

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2021] NZREADT 23**

**READT 020/2020**

IN THE MATTER OF

An appeal under section 111 of the Real Estate Agents Act 2008

BETWEEN

MICHELLE BAKER and RODNEY BAKER  
Appellants

AND

THE REAL ESTATE AGENTS AUTHORITY (CAC 1901)  
First Respondent

AND

HAMISH DRUMM, MARK COFFEY, AND SAFARI REAL ESTATE (t/a TOMMY'S REAL ESTATE)  
Second Respondents

On the papers:

Tribunal:

Hon P J Andrews, Chairperson  
Mr G Denley, Member  
Mr N O'Connor, Member

Submissions received from:

Mr Baker  
Ms C Paterson and Ms A-R Davies, on behalf of the Authority  
Mr G Dewar, on behalf of Mr Drumm

Date of Decision:

18 May 2021

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**DECISION OF THE TRIBUNAL  
(PENALTY)**

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## **Introduction**

[1] In a decision issued on 9 March 2021 the Tribunal allowed an appeal brought by Mr and Mrs Baker (“the appellants”) against the decision of Complaints Assessment Committee 1901 (“the Committee”) to take no further action on their complaint against Mr Drumm. The Tribunal found Mr Drumm guilty of unsatisfactory conduct under s 72(a) and (b) of the Real Estate Agents Act 2008 (“the Act”) (“the substantive decision”).<sup>1</sup>

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

## **Background**

[3] The appellants’ owned a property at Lower Hutt (“the property”), which they wanted to sell so that they could buy a “live aboard” launch. Their expected sale price for the property was \$600,000. They engaged a real estate agency to market the property, but decided to terminate the agency and sell privately through TradeMe.

[4] At the relevant time, Mr Drumm was engaged as a licensed salesperson at Safari Real Estate (trading as Tommy’s Real Estate) (“the Agency”). Mr Drumm first approached the appellants seeking to list the property on 1 December, after they had purchased a TradeMe listing. He was aware of the prior agency. He prepared an appraisal of the property which he presented to the appellants when he first visited them. The appellants signed an agreement to list the property with Mr Drumm on 6 December 2017 (“the agency agreement”). Mr Drumm marketed the property with printed flyers and on-line advertising, and conducted open homes at the property.

[5] The property was scheduled for auction on 16 December 2017 but as there were no registered bidders the auction was re-scheduled for 21 December. One bid was received at the auction, which was for \$500,000 and it was not acceptable to the appellants. The appellants then determined to take control of the marketing themselves (preparing a revised TradeMe advertisement), although they used the Agency to co-

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<sup>1</sup> *Baker v Real Estate Agents Authority (CAC 1901)* [2021] NZREADT 10.

ordinate open homes. An open home was held on 7 January 2018, and the appellants accepted an offer of \$603,000 (later reduced by agreement to \$602,750) the same day.

[6] The appellants complained to the Authority on 8 March 2018 about a number of aspects of Mr Drumm’s conduct in marketing the property. Complaints Assessment Committee 416 investigated the complaint and in a decision dated 19 December 2018 decided to take no further action on it. The appellants appealed to the Tribunal, and in a decision issued on 12 August 2019, the Tribunal referred the complaint back for fresh consideration of the evidence (“the Tribunal’s first decision”).<sup>2</sup> The Committee carried out a further investigation and issued its decision on 24 July 2020 in which it determined to take no further action on the complaint. The appellants appealed a second time to the Tribunal.

[7] In its substantive decision following the second appeal the Tribunal found that the Committee had erred in respect of some elements of the appellants’ complaint and found that Mr Drumm was guilty of unsatisfactory conduct in that he had:

- [a] breached ss 126(1)(c) and 132 of the Act, and rr 9.7 and 10.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”) by failing to recommend that the appellants seek legal advice, and failing to provide them an opportunity to do so, before they signed the agency agreement, and by failing to explain adequately the commission provisions of the listing agreement;<sup>3</sup>
- [b] breached rr 6.4 and 9.4 of the Rules by misleading customers as to the appellants’ price expectations for the property;<sup>4</sup> and
- [c] breached r 9.1 of the Rules by failing to act in accordance with the appellants’ instructions as to marketing the property.<sup>5</sup>

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<sup>2</sup> *Baker v Real Estate Agents Authority (CAC 416)* [2019] NZREADT 34.

