

**PURSUANT TO S 108(1)(C) OF THE REAL ESTATE AGENTS ACT 2008,  
PUBLICATION OF THE NAMES OR ANY IDENTIFYING PARTICULARS  
OF THE APPELLANTS IS PROHIBITED**

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2021] NZREADT 02**

**READT 016/20**

IN THE MATTER OF                      an appeal under s 111 of the Real Estate Agents Act  
2008

BETWEEN                                [APPELLANT]  
Appellant

AND                                        THE REAL ESTATE AGENTS AUTHORITY  
(CAC 1904)  
First Respondent

AND                                        PRUDENCE FOSTER and WINSTON KIDD  
Second Respondents

On the papers

Tribunal:                                Hon P J Andrews, Chairperson  
Ms C Sandelin, Member  
Ms F Mathieson, Member

Submissions received from:        [Appellant]  
Ms A-R Davies, on behalf of the Committee  
Mr T Rea, on behalf of Ms Foster

Date of Decision:                      18 January 2021

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**DECISION OF THE TRIBUNAL  
(PENALTY)**

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## **Introduction**

[1] In a decision issued on 28 April 2020, Complaints Assessment Committee 1904 (“the Committee”) decided to take no further action on [the appellant’s] complaint against Ms Foster and Mr Kidd. [The appellant] appealed to the Tribunal against that decision.

[2] In a decision issued on 21 October 2020, the Tribunal allowed the appeal and made findings of unsatisfactory conduct against Ms Foster (“the substantive decision”).<sup>1</sup> The Tribunal dismissed the appeal insofar as it related to the appellant’s complaint against Mr Kidd. The Tribunal has now received submissions as to penalty, following the finding of unsatisfactory conduct against Ms Foster.

## **Background**

[3] [The appellant] and his wife were the owners of a property at Takapuna, Auckland (“the property”). On 25 October 2018, they entered into a 90-day sole agency agreement with Mr Kurt Piper, a licensed salesperson engaged at the Agency, to market the property for sale (“the initial agency agreement”). The initial agency agreement was due to expire on 25 January 2019.

[4] The property was not sold during the term of the agency. [The appellant and his wife] met with Ms Foster and Mr Kidd on 22 January 2019 to discuss how to proceed. After some discussion, which included discussion of a six-week marketing programme, [the appellant and his wife] signed a one-page document headed “Amendments to Existing Agency Agreement” (“the amendment agreement”) at the Agency. This document set out their names and the property’s address, had a tick inserted in the “By Negotiation” box under the heading “Sale Method”, and recorded that the agency was extended from 25 January to 25 April 2019. The amendment agreement was also signed by Ms Foster.

[5] About 30 minutes after leaving the Agency, [the appellant and his wife] were working in the garden at the property when Ms Foster visited them. She said they had

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<sup>1</sup> *[Appellant] v Real Estate Agents Authority (CAC 1904)* [2020] NZREADT 51.

signed the wrong form. She had a two-page document with her, which she said had the same information on it, and asked them to sign it. This document was headed “Renewal of Real Estate Agency Agreement” (“the renewal agreement”). It had the names of [the appellant and his wife] handwritten on it, together with the property’s address, but also named Mr Piper and Ms Foster as “licensees”. It contained a section headed “Exclusive Agency”, which provided that the “client” “re-appoints the Agent as sole agent”. “25/1/19” was handwritten as the commencement date and “25/4/19” as the end date.

[6] The renewal agreement also contained handwritten additions relating to the calculation of commission. It also provided that [the appellant and his wife] agreed to pay the sum of \$15,309.76 “for marketing and advertising the Property as agreed in the attached Marketing Plan upon signing this agreement”. [The appellant and his wife] initialled the first page of the renewal agreement and signed the second page.

[7] On 24 January 2019, [the appellant] sent Ms Foster a text message, asking her to email him a copy of “the contract we signed on Tuesday”. Ms Foster emailed him a copy of the renewal agreement. On 7 February 2019, [the appellant] asked Ms Foster for a copy of the document signed “when we met you and [Mr Kidd] on 22 January”.

[8] In response, Ms Foster sent [the appellant] a further copy of the renewal agreement. [The appellant] sent her a further text the same day, noting that he already had a copy of the renewal agreement, and saying that he wanted to view the document they had signed first.

