BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 35

READT 028/2020

IN THE MATTER OF	a charge laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 1905
AGAINST	DARREN BRADY Defendant

On the papers

Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Ms F Mathieson, Member
Submissions received from:	Mr S Waalkens, on behalf of the Committee Mr R J Hargreaves, on behalf of Mr Brady
Date of Decision:	7 July 2021

DECISION OF THE TRIBUNAL
(PENALTY)

Introduction

[1] In a decision issued on 28 April 2021 ("the substantive decision") the Tribunal found Mr Brady guilty of misconduct under s 73(b) (seriously incompetent or seriously negligent real estate agency work) of the Real Estate Agents Act 2008 ("the Act").[1] The Tribunal has now received submissions as to penalty.

Facts

[2] The Tribunal was provided with an agreed summary of facts. This was summarised in the Tribunal's substantive decision as follows:[2]

> [a] Mr Brady is a licensed agent engaged at Harvey's Real Estate Papakura ("the Agency"). He has a professional relationship with Mr Charles Ma, who is a property developer and director of Karaka & Drury Ltd ("K&D"). K&D is engaged in the substantial "Auranga" development near Drury. Prior to 2016, Mr Brady had acted for Mr Ma and K&D in multiple property transactions.
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> [b] In July 2016 Mr Brady, acting on behalf of Mr Ma, approached the owners ("vendors") of the property at 389 Bremner Rd ("the property") to ascertain if they wished to sell it to K&D. He had been introduced to them following his having acquired a neighbouring property at 415 Bremner Road for K&D. Mr Brady presented the vendors with offers by K&D to buy the property in August 2016, February 2017, May 2017, and early June 2017. With the exception of the offer presented in May 2017 (which was in response to an invitation to tender from the vendors) the offers were presented on Agreements for Sale and Purchase that recorded the Agency's name and Mr Brady as manager and salesperson in the "sale by" section.
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> [c] On 27 June 2017, the vendors entered into a sole agency agreement with Bayleys Real Estate Limited ("Bayleys") to sell the property by tender. The property was listed by Bayleys on or around 6 July 2017. Shortly thereafter, Mr Brady entered into an oral conjunctional arrangement with Bayleys pursuant to which he would receive a share of the commission on the sale if the property were sold to a purchaser introduced by him ("the conjunctional arrangement").
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> [d] On behalf of K&D Mr Brady presented a further offer to buy the property to the vendors, through Bayleys. The offer, for $4 million (inclusive of GST), was accepted on 6 September 2017 and settlement was to be completed on 2 April 2018. The purchaser was recorded on the Agreement for Sale and Purchase as "Karaka and Drury Limited and/or nominee".
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> [e] On 20 March 2018, K&D entered into a Deed of Nomination with Marmitmor Limited ("Marmitmor"), of which Mr Brady is the sole director

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1 *Complaints Assessment Committee 1905 v Brady* [2021] NZREADT 18.

2 Substantive decision, at [2].

> and a 50 percent shareholder, pursuant to which Marmitmor became the purchaser of the property. Marmitmor's purchase of the property was settled on 4 April 2018.
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> [f] Mr Brady did not obtain the vendors' informed consent in the prescribed form for Marmitmor to become the purchaser of the property, as is required by s 134 of the Act, and did not provide the vendors with an independent valuation of the property, as is required by s 135 of the Act.
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> [g] Mr Brady retained his share of the commission ($26,850 plus GST) paid in respect of the sale of the property.

[3] The Committee alleged that Mr Brady had breached ss 134 and 135 of the Act, by failing to obtain the vendors' informed consent in the prescribed form to Marmitmor's acquisition of the property, and failing to provide the vendors with an independent valuation of the property before seeking their consent. The Committee also alleged that Mr Brady had breached rr 5.1, 6.1, 6.2, 6.3, 9.1, and 9.14 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules").

[4] During the hearing Mr Brady accepted that he had breached ss 134 and 135 of the Act and that he had engaged in unsatisfactory conduct. He denied that he had breached the Rules as alleged and denied that his conduct constituted misconduct.

