BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 21

READT 004/20

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 409
AGAINST	WAYNE KEMP First Defendant
AND	MARINA SCOBLE Second Defendant

On the papers

Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Submissions received from:	Ms E Mok, on behalf of the Committee Mr A Darroch, on behalf of Mr Kemp and Ms Scoble
Date of Decision:	5 May 2021

DECISION OF THE TRIBUNAL
(PENALTY)

Introduction

[1] In a decision issued on 22 January 2021, the Tribunal found Mr Kemp and Ms Scoble guilty on charges laid by Complaints Assessment Committee 409 ("the Committee") of misconduct under s 73(b) of the Real Estate Agents Act 2008 ("the Act") (seriously incompetent or seriously negligent real estate agency work) ("the substantive decision").[1]

[2] The Tribunal has now received submissions as to penalty. The parties have agreed that penalty is to be determined on the papers.

Procedural history

[3] The charges arose out of a complaint made in December 2016 by the purchaser of a property (Mr Beath) marketed by the defendants at Mt Victoria, Wellington. The Committee issued a decision on 3 October 2017 in respect of the conduct which is the subject of the current charges. Mr Beath appealed against that decision to the Tribunal. In a decision issued on 31 August 2018 the Tribunal found that the Committee had made an error of law, and had failed to take relevant considerations in to account, and referred the complaint back to the Committee for further investigation and consideration.[2]

[4] Following further investigation, the Committee issued the charges on 11 February 2020.

Facts

[5] Mr Kemp and Ms Scoble ("the defendants") are licensed salespersons engaged at Mike Pero Real Estate Ltd ("the Agency"). They have worked together in real estate as business partners for many years, using a joint email address. In 2012 (while working at another agency) they marketed a property in Mt Victoria, Wellington. A prospective purchaser expressed concerns to Mr Kemp as to a party wall between the

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1 *Complaints Assessment Committee 409 v Kemp & Scoble* [2021] NZREADT 4.
2 *Beath v The Real Estate Agents Authority (CAC 409)* [2018] NZREADT 45.

property and an adjoining property, and told him that an engineer had advised it would cost about $50,000 to fix it if it required strengthening.

[6] The defendants marketed the property again in 2015. An offer to purchase was made in March 2015, conditional on a satisfactory builder's inspection report. The builder's report noted a potential safety risk posed by the party wall (in particular, that as it was of brick construction it might pose a risk in the event of a large earthquake) and recommended further inspection by an engineer. The prospective purchasers received preliminary advice from an engineer that the party wall appeared to lack seismic strengthening and would potentially pose a risk to life due to collapsing in an earthquake ("the party wall issue").

[7] The prospective purchasers communicated this advice (including the comment that the party wall was a potential risk to life) to Ms Scoble, who passed it on to Mr Kemp. The prospective purchasers' solicitors cancelled their offer on the grounds that the building report was not satisfactory. The solicitors' letter was uploaded to the Agency's Central Relationship Management System.

[8] The defendants informed the vendors of the reason for the cancelled offer. The vendors responded that they had no knowledge of the party wall issue. Ms Scoble asked if the vendors would be getting an engineer's report on the party wall, and was told that they would not. The defendants did not make any further enquiries regarding the party wall issue. They discussed whether to disclose the party wall issue and the cancelled offer to prospective purchasers and made a joint decision not to make any disclosures, unless directly asked about the party wall.

[9] The defendants showed the property to other prospective purchasers (Mr Beath and his partner) in April and May 2015. They did not make any disclosures regarding the party wall during visits to the property. Mr Beath advised they would be making an offer on the property and asked for further information, including whether there were any other important disclosures they should know of as buyers. Mr Kemp responded with information as to re-piling, re-wiring, plumbing and roofing work and included the statement that "the partition wall between properties is of brick construction as per the era of the home". Mr Kemp recommended that they obtain a

builder's report on the property which would "give [them] a good overview" as to its condition and work done on it. He did not disclose the concerns as to the party wall. The property was sold to Mr Beath and his partner.

[10] They learned of the party wall issue after they moved in. Mr Beath asked the defendants about it and was told they were "certainly not aware of any issues with the [party] wall … our owners also were not aware of any issues". He contacted the defendants again after learning that a buyer had been told of structural issues with the party wall in 2012, and had been told that the defendants were aware of it. The defendants responded that this was "news to [them]".

