BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 49

READT 002/20

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	TERESA and BRIAN HAMMOND Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 520) First Respondent
AND	SONIA TAFILIPEPE Second Respondent

On the papers

Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Submissions received from:	Mrs Hammond Mr R W Belcher, on behalf of the Authority Mr W A L Todd, on behalf of Ms Tafilipepe
Date of Decision:	12 October 2020

DECISION OF THE TRIBUNAL
(Penalty)

Introduction

[1] In a decision issued on 11 August 2020, the Tribunal allowed the appeal brought by Mr and Mrs Hammond against the decision of Complaints Assessment Committee 520 to take no further action on their complaint against Ms Tafilipepe, and found her guilty of unsatisfactory conduct under s 72 of the Real Estate Agents Act 2008 ("the Act") ("the substantive decision").[1]

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

Background

[3] Mr and Mrs Hammond's complaint related to Ms Tafilipepe's conduct in marketing a property in Christchurch for sale, where they were prospective purchasers. The property had suffered earthquake damage, and Ms Tafilipepe marketed it as "all EQC works have been completed and the property is ready to be occupied by the next lucky owner".

[4] Mr and Mrs Hammond entered into an agreement to purchase the property on 18 February 2019, conditional on finance, a satisfactory Land Information Memorandum, solicitor's approval, a satisfactory building report, and the assignment of the benefit of any outstanding claims for earthquake damage.

[5] Mr and Mrs Hammond obtained two building inspection reports. The first recorded cracking at sheet joins and the possibility of weathertightness issues. The second concluded that moisture readings were typical and within acceptable levels, and expressed the opinion that the exterior wall cladding provided a weathertight envelope. Their solicitor was later advised by the vendor's solicitor that the cladding issue related to further EQC work required to be completed.

[6] The Tribunal found that Ms Tafilipepe's advertising was misleading, and therefore a breach of r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"). The Tribunal accepted that the

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1 *Hammond v Real Estate Agents Authority (CAC 520)* [2020] NZREADT 34.

misrepresentation was not deliberate, as Ms Tafilipepe believed, on the basis of information given to her by the owner, that all EQC repairs had been completed.

[7] However, the Tribunal found that Ms Tafilipepe was aware of a letter sent to the vendor on 5 October 2018 by an EQC Settlement Specialist, Mr David Jones ("the David Jones letter"), which identified additional repair work required. The Tribunal found that having seen that letter, Ms Tafilipepe should have sought confirmation that the additional work had been completed before using the completion of repair work as a significant positive feature in her advertising of the property.

Principles as to penalty

[8] 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.[2] 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.[3]

[9] 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 deterrence.

[10] 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.[4]

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2 Section 3(1) of the Act.
3 Section 3(2).
4 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].

[11] In assessing penalty, the focus is on the seriousness of the relevant licensee's breach of professional obligations. As the Tribunal has previously said, the quantum of loss suffered by a complainant may be relevant to a civil claim for damages, but not to the assessment of penalty.[5]

[12] Pursuant to s 111(5) of the Act, having found Ms Tafilipepe guilty of unsatisfactory conduct, the Tribunal may make any of the orders that a Complaints Assessment Committee may make under s 93 of the Act. These include orders (as may be relevant in the present case):

[a] for censure or reprimand (s 93(1)(a));

[b] to pay a fine of up to $10,000 (s 93(1)(g));

[c] that Ms Tafilipepe apologise to Mr and Mrs Hammond (s 93(1)(c));

[d] that Ms Tafilipepe undergo training or education (s 93(1)(d));

[e] that Ms Tafilipepe reduce, cancel, or refund fees charged for work where that work is the subject of the complaint (s 93(1)(e)); and

[f] to rectify, at her own expense, any error or omission, or where it is not possible to rectify the error or omission, to take steps to provide, at her own expense, relief in whole or in part from the consequences of her error or omission (s 93(1)(f)).

Submissions

[13] Mrs Hammond submitted that having previously dealt with EQC in respect of an earthquake-damaged property, she and Mr Hammond never intended to revisit the stress and complexity of dealing with another earthquake-damaged property. They

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5 See *Brill v Real Estate Agents Authority (CAC 409)* [2017] NZREADT 28, at [39]. (In that case, the Tribunal did not accept a submission seeking a lesser penalty on the grounds that the complainants had not suffered any personal loss.)

wanted a home free from the stress of the past. Accordingly, they were drawn to Ms Tafilipepe's advertisement of the property.

[14] She submitted that if the advertising had been accurate rather than misleading, and had made full disclosure as to the true state of the property, they would never have entered into the agreement for sale and purchase, and never paid the deposit of $41,000. She submitted that the mortgage and repayments required to purchase another property were higher than they would have been if they had not been required to forfeit the deposit.

