BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 20

READT 023/20

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 2001
AGAINST	MICHAEL SHELDON Defendant

On the papers

Tribunal:	Hon P J Andrews, Chairperson Mr N O'Connor, Member Ms F Mathieson, Member
Submissions received from:	Ms L Lim, on behalf of the Committee Ms K Burkhart, on behalf of Mr Sheldon
Date of Decision:	5 May 2021

DECISION OF THE TRIBUNAL
(PENALTY)

Introduction

[1] In a decision issued on 19 February 2021, the Tribunal found Mr Sheldon guilty of unsatisfactory conduct in relation to his conduct in marketing a property at Laingholm, Auckland ("the substantive decision").[1]

[2] The Tribunal found that Mr Sheldon had acted in breach of rr 9.1 and 9.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") by sending text messages to prospective purchasers of the property inviting expressions of interest at "around $1.1 million", and in so doing misled prospective purchasers as to the vendors' price expectations. The Tribunal accepted that when sending the messages Mr Sheldon had intended to generate offers from which he could negotiate an acceptable sale price, and that this may have been a reasonable marketing strategy, but found that he had failed to ensure that the vendors were aware of, and agreed to, that strategy.

[3] The Tribunal further found that Mr Sheldon had acted in breach of r 6.4 of the Rules by providing the vendors with false information as to a prospective purchaser's feedback as to the value of the property. The Tribunal recorded that the prospective purchaser had given evidence that she had told Mr Sheldon that she expected the property to be worth "at least $1.25 million", and Mr Sheldon's evidence was that he had reported her feedback as "$1 million to $1.1 million" and that in doing so he had made an honest mistake and confused her with another person.

[4] The Tribunal did not find it proved that the prospective purchaser's feedback was at $1.25 million, but found that her feedback was not at $1 million to $1.1 million, as Mr Sheldon reported to the vendors. As Mr Sheldon accepted that this was not what the prospective purchaser had said, the Tribunal was satisfied that he had misled the vendors and breached r 6.4.

[5] The Tribunal has now received submissions as to penalty on behalf of the Committee and Mr Sheldon. The parties agreed that penalty is to be determined on the papers.

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1 *Complaints Assessment Committee 2001 v Sheldon* [2021] NZREADT 8.

Penalty principles

[6] 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".[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]

[7] 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.

[8] 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]

[9] Section 110(4) of the Act provides that if after hearing a charge against a licensee the Tribunal is satisfied that the licensee has engaged in unsatisfactory conduct, the Tribunal may make any of the orders that a Complaints Assessment Committee may make under s 93 of the Act. As relevant to the present case, the Tribunal may:

[a] censure or reprimand the licensee;

[b] order that the licensee apologise to the complainant;

[c] order that the licensee undergo training or education;

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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, [2009] 1 NZLR 1, at [97].

[d] order the licensee to reduce, cancel, or refund fees charges for work where that work is the subject of the complaint;

[e] order the licensee–

[i] to rectify, at his or her own expense, any error or omission; or

[ii] where it is not practicable to rectify the error or omission, to take steps to provide, at his or her own expense, relief, in whole or in part, from the consequences of the error or omission;

[f] order the licensee to pay a fine of up to $10,000.

Submissions

[10] Ms Lim submitted for the Committee that Mr Sheldon's conduct should be placed at the mid to upper range of unsatisfactory conduct. She submitted that the obligations under rr 9.1 and 9.4 are fundamental and ought to have been at the forefront of his mind. Despite there being no dispute that he knew that the vendors' bottom line sale price was $1.2 million, he sent prospective purchasers text messages advising a bottom line figure of $1.1 million.

[11] Ms Lim noted Mr Sheldon's evidence that he did not consider he needed instructions to do what he did, as it was a common marketing strategy. She submitted that it is of concern to the Committee that an experienced licensee considers it acceptable to act without client instructions if the actions are in the context of a marketing strategy.