[11] Mr Beath obtained a detailed seismic assessment of the party wall in March 2017, which recorded that it posed a very high risk to life, and required seismic strengthening. As noted earlier, he subsequently made a complaint to the Authority about the defendants' conduct in respect of the party wall issue. We record that he also complained as to other issues (for example, the defendants' failure to disclose the presence of "Dux Quest" plumbing at the property), and those complaints are currently before the Tribunal on his appeal against the Committee's finding of unsatisfactory conduct.

Charges

[12] Mr Kemp was charged with misconduct under s 73(a) of the Act (disgraceful conduct). Ms Scoble was charged with misconduct under s 73(c)(iii) of the Act (wilful or reckless contravention of the Act or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), or in the alternative, misconduct under s 73(b) of the Act (seriously incompetent or seriously negligent real estate agency work).

[13] The charges against the licensees alleged breaches of rr 6.4 (which provides that licensees must not mislead a customer or client, not provide false information, and not withhold information that should by law or in fairness be provided) and 10.7 (which imposes obligations on licensees when it would appear likely to a reasonably competent licensee that land may be subject to hidden defects).

[14] The Tribunal found that the cancellation of the conditional offer on the grounds that the party wall posed a risk of collapse in an earthquake squarely engaged the defendants' obligations to comply with r 10.7 and with r 6.4. It further found that in order to comply with their obligations the defendants were required either to obtain confirmation from the vendors, supported by evidence or expert advice, that there was no potential risk of the party wall collapsing in an earthquake, or to ensure that prospective purchasers were informed that there was such a risk, so that they could themselves seek expert advice.[3]

[15] The Tribunal was not satisfied that the Committee had established a case for a finding of disgraceful conduct against Mr Kemp.[4] Further, it was not satisfied that the Committee had established that either of Ms Scoble or Mr Kemp had deliberately or recklessly breached rr 6.4 or 10.7, and it found that there were no grounds for distinguishing between the conduct of Mr Kemp and Ms Scoble.[5] The Tribunal exercised its power under reg 13 of the Real Estate Agents (Complaints and Discipline) Regulations 2009 to amend the charge against Mr Kemp to one of misconduct under s 73(b) of the Act (seriously incompetent or seriously negligent real estate agency work).[6]

[16] The Tribunal recorded that the defendants accepted that they had failed to make adequate disclosure and/or to make further enquiries about the party wall issue, that they had made fundamental errors, and that their conduct fell below the acceptable standard, by a considerable margin.[7] The Tribunal found that the defendants had failed to comply with their obligations in two key respects: they relied on the vendors' assertion that they were not aware of the party wall issue without any evidence or expert advice in support of the assertion, and they failed to disclose the party wall and the cancelled conditional offer to the purchasers. Further, they failed to take any steps to investigate the party wall issue beyond asking the vendors.[8] It accepted the

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3 Substantive decision, at [25] and [27].
4 At [40].
5 At [53].
6 At [42]–[43].
7 At [26].
8 At [29].

Committee's submission that the recommendation to obtain a building report fell well short of what was required under the Rules.[9]

[17] The Tribunal rejected the defendants' claim that r 10.7 only obliged them to disclose defects if they had actual knowledge of an actual defect and concluded that their decision that they did not need to disclose the party wall issue was a serious departure from acceptable standards that could only be regarded as seriously incompetent or seriously negligent real estate agency work.[10] The Tribunal therefore made findings of misconduct under s 73(b) of the Act.

Penalty principles

[18] 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.[11] 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.[12]

[19] 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.

[20] 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.[13]

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9 At [30].
10 At [54].
11 Section 3(1) of the Act.
12 Section 3(2).
13 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] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As may be relevant to the present case, the Tribunal may:

[a] make any of the orders that a Complaints Assessment Committee may make under s 93 of the Act (following a finding of unsatisfactory conduct);

[b] order cancellation of the licensee's licence, or suspension for a period not exceeding 24 months; and/or

[c] order a licensee to pay a fine of up to $15,000.

Submissions

[22] Ms Mok submitted for the Committee that penalty orders in disciplinary proceedings may ensure both specific and general deterrence. She submitted that in the present case, not only do the defendants need to be specifically deterred from engaging in similar conduct in the future, but there is also a need to send a strong message to other licensees about the importance of complying with their disclosure obligations in the course of property transactions.

[23] Ms Mok submitted that the defendants' conduct falls at the upper end of the spectrum of seriousness for misconduct under s 73(b). She submitted that the potential structural defect with the party wall was serious and posed a risk to life (as opposed to being just a defect requiring costly repairs), and the defendants were clearly aware of it. She submitted that the defendants ought to have appreciated that the issue would be regarded as an important one by prospective purchasers, and that they needed to take particular care to comply with their professional obligations as to disclosure.