[15] Mrs Hammond sought an order that Ms Tafilipepe provide relief from the consequences of her conduct by paying $41,000 to replace the forfeited deposit, and $4030.40 to reimburse her and Mr Hammond for the cost of building reports and solicitor's costs, together with interest on each. She also submitted that Ms Tafilipepe should be censured and ordered to pay a fine.

[16] On behalf of Ms Tafilipepe, Mr Todd submitted that the appropriate penalty is an order for censure, and an order that Ms Tafilipepe apologise to Mr and Mrs Hammond.

[17] He submitted that Ms Tafilipepe marketed the property on the basis of information provided by the vendor which was "not obviously incorrect". He submitted that Mr and Mrs Hammond were aware that the EQC repairs were not completed before they were required to confirm the agreement for sale and purchase, and that Ms Tafilipepe could reasonably have expected that their solicitor (who had been given a copy of the David Jones letter by Ms Tafilipepe) would have discussed it with them.

[18] He submitted that Mr and Mrs Hammond elected to confirm the agreement after discussion with their solicitor, after receiving two building inspection reports on the property, and after receiving notification that the vendor would assign all EQC claim benefits. He submitted that Ms Tafilipepe should not be held accountable for the consequences of Mr and Mrs Hammond later changing their minds about purchasing the property.

[19] Mr Todd also submitted that an order should not be made for Ms Tafilipepe to pay compensation. He referred to the judgment of the High Court in *Edwards v Bridge*, in which her Honour Justice Doogue held that a purchaser who had been misled by unsatisfactory conduct, but learned of the true state of the property within which the purchase contract could be cancelled, but elected to proceed, could not receive payment under s 93(1)(f) of the Act.[6]

[20] Mr Todd referred to the fines imposed in three other cases of misrepresentation, which were $2,500, $3,500, and $7,000. He submitted that Ms Tafilipepe's conduct was less serious than each of these.

[21] Mr Belcher submitted for the Authority that the appropriate penalty was orders for censure, an apology, and a fine in the region of $4,000.

[22] He submitted that when assessing penalty, the focus is on the gravity of the licensee's departures from professional standards, and not the quantum of loss suffered by any complainant. He submitted that Ms Tafilipepe's conduct was at the lower end of the spectrum of unsatisfactory conduct, having regard to the facts that the breach related to an important feature of the property, but was not deliberate and was based on information provided by the vendor: Ms Tafilipepe's breach was in not taking steps to verify the information.

[23] He also submitted that it is relevant that Ms Tafilipepe encouraged Mr and Mrs Hammond to obtain building reports, which identified the incomplete repairs, and disclosed the David Jones letter to their solicitor. He further submitted that their forfeiting the deposit was not a "consequence" of Ms Tafilipepe's misrepresentation that "all EQC repairs had been completed" (for the purposes of a possible order under s 93(1)(f) of the Act), as they were aware of the David Jones letter before they confirmed the agreement for sale and purchase, and had the opportunity to cancel it but chose to confirm it.

[24] Mr Belcher submitted that there is an aggravating feature present, in that Ms Tafilipepe has previously been found guilty of unsatisfactory conduct by the Tribunal.

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6 *Edwards v Bridge* [2019] NZHC 2286, [2019] NZAR 1817.

[25] In reply, Mrs Hammond submitted that Ms Tafilipepe's conduct was "not minor and certainly not without its consequences", as she had advertised the property as having had all EQC works completed, and "ready to be occupied by the next lucky owner", when she was in possession of the David Jones letter which set out earthquake damage needing attention. She also referred the Tribunal to a further finding of unsatisfactory conduct against Ms Tafilipepe, by a Complaints Assessment Committee.

[26] Mrs Hammond asked that when considering penalty, the Tribunal takes into consideration their vulnerable status as East Christchurch residents, regarding their health, wellbeing, socio-economic position and inability to obtain equivalent legal representation to that of the Authority and Ms Tafilipepe, and previous earthquake-related trauma. She submitted that she and Mr Hammond are now in a financially disadvantaged position because of Ms Tafilipepe's unsatisfactory conduct. She submitted that it is likely they would never have contacted her had it not been for her misleading advertising, and they certainly would not have signed an agreement for sale and purchase if they had known the property had outstanding earthquake damage.

