

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 35

READT 056/18

IN THE MATTER OF a charge laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 412

AGAINST SURECAPITAL REAL ESTATE LIMITED
Defendant

On the papers

Tribunal: Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms C Sandelin, Member

Submissions received from: Ms L Lim, on behalf of the Committee
Mr T Rea, on behalf of the Defendant

Date of Decision: 13 August 2020

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] In a decision dated 12 June 2020, the Tribunal found the defendant, SureCapital Real Estate Limited, breached s 50 of the Real Estate Agents Act 2008 (“the Act”), and r 8.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”), and was guilty of unsatisfactory conduct under s 72(b) of the Act.¹

[2] The Tribunal has now received submissions as to penalty.

Facts

[3] Section 50 of the Act provides:

50 Salespersons must be supervised

- (1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or branch manager.
- (2) In this section, **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—
 - (a) that the work is performed competently; and
 - (b) that the work complies with the requirements of this Act.

[4] Rule 8.3 of the Rules provides:

- 8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.

[5] Complaints Assessment Committee 412 (“the Committee”) charged SureCapital with misconduct under s 73(b) of the Act, alleging that it failed to comply with its obligations as to the supervision and management of salespersons engaged or employed by it, under s 50 of the Act and r 8.3 of the Rules.

[6] The sole director of SureCapital is Mr Shuo Cui. He has never held any license under the Act, but SureCapital held an agent’s licence. SureCapital had branches in

¹ *Complaints Assessment Committee 412 v SureCapital Real Estate Limited* [2020] NZREADT 23.

Greenlane and Flatbush, Auckland. It purchased a RE/MAX franchise which was operated from the Flatbush branch.

[7] Pursuant to s 44(2) of the Act, a real estate company may be licensed as an agent if at least one “officer” of the company is licensed as an agent or branch manager. The Tribunal referred in its decision to the person by virtue of whom a company may hold an agent’s licence as the “licensee agent”.² Between 30 March 2016 and 30 November 2017, Ms Julie Pepper, a licensed agent, was employed as SureCapital’s licensee agent. She was based in Whangarei, and worked from there.

[8] Up until 10 May 2017, Mr Gabriel Tuhoro, a licensed agent, was the manager of the Flatbush branch and provided day to day supervision of salespersons at the branch. Between 10 May 2017 and 21 September 2018, Mr Antony McGirr was employed by SureCapital at the Flatbush branch. Ms Pepper understood that he was a licensed agent, and would provide supervision as Mr Tuhoro had done.

[9] There was a dispute as to Ms Pepper’s role at SureCapital. Mr Cui gave evidence to the Tribunal that he understood that she was to be responsible for all aspects of SureCapital’s compliance with its statutory and regulatory obligations, including providing supervision of salespersons. The Tribunal found that at no time was it Ms Pepper’s obligation to provide supervision and management of salespersons. That supervision was provided first by Mr Tuhoro, then by Mr McGirr after Mr Tuhoro’s demotion.

[10] Ms Pepper became aware that Mr McGirr was a licensed salesperson, not agent, and as such his provision of supervision and management was not in compliance with s 50 and r 8.3. On 11 October 2017, Ms Pepper advised Mr Cui of her concern regarding supervision at SureCapital, and said that she was not able to provide the required supervision. Mr Cui took advice from RE/MAX, as a result of which Mr Jeffrey Brill, a licensed agent, was appointed the licensee agent for SureCapital, to work at the Flatbush branch. However, he was not able to take up the appointment until 1 December 2017. Ms Pepper continued as licensee agent until 30 November 2017, but did not undertake supervision.

² The Tribunal understands that such a person may also be referred to as the “eligible officer”.

[11] The charge against SureCapital stated that during the period from May to December 2017, the following breaches of its supervision obligations occurred:

- [a] Mr McGirr was providing supervision of salespersons employed or engaged by SureCapital when, as a licensed salesperson, he was not licensed to do so.
- [b] Mr McGirr advised the Committee that he held regular conversations and “1 on 1 meetings” with a licensed SureCapital salesperson, Mr David Hilliam, thus providing supervision when he was not licensed to do so.
- [c] Mr McGirr signed off an agency agreement for Mr Hilliam, dated 7 June 2017, in relation to a property at Waiuku.
- [d] Mr McGirr signed off transaction reports for Mr Hilliam’s sales of two lots in the property at Waiuku.
- [e] Mr McGirr signed off a further agency agreement for Mr Hilliam, dated 26 July 2017, in relation to a property at Mellons Bay.
- [f] Mr Hilliam signed off eight of his own agency agreements, dated 23 May, 29 May, 26 July, 1 August, 26 September, 18 October, and 2 November (two agreements), in the space provided for the branch manager’s signature.

[12] SureCapital admitted that it was guilty of unsatisfactory conduct in its response to the charge, and the hearing before the Tribunal addressed the issue whether it should be found guilty of misconduct or unsatisfactory conduct.

