowledging that the charges against Ms Tafilipepe were not the sole cause of the termination of her engagement with MPRE, he submitted that the consequences of the restraint of trade were the same as would be experienced if she were suspended. In effect, he submitted, Ms Tafilipepe has already incurred, at least in part, the very penalty (suspension) now sought by the Committee. He submitted that a suspension would result in a penalty which is excessively punitive, as it would further punish both Ms Tafilipepe and those around her.

[31] Mr Todd submitted that Ms Tafilipepe has significantly altered her practices, and there is no need for a penalty aimed at reforming and rehabilitating her, as her current practice meets all compliance and regulatory requirements. Nor is a penalty required that addresses any adverse consequences suffered by clients, as there has been no such consequences. He submitted that Ms Tafilipepe accepts that a penalty should be imposed that sends a message to the industry that her conduct was unacceptable.

[32] Mr Todd submitted that an appropriate penalty would be an order for censure and a fine of $10,000.

Discussion

[33] The Tribunal was referred to the judgment of his Honour Justice Woodhouse in the High Court in *Morton-Jones v Real Estate Agents Authority* (concerning penalties for dishonesty),[15] and the Tribunal's penalty decisions in *Complaints Assessment Committee 414 v Goyal*,[16] *Complaints Assessment Committee 416 v Ganesh*,[17]

15 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804
16 *Complaints Assessment Committee 414 v Goyal* [2018] NZREADT 3.
17 *Complaints Assessment Committee 416 v Ganesh* [2018] NZREADT 27.

Complaints Assessment Committee v Goundar,[18] and *Complaints Assessment Committee 408 v Reed*.[19]

[34] As counsel acknowledged, none of these cases is on all fours with the present case. Mr Morton-Jones was a licensee acting as a property manager, who short-paid rental money to three clients, over a period of some three years. Mr Goyal failed to disclose that he had a financial interest in properties he was engaged to sell, as a result of having made loans to the purchaser, to be used to buy and develop the properties. Mr Ganesh failed to disclose that he had a financial connection to a transaction, and lied to the Authority's investigator. Mr Goundar failed to disclose that the vendor of a property was his sister. The Tribunal found that he had not given any thought to his obligations under the Act and Rules, at any time. With the exception of the finding that Mr Ganesh lied to the investigator, there is little similarity between the facts and circumstances of these cases and the present case.

[35] Mr Reed was the listing agent for the complainant's property. After the first open home at the property, he sought the vendor's approval for him to show his partner through it, and subsequently made an offer, which was accepted. The Tribunal found that he had breached ss 134 and 135 of the Act (by failing to obtain the vendors' informed consent to his purchase, and failing to provide them with a written (or any) valuation of the property), and failed to comply with rr 9.1 (failure to act in the vendors' best interests), failure to comply with rr 10.2 and 10.3 (as to appraisals). It was submitted for Mr Reed that his (admitted) breach of ss 134 and 135 was the result of a momentary, involuntary, lapse of recognition of his professional obligations. In that respect, there is a similarity to the present case.

[36] In this case, we can derive little, if any, assistance from reference to other penalty decisions cited to us. We must determine penalty on the basis of the facts of the case, and the various factors relevant to penalty.

[37] As was made clear in our substantive decision, Ms Tafilipepe's conduct involved serious breaches of the Act and Rules. Those who deal with real estate licensees are

---

18 *Complaints Assessment Committee v Goundar* [2017] NZREADT 76.
19 *Complaints Assessment Committee 408 v Reed* [2017] NZREADT 34.

entitled to expect the licensees to act with honesty and integrity. Lying to a client, prospective client, or customer is not consistent with that expectation. Compliance with the Act and Rules is essential for meeting the consumer protection purposes of the Act. Ms Tafilipepe's reckless contravention of r 9.6, by marketing properties without having an agency agreement in place demonstrates a serious lack of awareness and recognition of the importance of those consumer protection purposes.

[38] We note Mr Todd's submissions that neither Ms Cokojic nor any of the vendors referred to in the 416 charge suffered any adverse financial consequences as a result of Ms Tafilipepe's conduct, and that she acted in accordance with the vendors' instruction. We can give those submissions little weight with respect to penalty. As noted in the substantive decision, consideration of disciplinary breaches is not dependent on proof of harm. Secondly, it is significant that Ms Cokojic was sufficiently concerned as to Mr S having been brought to the property that she contacted MPRE very shortly after Ms Tafilipepe's call to her concerning a price range, and statement that "we can get an offer to you this afternoon…". Her concern was that the offer referred to by Ms Tafilipepe would come from Mr S, and that, in the circumstances, he should not have been at the property without her permission. This concern is not properly described as Ms Cokojic being "upset"; it is a concern as to the professional propriety of a prospective purchaser being brought to a property by a salesperson, and given information about the property, without the owner's prior informed consent in the correct form.