[5] The Tribunal was required to determine whether Mr Brady had carried out real estate agency work for K&D and the vendors both prior to and after the conjunctional arrangement. It found that he was carrying out real estate agency work for K&D prior to the conjunctional arrangement when he approached the vendors and presented offers pursuant to which K&D would buy the property, but was not at the same time also carrying out real estate agency work for the vendors. The Tribunal found that he carried out real estate agency work for both K&D and the vendors after the conjunctional arrangement.[3]

[6] The Tribunal found that Mr Brady:

[a] breached 134 and 135 of the Act, and r 5.1 of the Rules by failing to exercise skill, care, competence, and diligence when carrying out real estate agency work by providing real estate services without an agency

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3 At [47], [48], and [53].

agreement, acting for both the vendors and K&D in the same transaction, and allowing Marmitmor to become the nominated purchaser of the property without complying with ss 134 and 135;[4]

[b] breached r 6.1 by not complying with his fiduciary duties when acting for the vendors and K&D;[5] and

[c] breached r 9.1 by failing to act in his clients' best interests by acting in a position of conflict, failing to inform K&D and the vendors of the extent of the conflict following the conjunctional arrangement, allowing Marmitmor to take the nomination without obtaining the vendors' informed consent or providing the required valuation, and retaining commission after Marmitnor acquired legal title to the property.[6]

[7] The Tribunal did not find that Mr Brady had breached rr 6.2, 6.3 and 9.14 of the Rules.

[8] The Tribunal accepted a submission for the Committee that the authorities supported a finding of misconduct. The Tribunal concluded:[7]

> [81] … Mr Brady told the Tribunal that he had been a real estate agent for 38 years. He is a licensed agent under the Act, and is the principal agent at the Agency, employing 26 people. He was, or should have been, well aware of his obligations under the Act and Rules, yet he gave no thought to the requirements of ss 134 and 135 when he agreed to the nomination of Marmitmor to complete the purchase of the property. Nor did he give any thought to the self-evident conflict of interest he was in and the obligations that arose as a result.
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> …
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> [83] We reject Mr Hargreaves' submission that the fact that all parties knew and accepted that Marmitmor was his company reduces the seriousness of his conduct from misconduct to unsatisfactory conduct. Mr Brady's experience in the industry should have made him aware that the provisions of the Act and Rules and not mere formalities that may be disregarded "by consent".

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4 At [51].
5 At [53].
6 At [59].
7 At [81] and [83].

[9] The Tribunal records that during the hearing, Mr Brady advised that he would repay the vendors' agent the full amount of the commission he received. It has been confirmed that this payment has now been made.

Penalty principles

[10] 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.[8] 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.[9]

[11] 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.

[12] 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.[10]

[13] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As 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);

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8 Section 3(1) of the Act.

9 Section 3(2).

10 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].

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

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

Submissions

[14] Mr Waalkens submitted for the Committee that the evidence shows a total failure by Mr Brady to have regard to fundamental obligations in a situation of obvious conflict. He submitted that ss 134 and 135 place important obligations on licensees where their interests in acquiring property are in direct conflict with the interests of their vendor clients, and the acquisition of client property must occur in the most transparent and informed way possible, which even the most inexperienced licensee would be expected to recognise.

[15] Mr Waalkens submitted that as a highly experienced agent, over a period of 38 years, Mr Brady would have been well aware of his obligations, and his failure to comply with his obligations under ss 134 and 135, and to turn his mind to an obvious situation of conflict, falls well below what is expected of licensees. He submitted that the fact that he obtained a large commission from the vendor as a result of the sale should have been a clear indication to Mr Brady that his position was conflicted. He submitted that Mr Brady's late repayment of the commission is not a mitigating factor, rather, it is the absence of an aggravating factor.

[16] Mr Waalkens further submitted that beyond the breach of the formal requirements of ss 134 and 135, Mr Brady's acquisition of the property demonstrates a preference for his own interests, by ensuring the purchase went ahead, assisting in preserving his business relationship with Mr Ma and K&D, over his duty of loyalty to his vendor clients. He submitted that that conduct is reflected in his breaches of rr 5.1, 6.1 and 9.1 of the Rules.