[24] Ms Mok further submitted that despite the serious potential risk posed by the party wall, the defendants failed to take any proper steps to comply with their obligations under r 10.7 of the Rules. They failed to take any steps to obtain further information about the party wall and the cancelled conditional offer beyond making enquiries of the vendors, and they accepted the vendors' assertions at face value, with no supporting evidence. Further, their recommendation that the purchaser obtain a

building report fell well short of what was required as, without being informed of the potential serious risk, Mr Beath was not in a position to appreciate the need to obtain his own specialist advice.

[25] She submitted that the defendants not only made a fundamental error regarding their obligations under r 10.7, they also maintained the decision not to disclose the potential defect despite having opportunities to provide information. She put it that the defendants effectively "doubled down" on their incorrect stance as to what needed to be disclosed.

[26] Ms Mok also submitted that the impact on the purchasers was significant. She submitted that in 2017 they issued civil proceedings against the Agency seeking compensation regarding the party wall issue. She advised the Tribunal that the proceedings were settled in 2019.

[27] Ms Mok submitted that the Committee accepts that both defendants should be treated as having no previous disciplinary history for the purposes of assessing penalty in the present case, and will therefore be entitled to some credit for the lack of previous disciplinary findings against them. She further submitted that the Committee is not aware of any personal mitigating factors that are relevant to penalty. She acknowledged that the defendants had accepted at the outset of the Tribunal proceedings that their conduct amounted to unsatisfactory conduct, but submitted that that acknowledgement did not significantly reduce the length or complexity of the hearing before the Tribunal, as both defendants were required to be cross-examined. Accordingly, she submitted that the defendants should not be afforded any reduction of penalty for their acceptance of unsatisfactory conduct.

[28] Ms Mok referred to three previous decisions of the Tribunal as providing assistance in determining the appropriate penalty. She submitted that in the light of the defendants' serious conduct, involving a significant departure from acceptable standards, contrary to the consumer-protection purposes of the Act, the appropriate penalty orders would be orders for censure, and for suspension of their real estate licenses for six to nine months. She also submitted that as the defendants had

displayed a fundamental misunderstanding of their obligations under r 10.7, it would be appropriate to require them to undergo further education or training.

[29] On behalf of Mr Kemp and Ms Scoble, Mr Darroch submitted that their conduct should be assessed as being at the mid-range of seriousness, because it arose from an error in approach. He also submitted that the conduct could be placed in context by reference to the Committee's earlier decision that it amounted to unsatisfactory conduct.

[30] Mr Darroch further submitted that the defendants' conduct was generated by a serious error, which they had accepted, and been open and honest with the Authority's investigations during the course of both investigations, and when giving evidence before the Tribunal. He submitted that their approach and evidence provided confirmation of their insight into the inadequacy of their approach.

[31] In response to the Committee's submission that a more severe penalty might be imposed because the defendants had not entered early guilty pleas to the charges, Mr Darroch submitted that their approach was based on their opposition to the allegations that their conduct was disgraceful (Mr Kemp) or a wilful or reckless breach of the Rules (Ms Scoble). He submitted that their approach was upheld by the Tribunal's finding of seriously incompetent or seriously negligent real estate agency work. He submitted that their approach does not diminish their acceptance of and insight into their errors.

[32] Mr Darroch also submitted that as a result of the procedural history of this matter, the defendants have now faced two investigations. He noted that it took more than one year after the Tribunal remitted the matter back to the Committee before the current charges were laid. He submitted that the defendants have already faced an additional penalty over the lengthy period through which they have had to face the stress and concern of the complaint and investigation.

[33] As mitigating factors, Mr Darroch submitted that the defendants have completed further training provided by the Agency and have made significant changes to their practice, and are strongly supported by the Agency (evidenced by a letter of support

from the Agency). He also submitted that the defendants have co-operated throughout the disciplinary process and demonstrated insight and remorse.

[34] Mr Darroch also submitted that the defendants have resolved Mr Beath's civil proceedings, so no issue as to compensation arises, and there have been no complaints regarding their conduct since this matter arose. He further submitted that each of the defendants has had a lengthy career with no previous disciplinary history, Mr Kemp for 17 years, and Ms Scoble for 13 years.

[35] With respect to the decisions referred to in the Committee's submissions, Mr Darroch submitted that none was directly comparable. He referred to a further decision which he considered to be of assistance. He submitted that in the circumstances, the appropriate penalty would be an order for censure and an order to pay a fine.