[9] Ms Foster did not respond to this text. Her next text communication with [the appellant] was on 9 February 2019, reporting as to interest in the property

[10] [The appellant] subsequently complained to the Authority that:

[a] Ms Foster had concealed parts of the amendment agreement when he and [his wife] signed it;

- [b] They understood that the agency was to be renewed for six weeks, but found that it was renewed for 90 days, and Ms Foster failed to explain that the renewal agreement was for 90 days;
- [c] When the amendment agreement and the agency agreement were signed, Ms Foster failed to recommend that they seek independent legal advice, and failed to give them a reasonable opportunity to do so;
- [d] Ms Foster failed to provide him with a copy of the amendment agreement, when asked to do so; and
- [e] Mr Kidd had witnessed Ms Foster's conduct in concealing the amendment agreement but failed to report it to the Authority, and had failed to supervise and manage Ms Foster effectively.

[11] The Tribunal found Ms Foster guilty of unsatisfactory conduct, in respect of the following breaches of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012:

- [a] a breach of r 10.6, by failing to explain to [the appellant and his wife] the end date of the extended agency agreement, as set out in the amendment agreement and the renewal agreement.
- [b] a breach of r 9.7, by failing to recommend that [the appellant and his wife] take legal advice before signing the amendment agreement and the renewal agreement.
- [c] a breach of s 132 of the Real Estate Agents Act 2008, by failing to provide [the appellant] with a copy of the amendment agreement.

### **Penalty principles**

[12] The 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”.<sup>2</sup> The Act achieves its purpose 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.<sup>3</sup>

[13] In order to meet the purpose 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.

[14] 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.<sup>4</sup>

[15] Pursuant to s 111(5) of the Act, if the Tribunal finds a licensee guilty of unsatisfactory conduct, it may exercise any of the powers a Complaints Assessment Committee could have exercised. Those powers are set out in s 93 of the Act and include (as may be relevant to the present case):

- [a] Censuring or reprimanding the licensee (s 93(1)(a));
  - [b] Ordering the licensee to apologise to the complainant (s 93(1)(c));
  - [c] Ordering the licensee to undergo training or education (s 93(1)(d));
  - [d] ordering an individual licensee to pay a fine of up to \$10,000 (s 93(1)(g));
- and

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<sup>2</sup> Section 3(1) of the Act.

<sup>3</sup> Section 3(2).

<sup>4</sup> 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].

- [e] ordering the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing (s 93(1)(i)).

[16] Section 110A (1) and (2) of the Act are also relevant:

**110A Costs**

- (1) In any proceedings under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
- (2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether, and to what extent, any party to the proceedings—
  - (a) has participated in good faith in the proceedings:
  - (b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:
  - (c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

**Submissions**

[17] [The appellant] submitted that Ms Foster's conduct was not accidental, and that there was a pattern that shows that her breaches of the Act and Rules were premeditated, deliberate, and repeated.

[18] He also submitted that there were aggravating factors: first, that he was vulnerable at the time of signing the renewal agreement as he was not able to read the document without his reading glasses, and secondly, Ms Foster's conduct following the hearing. He submitted that in an email to the Tribunal on 28 October 2020 (following the Tribunal's decision being issued) Ms Foster had improperly called him a liar.

[19] [The appellant] submitted that the appropriate penalty order is a fine of \$5,000 to \$6,000. He also sought an order that Ms Foster pay his reasonable costs and expenses in pursuing his complaint and appeal.

[20] Mr Rea made submissions on behalf of Ms Foster.<sup>5</sup> He submitted that in all the circumstances, Ms Foster's unsatisfactory conduct was at a low level.

[21] With respect to the finding that Ms Foster breached r 10.6 by failing to explain the end date of the amendment and renewal agreements (which she continues to deny), he submitted that Ms Foster would have had an honest belief, on reasonable grounds, that [the appellant and his wife] had read the agreements and agreed to their contents, as confirmed by their signatures on the agreements.

[22] Mr Rea submitted that there was no suggestion that [the appellant and his wife] were under any disability at the time they signed the amendment agreement, and that they would undoubtedly have presented to Ms Foster as intelligent and educated people. He submitted that when [the appellant] signed the renewal agreement, there would have been nothing preventing him from obtaining his reading glasses to read the agreement if he wished. He further submitted that there appeared to be no explanation as to why [the appellant's wife] was not able to read both documents clearly.