Discussion

[27] In the substantive decision, the Tribunal said in respect of Ms Tafilipepe's conduct:[7]

> [70] … We accept that [Ms Tafilipepe] believed, on the basis of information given by the vendor, that all EQC repairs had been completed.
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> [71] However, concern about satisfactory completion of EQC repairs in Christchurch has been widely publicised, and would have been well known to Ms Tafilipepe. The fact that Ms Tafilipepe advertised the property as having "all EQC works … completed" indicates that she considered this to be a significant positive feature, that would attract buyers, as they would not have to be concerned with dealing with the EQC repair process. In the circumstances, it required the advertising to be accurate.
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> [72] Having seen the David Jones letter, Ms Tafilipepe should have sought confirmation that the additional work referred to by Mr Jones had in fact been completed, by way of some sort of sign off, before using the completion of EQC work as a selling feature. It was not sufficient for her to pass on information

[7] Substantive decision, at [70]–[76]: the phrase "relatively minor" in paragraph [76] is a reference to a discussion in the judgment of his Honour Justice Heath in *Vosper v Real Estate Agents Authority* [2017] NZHC 53, (2017) NZCPR 633.

> given to her by the vendor without taking any steps to check that it was correct.
> …
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> [73] There is no evidence that Ms Tafilipepe took any such step before becoming aware … that the sheet join cracks had not been repaired.
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> …
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> [75] The misrepresentation in the present case was clearly intended to be a material factor in inducing prospective purchasers to view the property, and was, therefore, capable of materially affecting a decision on the part of anyone who read the advertisement.
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> [76] … The conduct in issue, Ms Tafilipepe's failure to take any steps to ensure that "all EQC work had been completed" was correct, was not "relatively minor" …

[28] We have considered the cases put forward as comparable. In *Complaints Assessment Committee v Crockett*, the Tribunal found the licensee, Ms Crockett, guilty of unsatisfactory conduct.[8] She had marketed a property in 2011, at which time she became aware of a potential risk of weathertightness issues, due to the property's construction and plaster cladding. She marketed the property again in 2013, and did not disclose the risk of weathertightness issues when marketing the property to the eventual purchaser. The Tribunal found that Ms Crockett's failure was not deliberate, but the result of negligence.

[29] In determining that the appropriate penalty was an order for censure and a fine of $2,500, the Tribunal took into account that Ms Crockett had no previous disciplinary history, the disciplinary process had had a significant emotional impact on her, and she had changed her practices so as to keep a written record of all oral advice given to prospective purchasers, and provided written advice where possible.[9]

[30] In *Li v Real Estate Agents Authority (CAC 408)*, the Tribunal found that a licensee, Ms Riley, failed to disclose to the complainants (prospective purchasers) the risk of weathertightness issues, and found her guilty of unsatisfactory conduct.[10] Her failure to do so arose from the fact that she had not inspected one wall of the property before marketing it, as access to that wall was difficult. However, she did not ask the vendors any questions as to access to the wall, or as to the appearance and construction of the wall, and did not tell the complainants she had not inspected it.

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8 *Complaints Assessment Committee v Crockett* [2017] NZREADT 5.
9 *Complaints Assessment Committee v Crockett* [2017] NZREADT 19.
10 *Li v Real Estate Agents Authority (CAC 408)* [2017] NZREADT 9.

[31] In its penalty decision, the Tribunal assessed Ms Riley's conduct as being at the high end of unsatisfactory conduct. It found there were no aggravating features, or mitigating features (other than that there were no previous disciplinary findings against her) that should be taken into account. Ms Riley was censured, ordered to make a written apology to the complainants, and to pay a fine of $7,000.[11]

[32] In *McNichol v Real Estate Agents Authority (CAC 416)*, the Tribunal allowed an appeal against a Complaints Assessment Committee's decision to take no further action on a complaint against a licensee (Mr O'Loughlin), and found him guilty of unsatisfactory conduct.[12] The Tribunal found that he failed to identify the particular carpark allocated to apartments in an apartment complex being marketed to prospective purchasers, and failed to disclose that the complex's internet and telephone cabling was incompatible with the fibre networks available on the street.

[33] In its penalty decision, the Tribunal referred to the penalty orders made in *Crockett* and *Li*, and assessed Mr O'Loughlin's conduct as at the mid-level of unsatisfactory conduct. The Tribunal noted that he had no previous disciplinary history, and had taken steps to change his business practice as a result of the complaint against him and the appeal. Mr O'Loughlin was censured, ordered to make a written apology, and ordered to pay a fine of $3,500.[13]

[34] We do not accept the submission by Mr Todd that Ms Hammond's conduct was less serious than that in each of *Crockett*, *Li*, and *McNicholl*, or Ms Belcher's submission that it was at the lower end of the spectrum of unsatisfactory conduct. As recorded in the substantive decision, the representation that all EQC work had been completed was a positive representation, as to a feature which would be s significant selling point in Christchurch. The fact that work was not "complete" was identified in building inspection reports, and that Mr and Mrs Hammond became aware of that before confirming the agreement for sale and purchase, does not lessen the seriousness of Ms Tafilipepe's failure to verify the information she was given by the vendor. We assess her conduct as being at the mid-level of unsatisfactory conduct.

