BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 38

READT 059/18

IN THE MATTER OF	a charge laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 403
AGAINST	CORINNA MANSELL Defendant
Hearing:	19 August 2019, at Hamilton
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr M Hodge, on behalf of the Committee Mr M Ward-Johnson, on behalf of Ms Mansell
Date of Decision:	22 August 2019

DECISION OF THE TRIBUNAL
(FINDING OF MISCONDUCT AND PENALTY)

Introduction

[1] On 18 December 2018, Complaints Assessment Committee 403 charged Ms Mansell with misconduct under s 73(a) of the Real Estate Agents Act 2008 (disgraceful conduct). The parties filed an agreed summary of facts on 11 April 2019. By a memorandum dated 15 July 2019, Ms Mansell advised the Tribunal that she would enter a plea of guilty to the charge.

[2] The Tribunal is required to be satisfied that Ms Mansell's admitted conduct constitutes disgraceful conduct, as charged. In the event that it is satisfied of that, it is required to determine the appropriate penalty to be imposed.

Agreed summary of facts

[3] It is appropriate to set out the agreed summary of facts:

> The defendant Corinna Mansell (**defendant**) is a licensed agent and, at the time of the conduct, was the General Manager of REMAX New Zealand.
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> At all material times the defendant was a licensed agent under the Act.
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> The property at … Hamilton (**property**) was built in the early 1990s and is a monolithic clad structure.
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> In 2011, the then owner of the property, Michael Wallis, listed the property for sale. During this time, a pre-purchase inspection report was obtained by a prospective purchaser from InRed Thermal Imaging Services (**Inred report**), dated 17 November 2011. The report revealed the property's significant moisture ingress issues. Following this, the property was taken off the market.
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> Mr Wallis instructed Matt Carson Homes Limited to identify the cause of the moisture ingress and carry out any remedial work required. Matt Carson inspected the property and determined the nature and scope of remedial works required. Matt Carson Homes Limited then completed the remedial works, and on Matt Carson wrote to Mr Wallis on 2 April 2012 outlining the remedial works completed. The property was subsequently put back on the market.
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> In 2012, the defendant became interested in purchasing the property through her rental company. She obtained a property valuation from Brian Hammill dated 3 May 2012. The valuation noted that there had been some moisture ingress issues but that the affected areas had been remedied.
>
> Ms Mansell was provided with the Inred report and the letter from Matt Carson prior to her purchase.

On or about 30 April 2012, the defendant purchased the property … The sale and purchase agreement was transferred to the defendant's rental company, Corinna Rentals Ltd, on 18 May 2012.

Ms Mansell states that she lived in the property for a couple of years and then tenanted it.

On or about 28 August 2015, the defendant entered into an agency agreement with Breakaway Realty Limited, part of the REMAX group, for the sale of the property. Cary Ralph was the listing salesperson. Andrew Gibson was a licensed agent engaged by Breakaway Realty Limited.

The listing agreement did not refer to the previous moisture ingress issues with the property or the previous Inred report.

The listing salesperson, Mr Ralph, did provide information on the cladding and cavity system of the property to prospective purchasers. The property was constructed with monolithic cladding.

On or about 9 September 2015, an offer was made on the property by "the Deans". The offer was cancelled by email dated 15 September 2015 by the Deans' solicitor to the defendant's solicitor stating that the Deans were unable to obtain finance.

On or about 21 September 2015 a sole agency agreement with REMAX Cambridge commenced.

On or about 25 September 2015, Mr Gibson obtained a report from Kiwi Homes Inspections (**KHI report**) which was provided by Andrew Bankier. The report did not reveal any significant moisture issues with the property.

The defendant was informed of the results of the KHI report. And the report was disclosed to prospective purchasers. The defendant says she was not provided with a copy of the KHI report.

On or about 29 October 2015, the property was sold at auction to Margaret (Jean) Warburton. Ms Warburton was informed that the defendant was the vendor of the property. Settlement occurred on 16 December 2016 and the property was tenanted from 22 January 2016.