[23] Mr Rea further submitted that Ms Foster's breach of r 10.6 was of little consequence when [the appellant and his wife] re-listed the property with the Agency following the expiry of the 90-day renewal. He submitted that there was no evidence of any loss suffered by them as a consequence of the period of the renewal, nor of Ms Foster having made any financial gain as a result of the conduct found to be unsatisfactory.

[24] With respect to Ms Foster's admitted failure to recommend orally to [the appellant and his wife] that they should take legal advice before signing the amendment and renewal agreements, Mr Rea submitted that the Tribunal should take into account as mitigating factors that it was common ground that the recommendation was given when [the appellant and his wife] signed the original agency agreement, so they would have known of their ability to seek legal advice when they signed the amendment and renewal agreements. He also submitted that if they did not seek legal

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<sup>5</sup> As noted in the substantive decision, Ms Foster was not represented by counsel at the hearing, and was not present at the hearing following her cross-examination.

advice before signing the original agency agreement, or when signing the final renewal of it, it is highly unlikely they would have done so on the occasion of signing the amendment or renewal agreements. For these reasons, he submitted, the breach of r 9.7 was of no consequence.

[25] With respect to Ms Foster's breach of her obligation to provide a copy of the amendment agreement, Mr Rea submitted that this arose from a misunderstanding by Ms Foster in believing that the amendment agreement had been superseded by the renewal agreement, which she had provided to [the appellant]. Mr Rea submitted that this breach, too, was inconsequential in terms of any effect on the transaction or [the appellant and his wife].

[26] As to the appropriate penalty, Mr Rea submitted that the appellant's submissions were based on an incorrect premise that Ms Foster's conduct was "deliberate" or "premeditated", as the Tribunal made no such findings. He submitted that had the Tribunal considered that to be the case, it would have remitted the matter back to the Committee to consider laying charges of misconduct.

[27] Mr Rea further submitted that Ms Foster's email message to the Tribunal of 28 October 2020 should not be regarded as an aggravating factor, as it is insufficiently connected with her conduct to be considered relevant. Mr Rea submitted that the appellant had acted similarly to Ms Foster in making serious and unsubstantiated allegations of pre-meditation and a deliberate pattern of conduct, inconsistent with the Tribunal's decision.

[28] On behalf of the Committee, Ms Davies submitted that Ms Foster's conduct was of moderate gravity. She submitted that it involved breaches of three separate professional rules, at two different times. She submitted that a licensee's obligations to explain agreements before a vendor client enters into them, and to recommend that a vendor seeks legal advice and give the vendor the opportunity to do so, are fundamental. At the same time, Ms Davies submitted that there is no evidence that Ms Foster had any issues with her practice outside of the present case, and that her conduct appeared to be the result of negligence rather than intentional.



[29] Ms Davies acknowledged that Ms Foster has no previous disciplinary findings against her, that the most serious allegation against her was withdrawn at the hearing and that her admissions to the Tribunal formed the basis of the findings that she failed to recommend that [the appellant and his wife] take legal advice before signing the amendment agreement and the renewal agreement, and that she failed to provide them with a copy of the amendment agreement.

[30] However, Ms Davies submitted that the gravity of Ms Foster's conduct is not mitigated by explanations given by her regarding [the appellant's] conduct (for example, his signing the amendment and renewal agreements without using his reading glasses, and the fact that he and [his wife] entered into a further agency agreement after the renewal agreement expired). She submitted that the explanations offered by Ms Foster are precisely the reason why licensees are subject to the obligations set out in the Rules: regardless of the conduct of a consumer during a transaction, licensees have a minimum standard of conduct which must be adhered to.

[31] Ms Davies submitted that the appropriate penalty would be orders for censure, that Ms Foster provide an apology, and that she pay a fine in the vicinity of \$4,000.

## **Discussion**

[32] We do not accept [the appellant's] characterisation of Ms Foster's breaches of the Act and Rules as being deliberate and pre-meditated. Had the Tribunal taken the view that such a finding was open to it, it would have remitted the matter back to the Committee to consider laying charges of misconduct under s 73 of the Act.

[33] However, we do not accept Mr Rea's characterisation of the breaches as being of little consequence, or inconsequential. The obligations imposed by rr 10.6 and 9.7, in particular, are fundamental to achieving the purpose of the Act, as set out in s 3(1):

... to promote and protect the interests of consumers in respect of transactions that relate to real estate agency work and to promote public confidence in the performance of real estate agency work.