<sup>3</sup> Substantive decision, at [63].

<sup>4</sup> At [86].

<sup>5</sup> At [91].

[8] The Tribunal did not uphold the appellants' submissions that the Committee had wrongly determined to take no further action on other elements of their complaint against Mr Drumm. The Tribunal found that the evidence did not support the appellants' contentions that Mr Drumm fabricated the agency agreement in a fraudulent attempt to charge a higher commission,<sup>6</sup> failed to provide them with copies of corrected advertising flyers,<sup>7</sup> fraudulently altered an "advertising campaign" document and invoiced them for marketing they had not agreed to pay for,<sup>8</sup> and lied in statements to the Committee regarding scratches on the wooden floor of the property in order to mislead the Committee.<sup>9</sup>

### **Principles as to penalty**

[9] 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".<sup>10</sup> 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.<sup>11</sup>

[10] In order to meet the purposes of the Act, penalties following findings of misconduct (under s 73 of the Act) and unsatisfactory conduct (under s 72) 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.

[11] In assessing penalty, the focus is on the seriousness of the relevant licensee's breach of professional obligations. 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

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<sup>6</sup> At [61].

<sup>7</sup> At [94].

<sup>8</sup> At [105].

<sup>9</sup> At [113].

<sup>10</sup> Section 3(1) of the Act.

<sup>11</sup> Section 3(2).

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>12</sup>

[12] Pursuant to s 111(5) of the Act, having found Mr Drumm 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 Mr Drumm apologise to Mr and Mrs Baker (s 93(1)(c));
- [d] that Mr Drumm undergo training or education (s 93(1)(d));
- [e] that Mr Drumm reduce, cancel, or refund fees charged for work where that work is the subject of the complaint (s 93(1)(e));
- [f] to rectify, at his own expense, any error or omission, or where it is not possible to rectify the error or omission, to take steps to provide, at his own expense, relief in whole or in part from the consequences of his error or omission (s 93(1)(f)); and
- [g] to pay to a complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee (s 93(1)(i)).

### **Submissions**

[13] Mr Baker submitted that Mr Drumm's licence should be cancelled, he should be fined the maximum available penalty of \$10,000 and ordered to refund the entire

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<sup>12</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, [2009] 1 NZLR 1, at [97].

commission paid on the sale, and he should be ordered to compensate the appellants for their time and costs in relation to the appeal.

[14] He submitted that Mr Drumm had lied to the appellants, the Authority's investigator, the Committee and the Tribunal, and provided false evidence. He also submitted that Mr Drumm had gone out of his way to hide the fact that the appellants were being charged commission at 1.8 per cent, knowing that he was committing fraud. He further submitted that Mr Drumm had posted comments about Mr Baker that had caused his building business to fail.

[15] Mr Baker submitted that Mr Drumm should be ordered to pay costs in relation to the significant time spent preparing, responding, and gathering evidence for the Committee's investigation, and the two appeal hearings. He submitted that this was so extensive that Mrs Baker had had to leave her employment in order to do the required work.

[16] Mr Dewar submitted that Mr Drumm accepts the Tribunal's findings as to his breaches of the Act and Rules. He submitted that the appropriate penalty would comprise orders for censure and for a partial refund of the commission paid by the appellants.

[17] Mr Dewar submitted that Mr Baker's breaches of ss 126(1)(c) and 132 of the Act, and rr 9.7 and 10.6 of the Rules were inadvertent, and a minor transgression. He also submitted that the appellants would have been unlikely to have required time to seek legal advice. He submitted that the proper penalty (to which Mr Drumm consented) would be to order Mr Drumm to refund the difference between the commission the appellants said they agreed to and that charged. He calculated the difference between the "agreed" and "charged" commission as being \$1,574.93 (rounded to \$1,575).