The defendant did not disclose the existence of the Inred report or prior moisture ingress issues with the property to Ms Warburton or the auctioneer.

The defendant says that she did disclose the Inred report to Mr Gibson and Mr Ralph. She says that she posted the documents to the agency by her partner Jack Blair.

Around June 2016, Ms Warburton received complaints from her tenants about dampness in the property. Ms Warburton arranged for some work to be done in a bathroom. It was subsequently discovered that there were significant moisture ingress issues with the property and that a full weathertightness inspection needed to be undertaken.

On 30 June 2016, Noel Jellyman completed a full inspection of the property. The report revealed significant moisture ingress issues with the property, in particular, wet and rotting timber in the window frames and high moisture level readings in multiple parts of the property. The report recommended a complete re-clad of the property.

> After being informed of the extensive remedial work required, the complainant initiated civil proceedings against the defendant, Mr Gibson and Mr Ralph, Matt Carson (the builder who completed the work on the property prior to the defendant's purchase) and Tony Bankier from KHI. The case resolved after a settlement agreement was reached.

Should a finding of misconduct be made under s 73(a) of the Act?

[4] Mr Hodge submitted that as an experienced agent with a senior position in REMAX, Ms Mansell knew how important the Inred report was. He submitted that the fact that she says that she arranged for the report to be posted to the Agency shows that she knew that it should be disclosed. Despite that knowledge, Ms Mansell had not referred to the earlier moisture issues, the Inred report, or the remedial work done, in the relevant sections of the listing agreement or the property listing sheet.

[5] Mr Hodge submitted that by her admission of the charge, Ms Mansell had accepted that her conduct in not disclosing the Inred report amounts to disgraceful conduct.

[6] Mr Ward-Johnson submitted that Ms Mansell has never resiled from the existence of the Inred report. However, she understood from information provided by the previous owner that remedial work had been done on the property, and had resolved the issues. Mr Ward-Johnson accepted that it is evident on the face of the listing agreement and property listing sheet that Ms Mansell did not disclose the earlier weathertightness issues, remedial work, or Inred report, but he submitted that her failure was more inadvertent than disgraceful.

[7] We are satisfied that Ms Mansell should be found guilty of misconduct under s 73(a) of the Act (disgraceful conduct). Ms Mansell is a licensee with some 30 years' experience in the industry. She is well aware of the importance of full disclosure by licensees to prospective purchasers of any issues affecting a property being marketed. She was well aware that the property she was selling had had weathertightness issues. While she believed that the issues had been remediated, that did not absolve her from advising the salespersons engaged to market her property about those issues, and the remedial steps taken.

[8] Accordingly, we find Ms Mansell guilty of misconduct under s 73(a) of the Act (disgraceful conduct).

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."[1] 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.[2]

[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.[3]

[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 (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;

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1 Section 3(1) of the Act.
2 Section 3(2).
3 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].

[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.[4]

Submissions

[13] Mr Hodge submitted that Ms Mansell's conduct served to undermine the consumer-protection objectives of the Act, and should be considered a serious breach of acceptable standards. He submitted that the weathertightness of a property is a vitally important issue for prospective purchasers, and Ms Mansell had shown a cavalier attitude towards disclosure obligations and duties of fairness to prospective purchasers, by failing to disclose important information about the history of the property.

[14] Mr Hodge submitted that events through the listing period showed that Ms Mansell was on notice that the weathertightness of the property was of concern, and she had multiple opportunities to disclose the information that she had. He submitted that she should have been well aware of the importance of full disclosure being given.

[15] Mr Hodge also submitted that Ms Mansell's conduct had a significant impact on the purchaser of the property. The purchaser discovered extensive water damage and faced significant costs in repairing the property and subsequent litigation. Mr Hodge acknowledged that Ms Mansell had co-operated with the Committee in dealing with the charge, and had entered a guilty plea. He accepted that it would be appropriate for that to be recognised in determining the penalty to be imposed. However, he submitted, it is important to bring home to the industry the importance of full disclosure of key information held by a licensee.