[39] Nor can we accept that the fact that Ms Tafilipepe may have had oral agreement from the vendors of the properties referred to in the 416 charge is a valid mitigating factor for penalty. First, as noted in the substantive decision, Ms Tafilipepe said at the hearing that she generally had oral agreement from the vendors.[20] "Oral agreement" does not constitute compliance with r 9.6. Secondly, there is no indication that those vendors were made aware (before Ms Tafilipepe sent details of their properties to her "as is" buyers list) that Ms Tafilipepe should not have done so unless there was a signed agency agreement in place.

---

20 At paragraph [109].

[40] We enquired of Mr Hodge as to whether there had been any previous findings of unsatisfactory conduct or misconduct against Ms Tafilipepe. There was no reference to any such findings in the written submissions for the Committee. Mr Hodge subsequently advised us that there had been a finding of unsatisfactory conduct (by a Complaints Assessment Committee) in May 2017. However, he did not wish to submit that we should take this into account as an aggravating factor for penalty. We do not take the compliance letter into account as an aggravating factor, as that was incorporated into the 416 charge.

[41] We note the many favourable references and testimonials supporting Ms Tafilipepe. While we note Mr Hodge's submission that personal circumstances and character references carry much less weight in the disciplinary penalty process, because of the focus on protecting the public and reputation of the industry as a whole, we do not discount them entirely.

[42] It is necessary to send a strong message to the industry that the purposes of consumer protection and the promotion of public confidence in the industry, as set out in the Act, require full compliance with the Act and Rules, and it is not acceptable for licensees to take shortcuts, for example, by not obtaining an agency agreement before taking steps to market a property. In this case, that message requires that we consider, as a starting point for penalty, the imposition of a fine, together with a period of suspension of Ms Tafilipepe's licence.

[43] Mr Todd confirmed that Ms Tafilipepe is the only agent at Dynamic Realty. The practical effect of suspension of her licence would be that if arrangements could not be made for another agent or branch manager to supervise and manage the agency, it could not carry on in business.[21] Mr Todd's initial answers to questions to the Tribunal were to the effect that Ms Tafilipepe had no plan in place to protect the agency's employees in the event that an order of suspension was made. Further questions elicited the response that there is a person who could step in as agent.

[44] We accept that an order for suspension would have a serious impact on Ms Tafilipepe, and that it is also likely to have a significant impact on the agency and its

---

21 We note the provisions of ss 25–32 concerning the administration of agencies' trust accounts.

employees. We are not, however, persuaded that the impact on the agency and its employees could not be alleviated, at least to some extent, with the assistance of the agent suggested by Ms Tafilipepe.

[45] As noted earlier, Mr Todd submitted that we should not make an order for suspension. He referred to the Tribunal's decision in *Reed*, where suspension was not ordered. However, this is a different case, with different facts, and charges. *Reed* involved a single occurrence of a breach of ss 134 and 135. Here, Ms Tafilipepe has been found to have marketed nine properties (including Ms Cokojic's property) without having an agency agreement in place. In all but one case, that occurred after she had been given compliance advice to review her practice. While the lie to Ms Cokojic is accepted as having been a panic reaction, it is not the only element of conduct to be addressed in penalty.

[46] Although it was submitted that Ms Tafilipepe undertook training courses soon after the events referred to in the 416 charge, she did not acknowledge any wrongdoing at the hearing of the substantive hearing. Up to the final moment of the hearing, she maintained that she had done nothing wrong in sending details of properties to her "as is" buyers without an agency agreement in place. While the Tribunal has on many occasions refrained from ordering suspension in cases where it would otherwise have been appropriate, when a licensee expresses an early acknowledgment of wrongdoing, or enters a plea of guilty to charges, that option is not open to the Tribunal in this case.

[47] We have concluded that an order for suspension must be made in this case, in order to address the totality of Ms Tafilipepe's offending, and to achieve the purposes of the Act and to take into account the factors relevant to the determination of penalty. We accept that the restraint of trade period can be taken into account in our determination of the term of suspension. We are satisfied that the orders set out below are the least restrictive penalty orders that may be made, while achieving the purposes of the Act.

Orders

[48] We order that Ms Tafilipepe is censured, and that she is to pay a fine of $6,500. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[49] Ms Tafilipepe's licence is suspended for 90 days. The suspension is to take effect on 20 September 2019.

[50] In the light of the education undertaken by Ms Tafilipepe, we do not consider it necessary to make any orders as to completion of particular training courses.

[51] 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

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member