[18] Mr Dewar submitted that the Tribunal's finding that Mr Drumm breached rr 6.4 and 9.4 (by misleading customers as to the appellants' price expectations) was based on unsworn and untested statements by a neighbour of the appellants. He submitted that Mr Drumm's breach had no adverse consequences as the property sold for

approximately \$602,000, which was above the appellants' price expectation. He further submitted that Mr Drumm has completed a number of training courses designed to address marketing ethics and client instructions, and that he is now employed with a different agency which has a robust set of procedures to ensure compliance with licensees' professional obligations.

[19] Mr Dewar submitted that Mr Drumm's breach of r 9.1 (by failing to act in accordance with the appellants' instructions as to marketing the property) had no adverse consequences for the appellants, given the sale price achieved. He further submitted that Mr Drumm had been put under time pressure to sell the property, and had made particular efforts to assist the appellants.

[20] Mr Dewar submitted that the Tribunal should take into account several mitigating factors. First, he submitted that Mr Drumm now has seven years' experience in real estate (four at the time of marketing the appellants' property), has not been the subject of any other disciplinary complaint, and is considered an exemplary employee. He submitted that there will be no further complaints of this nature and that consumers are adequately protected. He submitted that the disciplinary process has been very distressing for Mr Drumm.

[21] Mr Dewar also submitted that the Tribunal should take into account the context in which the events occurred. He submitted that prior efforts had not achieved a sale of the property, and the appellants were very keen to sell. He submitted that this shows that pressure was exerted on Mr Drumm to achieve a sale.

[22] He further submitted that the appellants had been unreasonable, aggressive, intimidating, and abusive towards Mr Drumm, and brought overbearing pressure to bear on him. He recorded that Mr Drumm denied that he made postings adverse to Mr Baker.

[23] Affidavits sworn by Mr Drumm and his manager at the agency where he is now engaged were filed.

[24] Ms Davies submitted on behalf of the Authority that the focus for consideration of penalty is on the gravity of a licensee's departure from professional standards, not the quantum of any loss suffered. She submitted that the gravity of Mr Drumm's breaches should be assessed as being at the moderate level of unsatisfactory conduct. She pointed to the fact that Mr Drumm had been found in breach of two provisions of the Act, and five separate Rules. She also submitted that his unsatisfactory conduct occurred at three different stages of the process: at the agency agreement, marketing, and open homes.

[25] Ms Davies further submitted that the obligations to explain contracts (in this case, the agency agreement) and to recommend legal advice are fundamental obligations of licensees, as entry into contracts has significant financial ramifications.

[26] Against that, Ms Davies accepted that there is no evidence of Mr Drumm having ongoing issues elsewhere in his practice, and that the Tribunal did not find that his breaches were deliberate. She also submitted that the Tribunal may take into account that Mr Drumm has no previous disciplinary history.

[27] Ms Davies acknowledged the submission for Mr Drumm as to stress suffered by him, but submitted that the focus must be on the unsatisfactory conduct itself. She submitted that Mr Drumm's conduct is not mitigated by the appellants' behaviour, as regardless of a consumer's conduct, licensees must adhere to a minimum standard of conduct.

[28] Ms Davies also submitted that the fact that the property eventually sold for a price above the appellants' expectations is immaterial to the gravity of Mr Drumm's breaches. She submitted that this might be regarded as the absence of an aggravating factor rather than as a mitigating factor in and of itself. She further submitted that (particularly in light of the Tribunal's finding that he breached r 6.4 by misleading prospective purchasers as to the appellants' price expectations) it could not be said that

Mr Drumm's conduct had had no consequences for the appellants. She submitted that the appellants were demonstrably stressed over this period.

[29] Ms Davies submitted that the appropriate penalty would comprise an order for censure, an order that Mr Drumm refund the difference between commission agreed to by the appellants and that charged (which she calculated as being \$1,666.93), and an order that he pay a fine with a starting point of \$5,000, adjusted to reflect the commission refund and any mitigating factors accepted by the Tribunal.

## **Discussion**

[30] Both the submissions by Mr Baker and those on behalf of Mr Drumm (including Mr Drumm's affidavit filed with the penalty submissions) include matters that are not relevant to the issue of penalty.