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

[16] Mr Hodge submitted that the appropriate penalty is an order for Ms Mansell to be censured, and for her licence to be suspended for a period of six months. He submitted that such a penalty is required in order to hold Ms Mansell accountable for the misconduct, to act as both a general and personal deterrent, and to emphasise the high standards required of licensees. He did not submit that a fine should be imposed, or that we should make an order that Ms Mansell undertake further education or training.

[17] Mr Ward Johnson submitted that Ms Mansell had taken the appropriate step of engaging independent real estate salespersons for an arms-length sale of her property. As noted earlier, he submitted that Ms Mansell's reason for not disclosing the Inred report was her belief that issues identified in it had been remediated. He submitted that this was the basis on which she had purchased the property.

[18] Mr Ward-Johnson submitted that the property was clearly a "weathertight-stigma" property, given its monolithic cladding and, irrespective of the Inred report, remained at risk of weathertightness issues. He noted that Mr Gibson and Mr Ralph commissioned a weathertightness report after the Deans agreement was cancelled. He submitted that the fact that this report did not disclose any issues was consistent with Ms Mansell's belief that issues identified in the Inred report had been remediated.

[19] Mr Ward-Johnson accepted that the impact on the purchaser of the property was significant. He submitted that Ms Mansell had engaged proactively in the civil litigation and in effecting a settlement with the purchaser and other parties (the terms of which are confidential). He submitted that she had co-operated with the Real Estate Authority in its investigation. He advised the Tribunal that Ms Mansell had stood down as a licensee on 5 March 2018 and had, therefore, in effect been suspended since that time. He accepted that her "stand down" had not been by way of a voluntary suspension notified to the Registrar of the Authority.

[20] Mr Ward-Johnson submitted that Ms Mansell had entered a guilty plea at an early stage. Any perceived delay resulted from health issues suffered by Ms Mansell, including significant surgery and post-operative recovery. He also submitted that the circumstances of the charge had been the subject of extensive media reports. He

submitted that Ms Mansell had not engaged in any media debate or comment on these reports, being conscious not to air the dispute publicly, to the detriment of the industry.

[21] Mr Ward-Johnson submitted that an order for suspension is not warranted in this case. In support of this submission, he referred to Ms Mansell's unblemished record in the industry over a period of more than 30 years, and the fact that she effectively entered into a de facto suspension in March 2018. He submitted that some proven dishonesty or serious concern for the public is required before suspension will be ordered. He submitted that Ms Mansell's offending would appropriately be met by ordering her to pay a fine, only. He submitted that an appropriate fine would be in the range of $5,000 to $7,500.

Discussion

[22] Counsel discussed two penalty decisions issued by the Tribunal: *Real Estate Agents Authority (CAC 20006) v England*,[5] and *Complaints Assessment Committee 409 v Cartwright*.[6]

[23] The decision in *England* is of little, if any, assistance, as penalty was considered under the Real Estate Agents Act 1976, not the current Act, and a different penalty regime was in force. There, the licensee was selling his own home, and advised a prospective purchaser that the property had no weathertightness issues. He provided the prospective purchaser with a report stating the property had no weathertightness issues, but did not disclose a report from two years earlier, which identified high moisture readings and recommended remedial work, which the licensee had only partially undertaken.

[24] Further, the licensee advised the prospective purchaser of the sale of a next-door property, but did not advise that that property had had to be re-clad because of weathertightness issues. The Tribunal expressed its concern as to the seriousness of the licensee's conduct, but it was limited in the penalty that could be imposed.

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5 *Real Estate Agents Authority (CAC 20006) v England* [2013] NZREADT 97.
6 *Complaints Assessment Committee 409 v Cartwright* [2018] NZREADT 25.

[25] In *Cartwright*, the licensee failed to inform a prospective purchaser that a property she was tendering for had failed a building inspection. He minimised the content and effect of the building report, with the result that the purchaser was not alerted to the risk of defects in the property. The licensee did not recommend that the purchaser undertake her own independent due diligence, but suggested that she rely on a building report commissioned by the vendor (for which she paid half the cost), without ensuring that the report was addressed to her. Further, the licensee did not explain to the purchaser the significance of the report not being addressed to her. The purchaser subsequently found significant defects in the property which required remedial work.