[17] Mr Waalkens also submitted that Mr Brady did not accept his breach of the Act until late in the hearing of the charges (and then only to the level of unsatisfactory conduct, not misconduct), and his response to the charges changed on a number of key

matters, including his having originally stated that he was acting for the purchaser (K&D), but then denying that he was acting as agent for K&D. Mr Waalkens also referred to a previous finding against Mr Brady by the Tribunal, where the Tribunal found his conduct in advising his vendor client to remove an "as is where is" clause in an auction sale agreement without taking any steps to verify that it was appropriate to do so, and failing to recommend that the client took legal advice, constituted unsatisfactory conduct at the high level of such conduct.[11]

[18] Mr Waalkens referred to the penalties imposed by the Tribunal in the cases discussed in the substantive decision[12] and submitted that Mr Brady's culpability is slightly less serious than that in *Goyal*, but slightly more serious than that in *Reed* and *Zhang*. He submitted that Mr Brady is not entitled to any mitigation on penalty for his admission of his breach of ss 134 and 135 of the Act, or for his refund of commission after the hearing.

[19] He submitted that the appropriate penalty would comprise suspension of Mr Brady's licence for a period of three months, in light of his prior disciplinary history and his failure to take any steps to fulfil his professional obligations in numerous regards during the transaction. He submitted that there are legitimate concerns as to Mr Brady's having favoured his own interest in receiving commission over his duties to his vendor clients, and his conduct raises concerns as to his fitness to hold a licence and his ability to meet the standards of conduct reasonably expected of members of the industry.

[20] In the alternative, Mr Waalkens submitted that a fine of around $12,000 should be imposed, both to denounce Mr Brady's conduct and to meet the objective of deterrence and public protection.

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11 *Complaints Assessment Committee 409 v Brady* [2019] NZREADT 21.

12 *Complaints Assessment Committee 408 v Reed* [2017] NZREADT 34, *Complaints Assessment Committee 414 v Goyal* [2018] NZREADT 3, *Complaints Assessment Committee 403 v Zhang* [2018] NZREADT 54 and *Complaints Assessment Committee 412 v Manvinder Singh* [2019] NZREADT 4.

[21] On behalf of Mr Brady, Mr Hargreaves submitted that the appropriate penalty would comprise an order for censure and a fine in the order of $3,000 to $4,000, potentially with an order to complete further education or training.

[22] Mr Hargreaves submitted that the key assessment is where Mr Brady's conduct fits in the hierarchy of decisions following findings of breaches of ss 134 and 135. He submitted that Mr Brady's conduct is clearly less serious than that of Mr Goyal, who had concealed his involvement from the vendors of two properties, and had a financial involvement with the purchasers while acting for the vendors, and that while there were some similarities, his conduct was less serious than that of Mr Reed and Mr Singh.

[23] Mr Hargreaves submitted that the circumstances of *Zhang* are "as similar as two distinct situations can be" to those of the present case, and a similar penalty should be imposed. He submitted that Mr Zhang, like Mr Brady, was not involved in negotiating the price for the property (which was handled by the listing agent) and had stepped in to take a nomination and buy the property himself when the buyer he had introduced did not want to complete the purchase. He submitted that Mr Zhang's conduct was more serious than Mr Brady's, as Mr Zhang did not disclose his involvement in the purchase at all, and Mr Zhang admitted that his conduct brought the industry into disrepute, in breach of r 6.3.

[24] Mr Hargreaves submitted that Mr Brady should be given credit for having accepted his unsatisfactory conduct at the hearing, and for having returned the commission. He also submitted that the Tribunal should not regard his previous disciplinary finding as an aggravating factor. He submitted that the finding related to Mr Brady's having failed to identify that his vendor-client had misled him about whether a building consent was required for work done at the property being sold.

[25] He also submitted the offending did not involve any dishonesty on Mr Brady's part, or recklessness, but was carelessness, which Mr Brady admitted. He further submitted that Mr Brady should be given credit for the fact that for 37 of the 38 years he has been in the industry he has no disciplinary history, and has been a scrupulous and honest agent.

[26] Finally, Mr Hargreaves submitted that it is pertinent that the Tribunal did not make findings against Mr Brady on alleged breaches of rr 6,2, 6.3 or 9.14. He further submitted that there was no suggestion that Mr Brady had not acted in good faith, or dealt fairly with all parties, either before or after the conjunctional arrangement, that Mr Brady did not expect to have any personal interest in the purchase of the property before Mr Ma's "last resort" request, or that he would receive a commission or other fee from K&D's purchase of the property.