[36] Ms Mok filed brief submissions in reply. She submitted that Mr Beath's claim was settled with the Agency, not the defendants, as result of civil proceedings brought against the Agency. She also submitted that the defendants' reliance on the Committee's previous finding of unsatisfactory conduct was misconceived, as that decision had been overturned by the Tribunal on appeal. She submitted that the Tribunal's substantive decision on the charges sets out the relevant factual findings and assessment of the nature and gravity of the defendants' conduct, which are the proper basis for the Tribunal's decision as to penalty.

[37] Ms Mok further submitted that Mr Darroch's submission that the Committee was seeking "a more severe penalty" because the defendants did not enter early guilty pleas mischaracterised the Committee's submissions. She submitted that the Committee's position is that the nature and gravity of the defendants' conduct warrants a penalty of suspension of licence and that an early plea to misconduct is a factor that is absent in the present case, in contrast to those cases where, together with other mitigating factors, a licensee's early acceptance of misconduct has warranted orders less than cancellation or suspension being imposed.

Discussion

[38] Counsel referred to four Tribunal penalty decisions. The earliest was *Complaints Assessment Committee 402 v Dunham*.[14] In that case, the licensee was found guilty of misconduct under s 73(a) of the Act (disgraceful conduct) on a charge that she failed to disclose planned building work on a neighbouring property that would have a significant impact on the views from a property she was marketing, and guilty of unsatisfactory conduct under s 72 on a charge that she failed to disclose (in writing) that the vendors of the property were her parents. It is clear from the Tribunal's penalty decision that having recognised the serious nature of the licensee's conduct, the Tribunal had regard to her personal financial circumstances and character references and concluded that suspension was not required. The Tribunal ordered censure and imposed fines totalling $8,000.

[39] In *Complaints Assessment Committee 409 v Rankin*, the Tribunal imposed penalty having found the licensee guilty on two charges of misconduct under s 73(b) of the Act (seriously incompetent or seriously negligent real estate agency work).[15] He had failed to disclose to the purchasers of a property that the property had tested positive for methamphetamine contamination, he had allowed the purchasers to access the property despite a warning in a report as to methamphetamine contamination, and had failed to make enquiries as to whether it was safe to access the property. He accepted that his conduct amounted to unsatisfactory conduct, but not misconduct.

[40] The Tribunal imposed a penalty of censure, suspension of the licensee's licence for three months, and a fine of $3,000. The Tribunal did not give significant weight to the licensee's acceptance of unsatisfactory conduct, given that a hearing had still not been required. As the licensee had already taken steps towards further training, no order for training was considered necessary.

[41] In *Complaints Assessment Committee 409 v Cartwright*, the licensee pleaded guilty to a charge of misconduct under s 73(b) of the Act, and was censured, ordered to pay a fine of $5,000, to undertake further education, to reimburse the complainant

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14 *Complaints Assessment Committee 402 v Dunham* [2016] NZREADT 49.
15 *Complaints Assessment Committee 409 v Rankin* [2017] NZREADT 78.

for specific costs incurred, and to pay $20,000 in compensation to the complainant.[16] He had marketed a property where a tender had not proceeded because a building report identified building defects. While he told the complainant that the tender had "crashed" on the basis of a builder's report, he also said that the cancelled sale related to the tenderer's financial situation, and belittled the report which had disclosed defects.

[42] The Tribunal assessed the licensee's conduct as being in the middle of the range of seriousness, and took into account his early guilty plea, his remorse and insight into his conduct and recognition of his need for further education, and the fact that he was a relatively inexperienced salesperson at the time of the conduct. He also had no previous disciplinary history.

[43] In *Complaints Assessment Committee v Mansell*, the licensee pleaded guilty to a charge of misconduct under s 73(a) of the Act (disgraceful conduct) and was censured, her licence was suspended for three months, and she was ordered to pay a fine of $2,500.[17] The licensee had purchased a property which had undergone remediation work for significant moisture ingress issues. She subsequently sought to sell the property and did not disclose those issues before the property was sold at auction, believing that they had been remediated.

[44] The Tribunal found that the licensees' conduct involved a serious breach of acceptable standards. It was noted that the licensee had 30 years' experience in the industry and was aware of the importance of full disclosure of defects, but had failed to disclose the weathertightness issues or the nature of the remedial steps that had been taken. The Tribunal accepted a submission for the Complaints Assessment Committee that an order for suspension was warranted to emphasise the high standards required of licensees and to achieve the purposes of the Act and the principles as to penalty. The Tribunal took into account that the licensee had co-operated with the Authority in dealing with the matter and had agreed to a summary of facts at an early stage, had voluntarily withdrawn from real estate agency work and had no previous disciplinary action against her.

