

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2021] NZREADT 29**

**READT 006/2021**

IN THE MATTER OF                      a charge laid under s 91 of the Real Estate Agents  
Act 2008

BROUGHT BY                              COMPLAINTS ASSESSMENT COMMITTEE  
1901

AGAINST                                      MICHAEL LEE  
Defendant

Hearing:                                      14 June 2021, at Auckland

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

Appearances:                                Ms Z Wisniewski and Mr S Waalkens, on behalf of  
the Committee  
No appearance by or on behalf of Mr Lee

Date of Decision:                            17 June 2021

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**DECISION OF THE TRIBUNAL**

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## **Introduction**

[1] Complaints Assessment Committee 1901 (“the Committee”) has charged Mr Lee with misconduct under s 73(c)(i) of the Real Estate Agents Act 2008 (“the Act”). The Committee alleges that Mr Lee’s failure to comply with a Notice issued under s 85 of the Act (“the s 85 Notice”) constitutes a wilful or reckless contravention of a provision of the Act.

[2] The Tribunal records that Mr Lee did not appear at the hearing, in person or by counsel. The Tribunal is satisfied that Mr Lee had notice of the date, venue and starting time of the hearing and failed to provide any explanation as to his non-appearance. The Tribunal determined that the hearing could proceed by way of formal proof, on the basis of an affidavit sworn by an Authority investigator, Mr Callahan, and submissions by counsel for the Committee.

## **Factual background**

[3] At all relevant times Mr Lee was the holder of a salesperson’s licence under the Act.

[4] On 13 March 2020 the Committee decided pursuant to s 78(b) of the Act to inquire into and investigate whether he had carried out real estate agency work in respect of the sale and purchase of the property at 40 B Buckley Road, Epsom, Auckland (“the 40 B property”), outside the scope of his real estate salesperson’s licence. Mr Callahan advised Mr Lee of the Committee’s decision on 20 March 2020 and he was asked to provide (by 3 April 2020) a written response or explanation of the matters raised by the Committee, and to provide any documents in his possession relating to the sale and purchase of the 40 B property.

[5] Mr Lee requested and was granted extensions of time until 12 May and 19 May, but did not respond until 27 May 2020. His response referred to a property at 40 A Buckley Road, but did not address the 40 B property.

[6] On 4 June 2020, Mr Callahan advised Mr Lee that the investigation concerned the 40 B property, not the property at 40 A Buckley Road. Mr Callahan provided Mr Lee with a file note of a statement by the vendor of the 40 B property, referring to a commission paid to Mr Lee, and asked Mr Lee to comment on the vendor's statement and to provide copies of the agreement for sale and purchase, the invoice for commission, and any correspondence with the vendor, purchasers, or their solicitors relating to the 40 B property. Mr Lee's response was required by 9 June 2020.

[7] Mr Lee did not respond by 9 June 2020, and was given extensions of time to respond until 8 July 2020 and 17 July 2020. On 17 July 2020 Mr Lee sent a letter in response to the vendor's statement, but did not provide any of the documents requested. On 28 July 2020 Mr Callahan emailed Mr Lee requesting copies of the agreement for sale and purchase and commission invoice, for the 40 B property, to be provided by 31 July 2020. Mr Lee did not respond by that date, or at all.

[8] On 22 September 2020 Mr Callahan emailed and posted a s 85 Notice to Mr Lee. The Notice required Mr Lee to produce copies of the agreement for sale and purchase and of the invoice for commission for the 40 B property. The Notice stated that it was required to be complied with within ten working days of the date the Notice was given. The Notice also stated that failure to comply with the Notice without reasonable excuse is an offence under s 148 of the Act.

[9] Mr Lee acknowledged receipt of Mr Callahan's email on 23 September 2020. Mr Lee did not comply with the s 85 Notice either within the required ten working days, or at all, despite further communications from Mr Callahan on 7 and 8 October 2020.

### **Submissions**

[10] Ms Wisniewski submitted that Mr Lee's failure to comply with the s 85 Notice was a wilful breach of the Act, and constitutes misconduct under s 73(c)(i) of the Act. She submitted that the s 85 Notice had been issued as a final resort to obtain the documentation required by the Committee to consider whether Mr Lee had carried out real estate agency work beyond the scope of his licence.

[11] She submitted that Mr Lee's failure to provide the required information showed a disregard of his professional obligations as a licensee under the Act, which should be regarded as a serious matter. She submitted that it would have been clear to Mr Lee from the terms of the Notice that his failure to comply with the Notice would be in breach of his professional obligations.

## **Discussion**

[12] Section 85 of the Act provides that a Complaints Assessment Committee may require any person to produce "any papers, documents, records, or things", if the members of the Committee believe on reasonable grounds that it is necessary to do so to enable it to carry out an inquiry, and the person to whom the Notice is given has failed to comply with previous requests to produce such papers, documents or things within a reasonable time, and the Committee believes on reasonable grounds that it is not reasonably practicable to obtain the required information by any other means.

[13] Section 86 of the Act provides that a person who receives a Notice under s 85 must comply with the Notice in the manner and within the period (being not less than ten working days) specified in the Notice.

[14] The Tribunal is satisfied that the s 85 Notice was validly issued to Mr Lee. As set out in the narration of the background facts earlier in this decision, requests were made that he provide the agreement for sale and purchase and the commission invoice for the 40 B property, he was aware of the requests, and extensions of time were given to him to provide the requested documents, yet he failed to provide them.

[15] The Tribunal is also satisfied that the s 85 Notice was properly served on Mr Lee, and he acknowledged receipt of it. Further, the Tribunal is satisfied that Mr Lee did not comply with the s 85 Notice within the required time, or at all. It is also satisfied that Mr Lee was clearly advised that he was required to comply with the Notice.

[16] In the circumstances, the Tribunal accepts that the Committee has established that Mr Lee has failed to comply with the s 85 Notice and has therefore contravened s

86 of the Act. Mr Lee's failure to comply with the s 85 Notice constitutes a wilful or reckless contravention of a provision of the Act, and is misconduct under s 73(c)(i) of the Act.

## **Orders**

[17] The Tribunal finds Mr Lee guilty of misconduct under s 73(c)(i) of the Act.

[18] The Tribunal was advised that the Authority is taking steps towards cancellation of Mr Lee's salesperson's licence as a result of his non-payment of fees. As the outcome of the process is likely to be relevant to the issue of penalty, the Committee is to file submissions as to penalty within 20 working days of the date of this decision.

[19] A copy of this decision is to be sent to Mr Lee.

[20] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Mr N O'Connor  
Member