[13] The Tribunal found that SureCapital was in breach of its obligations under s 50 and r 8.3, by failing to ensure that all salespersons employed or engaged by it at the Flatbush branch were properly supervised and managed by an agent or a branch manager. Its breach persisted during the period from Mr Tuhoro’s departure in May 2017 until Mr Brill commenced on 1 December 2017. The Tribunal accepted the Committee’s characterisation of the breach as systemic, and not a “one-off”. Further,

the Flatbush branch continued to trade after being put on notice by Ms Pepper, without supervision in accordance with the Act and Rules.

[14] However, the Tribunal did not accept the Committee's submission that SureCapital sat back and allowed the Flatbush branch to trade in breach of the Act and rules, as Mr Cui was advised by RE/MAX, contacted possible agents who could take over the role of licensee agent and provide supervision, and appointed Mr Brill. Further, Ms Pepper stayed on at the branch until Mr Brill was able to start. The Tribunal concluded that SureCapital's breach did not reach the level of severity at which a finding of misconduct was justified. The Tribunal found SureCapital guilty of unsatisfactory conduct.

Penalty principles

[15] The principal purpose of the Real Estate Agents Act 2008 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."³ The Act achieves these purposes by regulating agents, branch managers, and salespersons, by raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.⁴

[16] In order to meet the purposes of the Act, 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 both individual and general deterrence.

[17] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistence in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least

³ Section 3(1) of the Act.

⁴ Section 3(2).

punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.⁵

[18] Section 110(4) of the Act provides that if Tribunal finds a licensee has engaged in unsatisfactory conduct, it may make any of the orders that a Complaints Assessment Committee may make under s 93 of the Act. As may be relevant to the present case, the Tribunal may:

[a] make an order of censure or reprimand;

[b] order SureCapital to pay a fine of up to \$20,000;

Submissions

[19] Ms Lim submitted for the Committee that the requirement for any penalty to have a general and individual deterrent effect is especially important in this case. She submitted that even if the Tribunal were to consider that SureCapital has learned from this experience, and will be more careful in the future, any penalty must mark the conduct in a way that sends a message to the real estate industry.

[20] Ms Lim submitted that the fine should be set at a level that takes into account that the maximum available fine for corporate defendants is \$20,000 (as opposed to \$10,00 for an individual), sends a message to the industry as to the expectation of strict compliance with supervisory obligations, reflects that the breach was systemic rather than one-off, and takes into account the duration of the breach (from May to 1 December 2017) and Ms Pepper's having put SureCapital on notice as to its supervision obligations on 11 October 2017. Ms Lim also submitted that the Tribunal could also take into account SureCapital's employment of Mr Brill as licensee agent and to provide supervision at the Flatbush branch.

⁵ 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, [200p] 1 NZLR 1, at [97].

[21] Ms Lim submitted that a penalty of censure and a “lower-mid range” fine of \$7,000 to \$8,000 would be consistent with the Tribunal’s approach to unsatisfactory conduct findings against corporate licensees, and the penalties in comparable cases.

[22] Mr Rea submitted for SureCapital that its unsatisfactory conduct was at a low level, and there are a number of mitigating factors. He submitted that together with the finding of unsatisfactory conduct (which in itself serves a penalty function) an order for censure would be a sufficient penalty, and that if a financial penalty were to be imposed, it should be limited to a modest fine.

[23] He submitted that the Tribunal could take into account as a mitigating factor that Mr Cui did not have, and under the Act was not required to have, any real estate training and qualifications, and was understandably confused as to SureCapital’s obligations as to supervision and management. He submitted that miscommunication occurred between Mr Cui and Ms Pepper, such that his understanding was that she was responsible for all supervision and management of salespersons. He submitted that Mr Cui’s confusion is even more understandable in the light of changes in the statutory scheme effected by the Act, when replacing the Real Estate Agents Act 1976.

[24] Mr Rea further submitted that it would be unfair to, in effect, make an example of SureCapital, even though it is unlikely to reoffend, in order for a message to be sent to the industry regarding the importance of proper supervision. He further submitted that the Tribunal’s finding that SureCapital’s breach was systemic is not surprising given the nature of the breach and the circumstances that gave rise to it.

[25] Mr Rea further submitted that there has been no evidence of guidance provided by the Real Estate Authority specifically to corporate licensees with directors or shareholders who lack real estate training or qualifications. He submitted that such training and qualifications are required of a licensee agent, and it would be appropriate for the Authority to engage with, or prepare an information pack for, companies intending to apply for an agent’s licence where no director of the company holds any real estate qualifications. He submitted that this would serve a more useful purpose than the general deterrence of a financial penalty being imposed on SureCapital.