[31] Mr Baker's submissions relate in large part to elements of the appellants' complaint in respect of which the Tribunal did not make findings against Mr Drumm. Penalty is to be determined on the basis of the conduct where Mr Drumm was found to have breached his professional obligations, not on the basis of allegations of breaches which have not been found proved.

[32] The submissions for Mr Drumm are critical of some of the Tribunal's findings (for example, its finding in respect of a statement taken from the appellants' neighbour). Such submissions are not relevant to the issue of penalty. Nor are they consistent with the submission that Mr Drumm accepts the Tribunal's findings.

[33] In his affidavit Mr Drumm made a number of statements in relation to his dealings with the appellants. Those statements might appropriately have been made in submissions to the Tribunal, but are not appropriate in penalty submissions. The Tribunal notes that Mr Drumm did not attend the first Tribunal hearing, and did not make any submissions for the second Tribunal hearing.

[34] Further, both Mr Baker's and Mr Drumm's submissions are critical of each other. In neither case do the submissions assist in determining the appropriate penalty orders to address Mr Drumm's breaches of the Act and Rules.

[35] The Tribunal agrees with Ms Davies' submission that the focus must be on the unsatisfactory conduct found by the Tribunal. We also agree with her submission that whatever the personality characteristics or conduct of their clients and customers, licensees must comply with their professional obligations.

### *Evidence*

[36] It is useful to set out the evidence in relation to Mr Drumm's breaches.

#### *(1) Breaches of ss 126(1)(c) and 132 of the Act and rr 9.7 and 10.6 of the Rules*

- [a] Mr Drumm agreed that the appellants told him he had to match another agency's "flat fee" of \$10,000 plus GST, but said they eventually agreed to pay commission at 1.8 per cent. There was no mention of a 1.8 per cent fee in Mr Drumm's emails to the appellants, and it appeared as a handwritten insertion (not initialled) in the agency agreement. The Tribunal found that Mr Drumm did not make it clear to the appellants that they were agreeing to a 1.8 per cent commission structure.
- [b] The Tribunal accepted the appellants' evidence that Mr Drumm did not leave a copy of the agency agreement with them after it was signed, and they did not have a copy of it until they asked for it after an open home on 17 December 2017.
- [c] The Tribunal also accepted that as the appellants were not given a copy of the agency agreement, they were not given the opportunity to obtain legal advice.

(2) *Breaches of rr 6.4 and 9.4*

- [d] Mr Drumm accepted that the appellants had advertised the property on TradeMe with an expected sale price of \$600,000. The Tribunal noted that this was at the mid-point of Mr Drumm's appraisal range for the property. The Tribunal found that the on-line marketing conveyed the very clear message that the property could be purchased for less than the appellants' expectation, and that a revised version of the marketing (correcting an incorrectly stated RV) invited prospective purchasers to "forget all previous price expectations".
- [e] Regarding the neighbour's statement, the Tribunal recorded that the appellants provided his details to the Authority, but these were not passed to the investigator. The neighbour was spoken to during the second investigation, by which time 11 months had passed since he had attended an open home at the property. His evidence (that Mr Drumm "was lowballing what the [appellants] wanted" and "was offering a lower price") was set out in a typed-up record made by the investigator.
- [f] The record of the neighbour's statement was available to Mr Drumm before the second Committee decision. He said he did not recall the neighbour referred to and would not have made a statement as to what a property could be purchased for.
- [g] The Tribunal was satisfied that Mr Drumm had breached r 6.4 (by misleading a customer), and breached r 9.4 (by misleading customers as to the appellants' price expectations).

(3) *Breach of r 9.1*

- [h] The Tribunal accepted the appellants' evidence that they made it clear to Mr Drumm that they did not want him to emphasise the property's RV, which they considered did not take into account recent renovations. Mr Drumm did not suggest that he provided the marketing material to the

appellants for their approval in advance. His evidence was that the appellants agreed to a “highly motivated vendors” marketing strategy, but that was not what the marketing material said.