[27] Mr Hargreaves submitted that the penalties proposed by the Committee (suspension or a fine in the order of $12,000) are inconsistent with those ordered by the Tribunal in the cases referred to, and the Committee's comparison of the present case with *Goyal* is inaccurate and unrealistic.

[28] He submitted that suspension is not required to satisfy the penalty principles of the Act and should not be ordered, and that a censure, fine, and order for further education would indicate that failures to comply with ss 134 and 135 of the Act are taken seriously. He submitted that the penalty imposed should be the least punitive penalty that is appropriate in the circumstances, and in the present case the appropriate penalty is an order for censure, a fine of $3,000 and an order to complete training on the management of conflicts, as was ordered against Mr Zhang.

Discussion

[29] The Tribunal's determination of penalty is the end result of its consideration of the circumstances of the licensee's conduct (including any aggravating and mitigating features of that conduct), the licensee's personal circumstances (again, including any aggravating and mitigating features), the circumstances of and penalties imposed in similar types of cases, and its assessment of what is the appropriate combination of the range of penalty orders available to the Tribunal. Given the range of factual and personal circumstances, and the range of available penalty orders, the comparison of one case with another is not a straightforward task. By way of example, whether or not penalty orders include an order for cancellation or suspension of licence is likely to have an impact on the quantum of any fine ordered.

[30] Mr Brady was found guilty of misconduct under s 73(b) of the Act for having breached ss 134/135 of the Act, and for having breached r 5.1, 6.1, and 9.1 of the Rules. We accept Mr Waalkens' submission that the evidence showed that Mr Brady totally failed to have regard to fundamental obligations placed on him by the Act and the Rules. We agree that Mr Brady's conduct fell well short of what is expected of licensees, particularly a licensee with Mr Brady's experience. Mr Brady's conduct is not significantly mitigated by the fact that the vendors knew that Marmitmor was his company when it took the nomination, or that the vendors had their own valuation, or that the price had been negotiated by another agent. Mr Brady should have had regard to his obligations under the Act and Rules and complied with them.

[31] As recorded earlier, counsel made submissions as to the Tribunal's penalty decisions in other cases involving breaches of ss 134 and 135 of the Act. It is appropriate to refer to these decisions in some detail.

Complaints Assessment Committee 414 v Goyal

[32] Mr Goyal was the vendors' agent for two neighbouring properties. Both properties were purchased by a regular client of his, for a development. Mr Goyal negotiated the purchase prices. After agreements for sale and purchase were signed, Mr Goyal paid a substantial sum into his client's bank account. The client was not able to settle the transactions and shortly before settlement a company controlled by Mr Goyal took a nomination or each Agreement for Sale and Purchase and completed settlement.

[33] The Tribunal found that Mr Goyal had at least some financial interest in the development, from the outset. He did not inform either of the two vendors of his financial involvement in the purchases, or his ownership of the nominated purchaser, even informally. He admitted breaches of ss 134/135, and rr 6.1, 6.4, and 9.1. The Tribunal found him also in breach of r 6.3 and found that his conduct amounted to misconduct under s 73(b) of the Act. Mr Goyal was censured, his licence was suspended for six months, and he was fined $4,000.

[34] A distinction between the present case and *Goyal* is that in the present case another licensee was acting for the vendor and negotiated the purchase price. Mr Brady stepped in as purchaser only after all details of the sale had been agreed. Secondly, the vendors in the present case knew who was buying the properties. Thirdly, the Tribunal did not consider that a finding of a breach of r 6.3 was justified against Mr Brady, as there was no evidence that he had or expected to have any personal interest in the purchase of the property before Ma's "last resort" request.

Complaints Assessment Committee 408 v Reed

[35] Mr Reed was the listing agent for a property. He conducted two open homes, after which a prospective purchaser made an offer for the property, which was rejected. Later the same day, Mr Reed telephoned the vendors and asked if they had any objection to his showing the property to his wife. The Tribunal accepted that this was a sudden decision on his part. The vendors consented to Mr Reed's wife viewing the property. A purchase offer was then submitted and accepted by the vendors. No commission was charged. The Tribunal held that Mr Reed had given no thought to his obligations under ss 134 and 135 and found him in breach of those sections, and of rr 10.3 and 9.1. He was censured and fined $10,000.