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11 *Li v Real Estate Agents Authority (CAC 408)* [2017] NZREADT 33.
12 *McNichol v Real Estate Agents Authority (CAC 416)* [2019]NZREADT 19.
13 *McNichol v Real Estate Agents Authority (CAC 416)* [2019]NZREADT 32.

[35] We must also take into account that Ms Tafilipepe has had previous disciplinary findings against her. In a decision issued on 3 March 2017, Complaints Assessment Committee 410 found her guilty of unsatisfactory conduct. Ms Tafilipepe had inserted the vendor's initials onto an agency listing agreement (on the vendor's instructions) after the vendor had mistakenly failed to do so. She did not inform her agency, or note on the agreement, that the initials were not inserted by the vendor, and the agreement was therefore deceptive. The Committee recorded that Ms Tafilipepe had no previous disciplinary history, and had completed further education, and concluded that her conduct was an error of judgment. It ordered Ms Tafilipepe to pay a fine of $500.

[36] In a decision issued on 11 April 2019 (recalled and re-issued on 10 May 2019), the Tribunal found Ms Tafilipepe guilty of misconduct under s 73(a) of the Act (disgraceful conduct) on a charge brought by Complaints Assessment Committee 414 for having lied to a vendor of a property regarding the identity of a person who attended at an inspection of a property with her, and his purpose in being there. The Tribunal also found Ms Tafilipepe guilty of unsatisfactory conduct for other breaches of the Rules in relation to this transaction, which occurred in May 2016.

[37] The Tribunal also found Ms Tafilipepe guilty of misconduct under s 73(c)(iii) of the Act (wilful or reckless contravention of r 9.6 of the Rules) on a charge brought by Complaints Assessment Committee 416, for having sent people who were on her list of potential buyers of "as is where is" properties, details of eight properties (including the addresses of the properties, comparative market appraisals, and vendors' price expectations) without having an agency agreement for any of the properties, between September 2016 and March 2017.[14]

[38] In its penalty decision, the Tribunal noted the finding of unsatisfactory conduct in May 2017, but recorded that it was not submitted that it should be taken into account as an aggravating factor for penalty. The Tribunal took into account matters raised in mitigation and made orders for censure, imposing a fine of $5,500, and suspension of her licence for 90 days.

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[14] *Complaints Assessment Committee 414 and Complaints Assessment Committee 416 v Tafilipepe* [2019] NZREADT 13.

[39] While her particular breaches of the Act and Rules were not the same in each of the earlier cases, the findings against Ms Tafilipepe must be regarded as an aggravating factor. We accept Mr Belcher's submission that Ms Tafilipepe has been put on notice as to the importance of complying with her professional obligations. Further, she cannot claim the benefit of a previously unblemished record. In accordance with our assessment of Ms Tafilipepe's conduct being at a mid-level of unsatisfactory conduct, we have concluded that a fine of $5,000 should be imposed.

[40] We turn now to Mrs Hammond's submission for an order under s 93(1)(f) of the Act, that Ms Tafilipepe pay the forfeited deposit ($41,000) and $4030.40 (for building inspection reports and solicitors' costs), together with interest.

[41] We accept the submissions made by Mr Todd and Mr Belcher, that it is not open to the Tribunal to make such an order, as a result of the judgments in *Quin v Real Estate Agents Authority*,[15] and in *Edwards v Bridge*.[16] In the former judgment, it was held that s 93(1)(f) does not give a Committee the power to order a licensee to pay compensatory damages, and in the latter judgment, an order was declined because the complainant purchaser (who had been misled by unsatisfactory conduct) learned of the true state of the property within the time within which he could have cancelled the agreement for sale and purchase, but elected to proceed with the purchase.

[42] We note Mrs Hammond's submission (in her reply submissions) that she and Mr Hammond would not have signed an agreement for sale and purchase if they had known that the property had outstanding earthquake damage. However, the agreement was conditional, and it was clear on the evidence before the Tribunal that they were aware that the earthquake repairs had not been completed before they confirmed it as unconditional. Up until the time they confirmed the agreement they could have cancelled it on learning of the further work required, but they did not do so.

[43] Accordingly, we accept that there is no basis on which we could make an order for payment under s 93(1)(f) of the Act.

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15 *Quin v Real Estate Agents Authority* [2012] NZHC 3557.
16 *Edwards v Bridge*, fn 6, above.

Result

[44] We order as follows:

[a] Ms Tafilipepe is censured.

[b] Ms Tafilipepe is ordered to make an apology to Mr and Mrs Hammond (the form of which is to be approved by the Authority), within 20 working days of the date of this decision.

[c] Ms Tafilipepe is ordered to pay a fine of $5,000 to the Authority, within 20 working days of the date of this decision.

[45] 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