- [i] Further, it was clear from the communications from the appellants to Mr Drumm that they were not happy with his marketing strategy, and asked him to take it down, but he did not do so. The Tribunal was satisfied that in pursuing his marketing strategy Mr Drumm failed to act in accordance with the appellants’ instructions, in breach of r 9.1.

*Assessment of seriousness of unsatisfactory conduct*

[37] 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 being 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.<sup>13</sup>

[38] We assess Mr Drumm’s unsatisfactory conduct as being at a moderate level of seriousness. We have concluded that the appropriate penalty is an order for censure, an order for a partial refund of commission, and an order to pay a fine.

*Refund of commission*

[39] We do not accept Mr Baker’s submission that Mr Drumm should be ordered to refund the entire commission. We accept the submissions for Mr Drumm and the Authority that the refund should be limited to the difference between the \$10,000 plus GST the appellants agreed to and the amount they were charged (\$11,449.50 plus GST). We agree with Ms Davies’ calculation that the difference is \$1,666.93. We have concluded that Mr Drumm should be ordered to refund commission in the sum of \$1,666.93.

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<sup>13</sup> See *Railton v Real Estate Agents Authority (CC 1904)* [2021] NZREADT 02, at [34].

### *Fine*

[40] The Tribunal is satisfied that Mr Drumm’s breaches of his professional obligations require that he be ordered to pay a fine. In the light of the nature of the breaches, the appropriate starting point is a fine of \$5,000. We accept that appropriate reductions should be made for the fact that Mr Drumm has no previous disciplinary findings against him, and for the steps he has taken to change his procedures so as to ensure compliance with his obligations in the future.

[41] It is also appropriate that the fine should reflect the fact that Mr Drumm is being required to refund part of the commission. However, orders for refund of commission and fines serve different purposes. A commission refund directly addresses the impact of a licensee’s conduct on the client. A fine addresses the purposes and principles of penalties, which include both specific and general deterrence. While it is appropriate to give consideration to the overall financial impact of the penalties imposed, it would not generally be the case that an order to refund commission should result in a “dollar for dollar” reduction in a fine ordered.

[42] We have concluded that the appropriate order, that takes into account the purposes of the Act, the principles as to penalty, and the mitigating factors referred to above, is that Mr Drumm is ordered to pay a fine of \$2,500. We are satisfied that this is the least restrictive penalty that is appropriate.

### *Application for costs*

[43] Section 93(1)(i) of the Act provides that an order may be made that a licensee pay to a complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee. A claim for an order for costs would have to be supported by evidence as to the nature and quantum of the costs or expenses in order to establish that the costs or expenses have been “incurred”.<sup>14</sup>

[44] While Mr Baker submitted that “significant amounts of time” had been spent “preparing, responding, and gathering evidence” over the past two years, he did not

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<sup>14</sup> See *Clough v Real Estate Agents Authority (CAC 520)* [2020] NZREADT 2, at [39].

submit any evidence as to any particular “costs or expenses” incurred. There is therefore no basis on which the Tribunal could consider making an order for payment by Mr Drumm. Further, if there were such evidence, the Tribunal would take into account that the appellants did not succeed in all aspects of their appeal.

[45] Accordingly, the Tribunal declines to make any order for costs.

### **Application for prohibition on publication**

[46] Mr Drumm has sought an order prohibiting publication of his name and those of the other two second respondents. The Tribunal will address that application in a Ruling which will be issued at the same time as this decision.

### **Orders**

[47] The Tribunal makes the following orders:

[a] Mr Drumm is censured.

[b] Mr Drumm is ordered to pay the appellants \$1,666.93 as part-refund of commission. This payment is to be paid to the appellants within 20 working days of the date of this decision.

[c] Mr Drumm is ordered to pay a fine of \$2,500. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[48] 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.

### **Addendum**

[49] Shortly before this decision was issued, the Tribunal received a communication from Mr Baker, in which he made submissions concerning a telephone call he had made to the Authority after the Committee’s decision was issued on 24 July 2020, and

as to his claim for costs. The Tribunal has considered Mr Baker's submissions and does not consider that any amendment to this decision is required.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Mr N O'Connor  
Member