[26] Mr Cartwright pleaded guilty to a charge of misconduct under s 73(b) of the Act: that is, his conduct was seriously incompetent or seriously negligent. Mr Cartwright was censured and ordered to pay a fine of $5,000, to undertake specified further training, and to pay compensation to the purchaser. We note that in *Cartwright*, it was not submitted that an order of suspension should be imposed.

[27] Except for the fact that in both *England* and *Cartwright* there was a failure to disclose key information as to defects, there is little similarity between those cases and the present case.

[28] Mr Ward-Johnson cited the Tribunal's penalty decision in *Complaints Assessment Committee 416 v Prasad*,[7] in support of his submission that some proven dishonesty or serious concern for the public is required before suspension will be ordered.

[29] In that case, a penalty including an order for the licensee's licence to be suspended for 18 months was imposed following two findings of misconduct: a finding of misconduct under s 73(b) of the Act (based on the licensee's failure to inform all attendees at open homes, and all her fellow salespersons, that a property was subject to a road widening proposal that would result in part of the front of the property being taken), and a finding of misconduct under s 73(a) of the Act (based on the licensee's having added diary entries, and an entry to a transaction report, to the effect that open

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7 *Complaints Assessment Committee 416 v Prasad* [2019] NZREADT 17.

home attendees and a fellow salesperson had been informed of the road widening proposal, after the licensee became aware of a complaint made against her).

[30] While the Tribunal discussed a submission on behalf of the Committee that the licensee's licence should be cancelled, this decision does not support a submission that "some proven dishonesty or serious concern for the public is required before suspension will be ordered". The Tribunal concluded that it "must determine the appropriate penalty orders on our assessment of the circumstances of the particular case before us, and by applying the relevant penalty principles…".[8] We must carry out the same exercise in the present case.

[31] As shown by her having asked her partner to post it to the Agency, it is clear that Ms Mansell knew that the Inred report should be disclosed, notwithstanding that she believed that the issues identified in that report had been remediated. Her belief that the issues had been remediated did not absolve her from advising the salespersons engaged to market her property about those issues, and the remedial steps taken.

[32] We accept Mr Hodge's submission that Ms Mansell's failure to advise Mr Gibson and Mr Ralph was a serious breach of acceptable standards, which undermined the consumer-protection purposes of the Act. We also accept his submission that it is necessary to hold Ms Mansell accountable for her conduct, and to emphasise the high standards required of licensees. We agree that an order for suspension of Ms Mansell's licence is warranted to address Ms Mansell's conduct, and to achieve the purposes of the Act and the principles as to penalty.

[33] In determining the length of the suspension, we take into account that Ms Mansell co-operated with the Authority in dealing with this matter. She agreed to a summary of facts at an early stage in the proceeding. While she advised that she would plead guilty to the charge under s 73(a) some three months later, the Tribunal was informed at the time of her health issues, and her surgery and post-operative care requirements. Ms Mansell may be given the benefit of her guilty plea.

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8 *Prasad*, at [46].

[34] We also take into account Ms Mansell's long and unblemished career in the industry. We were advised that this is the first disciplinary action against her in a career of more than 30 years. We also give some recognition to her having withdrawn from real estate agency work earlier this year – albeit not by way of a formal voluntary suspension.

[35] We have concluded that the appropriate penalty orders are for Ms Mansell's licence to be suspended for a period of three months, coupled with an order that she pay a fine of $2,500. We are satisfied that this is the least restrictive penalty that will achieve the purposes of the Act, in accordance with the relevant penalty principles. It is not necessary to make any order that Ms Mansell undertake further education. It is apparent from Mr Ward-Johnson's submissions that Ms Mansell is diligent as to her continuing education obligations.

Orders

[36] Ms Mansell is censured. We order that her license is suspended for a period of 90 days, as from the date of this decision. She is ordered to pay a fine of $2,500. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[37] 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.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Ms C Sandelin
Member