[34] We accept Ms Davies' submission that regardless of [the appellant's] intelligence and education, and his own conduct (for example, not getting his reading

glasses to read the documents) the Act and Rules prescribe a minimum standard of conduct that must be adhered to. Even if they do not have a negative consequence for the particular consumer, breaches of fundamental obligations should not be regarded as of little or no consequence. Professional disciplinary proceedings serve a purpose which extends beyond the particular parties involved, and it is important that members of the industry are reminded of the importance of adhering to the relevant rules of conduct.

[35] We assess the totality of Ms Foster’s unsatisfactory conduct, comprising breaches of three separate obligations, as being at a moderate level. We take into account that she admitted two of the breaches at the Tribunal hearing, and that she has no history of previous disciplinary findings against her.

[36] Having taken the above factors and the parties’ submissions into account, we have concluded that the appropriate orders are that Ms Foster is censured and ordered to pay a fine of \$1,500. We accept Ms Davies’ submission that Ms Foster should be ordered to provide an apology to [the appellant].

## **Costs**

### *Submissions*

[37] [The appellant] sought an order that Ms Foster pay his “reasonable costs and expenses in pursuing this matter”. He referred to an invoice from his solicitors, dated 27 September 2019, for \$891.00 in relation to filing his complaint.

[38] Mr Rea submitted that an order for costs should not be available against Ms Foster, as she did not participate in the appeal hearing, other than as a witness required to attend for cross-examination. He submitted that any costs that may have been incurred by [the appellant] in respect of the appeal, and steps taken in relation to it, were a consequence of the Committee’s decision, not Ms Foster.

[39] Mr Rea also submitted that [the appellant] was not fully successful in his appeal, with two out of the five grounds of his original complaint against Ms Foster being

dismissed, and he accepted at the appeal hearing that a serious allegation made against Ms Foster, that she had deliberately concealed part of the amendment agreement, was incorrect.

[40] Further, with reference to s 110A(2) of the Act, Mr Rea submitted that Ms Foster had participated in good faith in the proceeding (to the extent that she participated in it), she had not acted in any way so as to obstruct the process of information-gathering by the Tribunal (in particular, in making admissions leading to two findings against her), and she had acted in a manner that facilitated the resolution of the issues which were the subject of the proceeding, by engaging in good faith in the Authority's Early Resolution Procedure.

[41] Ms Davies submitted that the Authority abides the Tribunal's decisions as to costs. She submitted that s 110A of the Act gives the Tribunal a broad discretionary power to award costs and in addition, the Tribunal has confirmed that s 93(1)(i) extends to costs and expenses in the Tribunal in appeals from Committee decisions. She submitted that while such awards are rare, the Tribunal has made awards of costs under s 93(1)(i) following successful appeals against Complaints Assessment Committee's decisions to take no further action, as is the case here.<sup>6</sup> Ms Davies also submitted that the Tribunal has commented that it would award costs in relation to matters directly related to making the complaint to the Committee and then appealing to the Tribunal, as opposed to awarding costs incurred in relation to initial advice.<sup>7</sup>

[42] In respect of the present case, Ms Davies submitted that the Tribunal has the power to order Ms Foster to pay [the appellant] costs which were directly related to making his complaint to the Committee and his appeal to the Tribunal. She submitted that as a successful self-represented litigant before the Tribunal, [the appellant] could be entitled to recover disbursements, but not costs. She submitted that the invoice submitted by [the appellant] relates to legal services incurred in support of his initial complaint to the Authority. She further submitted that [the appellant] was successful

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<sup>6</sup> Referring to *Martin v Real Estate Agents Authority (CAC 407)* [2017] NZREADT 14, at [19], and *Tong v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 3, at [22].

<sup>7</sup> Referring to *Martin*, above n 6.

in the sense that the Tribunal has made a finding of unsatisfactory conduct against Ms Foster.

### *Discussion*

[43] We do not accept Mr Rea's submission that an award of costs is not available against Ms Foster. The Tribunal's decisions in *Martin* and *Tong* referred only to the discretion to award costs under s 93(1)(i) (s 110A having come into force on 14 November 2018), but the Tribunal noted that its discretion is broad and allows the Tribunal to make an award of costs where the Committee could do so. In both cases, the appellant (complainant) had successfully appealed against a Complaints Assessment Committee's decision to take no further action on a complaint.