[12] She also submitted that given that Mr Sheldon was aware the vendors would not consider offers below their bottom line, his conduct also amounted to a breach of his obligation not to mislead prospective purchasers. She submitted that Mr Sheldon's explanation that he was not "misleading prospective purchasers", but "merely inviting expressions of interest" demonstrated a complete failure to understand his obligations as a licensee. She submitted that as an experienced licensee Mr Sheldon ought to have had a better understanding of his obligations not to mislead.

[13] With respect to the prospective purchaser's feedback, she submitted that Mr Sheldon ought to have taken more care in reporting to clients, and his conduct fall short of that required of a competent licensee.

[14] Ms Lim referred to the penalty imposed in *Mabruk v Real Estate Agents Authority (CAC 409)*,[5] where the licensee appealed against the fine imposed by a Complaints Assessment Committee following a finding of unsatisfactory conduct. The Tribunal quashed the Committee's order that Mr Mabruk pay a fine of $1,000, leaving only an order for censure. Ms Lim also referred to *Complaints Assessment Committee 403 v Robb*, where a licensee did not inform his vendor clients of a telephone call confirming a prospective purchaser's interest in making an offer on the property, but advised the vendors that there was no such interest.[6] Mr Robb was censured and ordered to pay a fine of $8,000. Ms Lim submitted that Mr Sheldon's conduct was more serious than that of Mr Mabruk, but less serious than that of Mr Robb.

[15] Ms Lim submitted that the Committee accepts that Mr Sheldon is entitled to credit for his previously unblemished record. She submitted that the appropriate penalty would be an order for censure and a fine of $3,500 to $4,000.

[16] Ms Burkhart submitted that the penalty orders sought by the Committee are excessive for conduct which should properly be regarded as being unsatisfactory conduct at the moderate to low end of the scale. She submitted that the appropriate penalty order against Mr Sheldon would be an order of censure, an order that he apologise to the complainants, and an order that he undergo further training in respect of his reporting obligations.

[17] Ms Burkhart submitted that while Mr Sheldon's conduct in sending the text messages to prospective purchasers may have been misguided and based on an incorrect understanding of the extent of his obligation to obtain his clients' consent to his marketing strategy, it was for the genuine purpose of soliciting written offers for the property with a view to negotiating them up to a price acceptable to the vendors.

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5 *Mabruk v Real Estate Agents Authority (CAC 409)* [2018] NZREADT 74.
6 *Complaints Assessment Committee 403 v Robb* [2017] NZREADT 39.

She submitted that there was no wilful intent to mislead prospective purchasers or the vendors, and Mr Sheldon was attempting to achieve the best outcome for his clients. She submitted that Mr Sheldon had been honest and open about sending the texts and had advised the vendors that he had done so.

[18] Ms Burkhart did not agree with the Committee's submission that Mr Sheldon's conduct was more serious than that of Mr Mabruk. She submitted that the fact of having more experience (Mr Sheldon having been a licensee for seven years, as opposed to Mr Mabruk's less than 12 months) does not add to the severity of the conduct, especially where no harm has been caused and where the conduct was not based on ulterior motives or to the detriment of the complainants.

[19] Regarding the finding that Mr Sheldon breached r 6.4 in reporting the feedback of a prospective purchaser, Ms Burkhart submitted that his conduct was based on a genuine but mistaken recollection of price feedback received from a prospective purchaser. She submitted that Mr Sheldon's conduct did not cause loss to the vendors, or create any risk of loss. She submitted that Mr Sheldon is very unlikely to engage in similar conduct in the future, and the finding of unsatisfactory conduct will ensure that he exercises particular caution in the future. She submitted that there is no utility in imposing a penalty where Mr Sheldon poses no further risk to industry standards or the interests of vendors.

[20] Ms Burkhart submitted that Mr Sheldon is entitled to credit for his previously unblemished record as a salesperson, and that the isolated breaches of the Rules on which led to the finding of unsatisfactory conduct do not otherwise undermine his otherwise impeccable record.

Discussion

[21] In the substantive decision, the Tribunal recorded that it assessed the seriousness of Mr Sheldon's conduct as being at a moderate level of seriousness.[7] We remain of that view.

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7 Substantive decision, fn1 above, at [67].