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16 *Complaints Assessment Committee 409 v Cartwright* [2018] NZREADT 25.
17 *Complaints Assessment Committee v Mansell* [2019] NZREADT 38.

[45] As the Tribunal has said previously, a penalty must be imposed on our assessment of the facts and circumstances of the particular case before us, and by applying the relevant penalty principles.[18] We are conscious of the need to endeavour to maintain consistency in penalties imposed for similar conduct in similar circumstances, but 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 inform the penalty decision, such that they can be considered to be on all fours with each other. Further, as the decisions we have referred to demonstrate, the penalties imposed in individual cases will vary in their combination of the available orders as to suspension of licence, fines, and other orders.

[46] We accept Ms Mok's submission that we are not assisted by the Committee's earlier finding of unsatisfactory conduct. We determine penalty on the basis of the findings in the substantive decision and by application of the principles as to penalty.

[47] We assess the defendants' conduct as being in the upper end of the range of misconduct under s 73(b). They failed to disclose a potential structural defect, of which they were aware, which posed a significant safety risk. They were told that the party wall was "a risk to life". Given their experience in the industry, they should have taken particular care to ensure that they complied with their obligations relating to disclosure. Their decision that they need only disclose the party wall issue if asked a direct question about the party wall demonstrates a fundamental misunderstanding of their professional obligations. That may have been, as Mr Darroch submitted, an error of approach, but their approach was one for which there was no reasonable basis in the Act or Rules.

[48] The defendants failed to disclose the risk even when Mr Beath asked a direct question as to whether there were any other important disclosures he should be aware of as a buyer. Further, they did not take any proper steps to obtain further information. They did not take steps to review the correspondence for the cancelled conditional sale, and they accepted the vendors' assertion that they were not aware of any issue at face value, with no supporting evidence. Their recommendation that Mr Beath obtain

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[18] See, for example, *Complaints Assessment Committee 416 v Prasad* [2019] NZREADT 17, at [46].

a building report to "get a good overview" of the property, without informing him of the risk, fell well short of what was required.

[49] We accept Ms Mok's submission that the defendants significantly compounded their fundamental error as to disclosure, and the breaches of their professional obligations, in their responses to Mr Beath's later questions concerning the party wall, when they told Mr Beath that they were "certainly not aware of any issues with the [party] wall … " and that the party wall issue was "news to [them]".

[50] The defendants' failure to disclose the party wall issue was a serious breach of acceptable standards, and it undermined the consumer-protection purposes of the Act. The importance of those purposes, and the need for compliance with the provisions of the Rules, has to be made clear to the real estate industry. We accept Ms Mok's submission that there is a need for both specific and general deterrence.

[51] We note that the defendants accepted prior to the hearing that the evidence established that they had engaged in unsatisfactory conduct, but the charges of misconduct were denied, and a hearing was required to determine whether their conduct amounted to misconduct or unsatisfactory conduct. We acknowledge that the evidence given by Mr Beath was not challenged, and he was not required to attend for cross-examination, but both of the defendants attended and were cross-examined. Accordingly, while a hearing was still required, it was not as lengthy and complex as it might have been.

[52] We accept that the defendants have each had many years in the industry, with no previous disciplinary action against them. We also accept that they have acknowledged their fundamental error, have completed further training, have made significant changes to their practice, and have ongoing support from the Agency.

[53] We also consider it appropriate to take into account that the complaint that ultimately led to the current charges was made in December 2016. The charges were heard by the Tribunal four years later, in December 2020, following two investigations by the Authority and an earlier hearing before the Tribunal. There is some force in Mr

Darroch's submission that the lengthy disciplinary process has had a significant emotional impact on and caused stress to the defendants.

[54] Taking all of the above matters into account, and bearing in mind the purposes of the Act and the principles as to penalty, we have concluded that the appropriate penalty will comprise an order for censure, and an order that each of the defendants is to pay a significant fine, but not an order for suspension of licence. In determining the quantum of the fine we have taken into account our decision that suspension of licence should not be ordered in this case.

Orders

[55] The Tribunal orders that each of Mr Kemp and Ms Scoble are censured. Each of Mr Kemp and Ms Scoble is further ordered to pay a fine of $10,000. The fine is to be paid to the Registrar within 20 working days of the date of this decision.

[56] 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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Mr N O'Connor
Member