[36] This case is similar to Mr Brady's in that both licensees advised the vendors of the personal offer to purchase the property but did not complete the required formal process. They differ in that Mr Reed was acting for vendor and negotiated the purchase price when he knew he was intended purchaser. Mr Brady was never in that position as he was not expecting to buy the property when the agreement for sale and purchase was signed.

[37] Further, the Tribunal was concerned at the speed at which Mr Reed's transaction proceeded and doubted that all prospective purchasers had been exhausted before his offer was made. In the present case the property had been on the market for over a year, and a tender process had been completed. We accept Mr Hargreaves' submission that the market had determined the value of the property before Mr Brady contemplated taking the nomination.

Complaints Assessment Committee 412 v Manvinder Singh

[38] This case did not involve a breach of ss 134 and 135. Mr Singh was the listing salesperson for a property. He did not disclose to the vendors that he had a prior relationship with purchaser, or that he had lent money to the purchaser, the purchaser was in financial difficulty, and required a further loan from Mr Singh to enable the purchaser to settle the purchase, where the vendors were committed to the purchase of another property. Singh admitted a breach of s 136 of the Act (which required him to make disclosure of the fact that he might benefit financially, other than by way of commission, from the transaction), and admitted misconduct under s 73(b). He was censured, ordered to pay a fine of $5,000, and ordered to complete further education.

[39] There is a similarity between Mr Singh's conduct and Mr Brady's, in that Mr Singh, like Mr Brady, provided funding to enable settlement as a "last resort". There is a difference in that Mr Singh was the listing agent and had a financial involvement with the purchase as a result of the loans made to him.

Complaints Assessment Committee 403 v Zhang

[40] Mr Zhang was not the listing agent but introduced the prospective purchaser of a property whose purchase offer was accepted. The price negotiations were carried out by the listing agent, not Mr Zhang. The purchaser then said he did not want to complete the purchase and Mr Zhang decided ten days before settlement that he and his wife would buy the property. Mr Zhang's wife took a nomination of the agreement for sale and purchase. Mr Zhang did not inform the vendor and did not complete the 134 and 135 requirements. Mr Zhang admitted breaches of ss 134 and 135, and of r 6.3. The Tribunal found Mr Zhang guilty of misconduct under s 73(b). He was censured and ordered to pay a fine of $3,000.

[41] The similarity between the present case and *Zhang* is that Mr Zhang was not involved in price negotiations for the property, and that he had no interest in purchasing the property until the prospective purchaser said he did not want to complete the purchase. The two cases differ in that the vendors in the present case

were aware that Marmitmor was buying the property while in *Zhang* they were not, and Mr Zhang admitted a breach of r 6.3.

[42] In assessing the seriousness of Mr Brady's conduct we take into account that price negotiations with the vendors were undertaken by a different agency, and that Mr Brady had no personal interest (other than as agent for K&D and Mr Ma) prior to the agreement for sale and purchase being entered into. He became personally involved when K&D was having difficulties as to settlement and he was asked, as a last resort, if Marmitmor could complete settlement. However, as noted in the Tribunal's substantive decision, Mr Brady had ample time to consider what his obligations were before executing the nomination and completing settlement.[13] Further, it does not significantly mitigate the seriousness of his conduct that all parties knew and accepted that Marmitmor was his company.[14]

[43] Mr Brady did not acknowledge his breaches until well into the hearing of the charges against him, and when he did so it was only at the level of unsatisfactory conduct. Further he did not offer to repay the commission until late in the hearing. In these respects, he differs from Mr Zhang, who acknowledged his breaches and offered to refund commission promptly after being made aware of his errors. He also differs from Mr Reed, who did not charge commission.

[44] With regard to personal factors, we take into account that Mr Brady has been involved in the industry for many years. However, on the basis of that experience he should have been well aware of his obligations under the Act and Rules, and complied with those obligations.