[44] Section 110A of the Act is also in broad terms: in *any* proceedings under the Act, the Tribunal may make *any* award as to costs. The factors that the Tribunal may take into account in considering whether to make an award are not limited to those set out in s 110A(2).

[45] We have concluded that it is appropriate to order Ms Foster to pay costs. As a result of his appeal, [the appellant] has ultimately succeeded in upholding three of his complaints against Ms Foster. We take into account, however, that he has not succeeded in upholding all elements of his complaint. In particular, he acknowledged at the appeal hearing that his allegation that Ms Foster had concealed part of the amendment agreement was incorrect.

[46] We note Mr Rea's submissions as to the factors set out in s 110A(2) of the Act. However, we accept Ms Davies' submission that as the holder of a licence to carry out real estate agency work, Ms Foster was obliged to cooperate with the complaints process, and with the appeal to the Tribunal. We accept that her cooperation is not a basis on which an order for costs can be resisted.

[47] We have concluded that the appropriate order is that Ms Foster is to pay [the appellant] \$600 (GST incl) as a contribution towards the costs he has incurred.

## **Applications for order restricting publication**

### *Submissions*

[48] Shortly after the Tribunal's substantive decision was issued, Ms Foster sought an order prohibiting publication of the decision. She did not pursue this application.

[49] [The appellant] sought an order prohibiting publication of his and [his wife's] name and the address of the property. His grounds for doing so were to protect their privacy, and that anonymising the details would not detract from the decision, the purpose of the Act of protecting consumers' interests, or the public interest.

[50] Mr Rea submitted that restricting publication of [the appellant's and his wife's] names, and the address of the property would be very unusual, and he submitted that no proper grounds regarding any serious sensitivity or privacy had been made out. He submitted that nothing in the Tribunal's substantive decision would be in any way embarrassing or prejudicial to [the appellant and his wife].

[51] Mr Rea submitted that he was aware of only one case where an order such as that sought by [the appellant] had been made. He submitted that that case involved a sale and purchase agreement that contained strict confidentiality provisions, and that the parties had agreed to suppression of identities.

[52] Ms Davies submitted that the Authority is neutral as to [the appellant's] application. She submitted that the Tribunal has previously noted that the starting point should always be the interest in open justice, because this reflects Parliament intentions of promoting and protecting consumer interests, and has emphasised the public interest in publishing the names of licensees involved in disciplinary proceedings. She submitted that in most circumstances it will be proper for the Tribunal to order the publication of a licensee's name, in general, there is inherently less of a public interest in the publication of a complainant's details.

[53] In the present case, she submitted that [the appellant's and his wife's] names could easily be redacted, should the Tribunal consider it appropriate to restrict publication.

### *Discussion*

[54] The Tribunal's jurisdiction to restrict publication of a proceeding is set out in s 108(1) of the Act which provides (as relevant to this case):

#### **Restrictions on publication**

- (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make 1 or more of the following orders:
  - (a) An order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:  
...
  - (b) An order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.

[55] As Ms Davies submitted, it is in the public interest that disciplinary proceedings be open and transparent, that the disciplinary process be accountable, that the public knows the identity of licensees found guilty in disciplinary proceedings, to have regard to the importance of freedom of speech.

[56] We accept that it is rare for the Tribunal to restrict publication of a decision, and such orders are not often sought. However, they are not restricted to the "very unusual" circumstances outlined in Mr Rea's submissions. We accept Ms Davies' submission that there is inherently less public interest in the publication of a complainant's details than there is in the publication of a licensee's details.

[57] We accept [the appellant's] submission that it would not detract from the Tribunal's decision, the purpose of the Act of protecting consumers' interests, or the public interest, if [the appellant's and his wife's] names, and the address of the property, were redacted from the published version of the Tribunal's ruling dated 10 August 2020, the substantive decision and this penalty decision.

## Orders

[58] Ms Foster is censured, and ordered to pay a fine of \$1,500. The fine is to be paid to the Authority within 20 working days of the date of this decision. Ms Foster is also ordered to provide an apology to [the appellant], in a form approved by the Authority, within 20 working days of the date of this decision.

[59] Ms Foster is ordered to pay [the appellant] the sum of \$600 (GST incl) as a contribution towards his costs, within 20 working days of the date of this decision.

[60] [The appellant's and his wife's] names, and the address of the property, are to be redacted from the published versions of the Tribunal's substantive decision, and this penalty decision.

[61] 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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Ms C Sandelin  
Member



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Ms F Mathieson  
Member