[26] Mr Rea submitted as mitigating factors that:

- [a] SureCapital has no prior disciplinary history;
- [b] there is no evidence of any complaint against the agency, either prior to or after the events in issue in this case;
- [c] the level of supervision at the Flatbush branch appears to have been generally adequate (albeit not complying with the Act and Rules);
- [d] Mr Cui took immediate steps to obtain guidance from RE/MAX, and engage a suitably qualified manager;
- [e] Mr Brill started at the earliest date he could accommodate; and
- [f] no loss was suffered by any member of the public as a result of the supervision structure at SureCapital.

[27] Mr Rea also referred to SureCapital's admission of unsatisfactory conduct, made at the earliest opportunity in its response to the charges on 22 January 2019.

[28] Ms Lim submitted brief submissions in reply. She submitted that the provisions of the Real Estate Agents Act 1976 are irrelevant to the assessment of SureCapital's culpability, as supervision obligations under the current Act are clear and have been developed through case law and guidance from the Authority. She submitted that the Act allowed SureCapital to operate as an agent without requiring the licensee agent to be on site, but it did not permit it to operate in breach of its supervision obligations.

[29] Ms Lim further submitted that any confusion there may have been as to the purpose of a licensee agent does not negate SureCapital's responsibility to ensure that its salespersons were properly supervised by an agent or branch manager. She further submitted that as director of SureCapital, Mr Cui was responsible for ensuring that it was meeting its obligations under the Act; it was his responsibility to understand what was required for SureCapital to operate in compliance with the Act. She submitted

that supervision of salespersons is a basic and fundamental requirement that should be at the forefront of any director's mind.

Discussion

[30] Ms Lim referred the Tribunal to its decision in *Kek v Real Estate Agents Authority (CAC 409)*.⁶ This concerned an appeal by a salesperson (Ms Kek) and the agency at which she was engaged, against a Complaints Assessment Committee's findings of unsatisfactory conduct and penalty orders following a complaint as to misrepresentation of features of a property being marketed. As relevant to the present case, the Tribunal considered the agency's appeal against the penalty imposed for its breach of r 8.3, having failed to ensure that Ms Kek was properly supervised and managed by a branch manager or agent. Ms Kek had been supervised and managed by an experienced salesperson, who was not a licensed branch manager or agent.

[31] The Complaints Assessment Committee referred to two previous penalty decisions against the agency concerning supervision: one in May 2016, in which the agency was censured and fined \$5,000, and one in September 2017, in which the agency was censured and fined \$8,000. In *Kek*, the Complaints Assessment Committee noted that the person charged with supervising Ms Kek was still actively engaged in supervision and had not obtained a branch manager qualification until September 2018. The agency was censured and fined a "mid-level" fine of \$10,000.

[32] On appeal, the Tribunal reduced the fine of \$10,000 to \$8,000. It found that the Committee had failed to take into account that in order to ensure that salespersons in management positions obtained branch manager qualifications, those salespersons had to repeat their entire training process, from salesperson's certificates onwards. The Tribunal accepted that short of closing down offices, the agency could not have done more to ensure adequate supervision.

[33] We accept that *Kek* is not on all fours with the present case, but we reject Mr Rea's submission that it has very little relevance to it.

⁶ *Kek v Real Estate Agents Authority (CAC 409)* [2019] NZREADT 26.

[34] We accept Ms Lim's submission that the provisions of the Real Estate Agents Act 1976 are irrelevant to the assessment of SureCapital's culpability. The current Act is clear as to the applicable supervision obligations. The Act, and the obligations set out in the Act, cannot be considered as novel, having come into force on 17 November 2009. Tribunal decisions have set out the requirements as to supervision,⁷ and the Authority has provided guidance.

[35] We also accept Ms Lim's submission that supervision of salespersons is a basic and fundamental requirement that should be at the forefront of the mind of any company carrying out real estate agency work. It is necessary for a breach of those obligations to be marked by appropriate penalty orders.

[36] Any confusion Mr Cui may have had as to the purpose of a licensee agent does not negate or mitigate SureCapital's responsibility to ensure that its salespersons were properly supervised by an agent or branch manager. We agree that as director of SureCapital, Mr Cui was responsible for ensuring that it was meeting its obligations under the Act, and it was his responsibility to know and understand what was required for SureCapital to operate in compliance with the Act.

[37] We accept that we must take into account that SureCapital has not previously been the subject of a disciplinary finding, and that it admitted that its failure to comply with its supervision obligations constituted unsatisfactory conduct at the earliest opportunity.

[38] We assess SureCapital's offending as being at the low to mid-range of seriousness. In the light of that assessment, and having taken into account the matters set out earlier, we have concluded that the appropriate penalty is that SureCapital is censured, and ordered to pay a fine of \$5,500.

⁷ See, for example, *Hutt City Ltd v Real Estate Agents Authority (CAC 20002)* [2013] NZREADT 109, at [35] and [42], and *Maserow v Real Estate Agents Authority (CAC 404)* [2016] NZREADY 19, at [25].

Orders

[39] SureCapital is censured and ordered to pay a fine of \$5,500. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[40] 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

Ms C Sandelin
Member