[22] Neither of the two decisions referred to us provides substantial assistance in determining penalty in the present case. The facts and circumstances of each are quite different. We are conscious of the need to endeavour to maintain consistency in penalties imposed for similar conduct in similar circumstances. But a penalty must be imposed on the particular facts and circumstances of the conduct concerned. It is rare for two cases to have sufficient similarity as to the background facts, the seriousness of the licensee's conduct, and other factors which are taken into account in the penalty decision, such that they can be considered to be on all fours with each other.

[23] *Mabruk* was an appeal against a Complaints Assessment Committee's penalty orders. Mr Mabruk advised prospective purchasers that the "BBU" (Buyer Budget Up from) price for a property was $595,000, when the vendors' bottom line sale price was $700,000. The vendors had agreed to the property being marketed as "BBU $595,000". A complaint was made by a prospective purchaser who submitted a tender price that was above the BBU, but below the vendors' bottom line. The prospective purchaser complained that he had been misled as to what the vendors would accept.

[24] The Committee assessed Mr Mabruk's conduct as being in the low to moderate range of unsatisfactory conduct. The fine it imposed ($1,000) was a reduction from its starting point of $2,000, to allow for significant mitigating factors. Those factors included his lack of experience, the fact that he had apologised to the complainant, and fact that the Agency that employed him had "completely and utterly failed to meet its responsibility to ensure that salespersons were properly supervised and managed".[8]

[25] In *Robb*,[9] the Tribunal made a finding that the licensee was guilty of misconduct under s 73 (c)(iii), having found that he wilfully or recklessly contravened provisions of the Act or Rules. Mr Robb did not inform his vendor client that a prospective purchaser had telephoned to confirm that he wanted to submit an offer on the client's property, and he told the client that there was no such interest. The Tribunal found that he had breached is obligation under r 9.1 to act in his client's best interests and he had misled the client, provided false information, and withheld information he should have provided, in breach of r 6.4.

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8 See *Mabruk v Real Estate Agents Authority (CAC 409)*, fn 5 above, at [18].
9 *Complaints Assessment Committee 403 v Robb*, fn 6 above.

[26] The Tribunal accepted that Mr Robb had no previous disciplinary history and was held in high regard, and that no concerns had been raised as to his professional work since the events complained of. The Tribunal assessed the seriousness of Mr Robb's misconduct as being nearer to the "serious" end of the scale of misconduct than the "lower" end. The Tribunal noted that while the matters put forward on behalf of Mr Robb did not ameliorate the seriousness of Mr Robb's conduct, they could be considered as a mitigating factor in assessing penalty.[10]

[27] We agree with Ms Lim's submission that it is of concern if it is indeed a common marketing strategy to advertise a property at a price which is below the vendor's bottom line, without having the vendor's instructions to do so. This is particularly so in the light of the High Court judgment in *Commerce Commission v Whitehead* in 2007 (a case which concerned marketing of real estate) that it is misleading conduct to indicate a price that is below the vendor's price expectation.[11] We would have thought that that judgment would have been well-publicised in the industry.

[28] Following our assessment of Mr Sheldon's unsatisfactory conduct as being at a "moderate" level, the starting point for penalty would be an order for censure and a fine at the mid-level, that is $5,000. We accept that he is entitled to recognition of the fact that he has a previously unblemished record, and that his conduct in marketing the complainants' property may have involved isolated breaches of the Rules.

[29] However, we are satisfied that the appropriate disciplinary response, which takes into account the purposes of the Act and the principles as to penalty set out earlier, is that Mr Sheldon is censured, ordered to pay a fine, and to undergo further training.

Orders

[30] The Tribunal orders that:

[a] Mr Sheldon is censured;

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10 At [69]–[70].

11 *Commerce Commission v Whitehead* HC Wellington, CIV 2006-485-88, 4 July 2007.

[b] Mr Sheldon is to pay a fine of $3,000. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[c] Mr Sheldon is to provide evidence of having satisfactorily completed Unit Standard 23136 "Demonstrate knowledge of laws related to consumer protection in a real estate context", within six months of the date of this decision.

[31] 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 N O'Connor
Member

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Ms F Mathieson
Member