[45] We note the previous disciplinary finding against Mr Brady. A previous finding against a licensee can be regarded as an indication that personal deterrence is a more significant factor in assessing penalty, if a licensee has previously been reminded of the importance of complying with professional obligations but has not taken heed of that advice. In Mr Brady's case, the conduct that was the subject of the charge against him occurred in June 2015, but he was not charged until August 2018. The matter did

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13 Substantive decision, at [82].
14 Substantive decision, at [83].

not come before the Tribunal until May 2019. Marmitmor took the nomination of the agreement for sale and purchase in the present case in March 2018. While it is reasonable to assume that a Complaints Assessment Committee was considering the earlier matter when Mr Brady was dealing with the present transaction, there was no charge against him at that time, and no finding. Accordingly, we do not place any significant weight on the previous finding.

[46] In the light of the findings against Mr Brady, we have concluded that his conduct should be placed at the medium level of seriousness. Having considered the conduct and the matters referred to above, we have concluded that the appropriate penalty will comprise an order for censure, an order to pay a fine of $4,000, and an order that he complete further training.

Application for costs

[47] As from 14 November 2018, s 110A of the Act has provided as follows:[15]

> **110A Costs**
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> (1) In any proceeding 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.
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> (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–
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> (a) has participated in good faith in the proceedings:
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> (b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:
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> (c) has acted in a manner that facilitated the resolution of issues that were the subject of the proceedings.
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> …

Submissions

[48] Mr Waalkens sought an order pursuant to the Tribunal's power to award costs under s 110A of the Act. He submitted that a licensee found guilty of charges should

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15 Section 110A was inserted by section 244 of the Tribunals Powers and Procedures Legislation Act 2018.

generally (although not invariably) be ordered to make a payment of at least some of the relevant Complaints Assessment Committee's costs in bringing the charges. He submitted that this reflects the purposes of the Act, in particular accountability through the disciplinary process, and recognises that the costs associated with charges proceedings are born by members of the industry.

[49] Mr Waalkens submitted that an order requiring Mr Brady to pay a reasonable contribution towards costs is appropriate in this case. He provided a statement as to costs, which records total fees (exclusive of GST and disbursements) of $21,559.00, and submitted that an order for a contribution of 50 percent ($10,779.50) of the Committee's actual costs would be appropriate.

[50] Mr Hargreaves acknowledged the Tribunal's jurisdiction to order costs, and its broad discretion. He submitted that the Tribunal should consider the same mitigating factors as put forward as to penalty, that is, that Mr Brady had no intention of being nominated as purchaser at the time the agreement for sale and purchase was signed, the vendors were aware of the nomination to Marmitmor and have not made a complaint, and that he has refunded his share of the commission.

[51] He also submitted that the present case differs from the cases addressed by counsel, in that neither the vendors nor the original purchaser made a complaint about Mr Brady, and the costs the Authority has incurred followed its own decision to inquire. He also submitted that an order for costs of $10,000 would have the practical effect of almost doubling the fine sought by the Authority.

Discussion

[52] The Tribunal is given a discretion as to orders for costs. That discretion is to be exercised in accordance with the Act, on the particular circumstances of the case before the Tribunal. In his judgment in *TSM v A Professional Conduct Committee*, his Honour Justice Palmer set out established principles as to orders for costs in professional disciplinary proceedings, as follows:[16]

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[16] *TSM v A Professional Conduct Committee* [2015] NZHC 3063, at [21], citing *Vatsayann v Professional Conduct Committee of The New Zealand Medical Council* [2012] NZHC 1138, at [34].

(a) professional groups should not be expected to bear all the costs of the disciplinary regime;

(b) members who appeared on charges should make a "proper contribution" towards costs;

(c) costs are not punitive;

(d) the practitioner's means, if known, are to be considered;

(e) a practitioner's defence should not be deterred by the risks of a costs order; and

(f) in a general way 50 percent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

[53] We accept that the Committee's legal costs of $21,559.00 are reasonable.

[54] It is appropriate that an order for costs is made in the present case. We do not accept Mr Hargreaves' submission that the fact that the Committee's inquiry did not follow a complaint by a client or customer should be a factor in the Tribunal's decision. The Committee was properly exercising its jurisdiction under the Act in inquiring into the matter, irrespective of how it came before it.

[55] The issue of costs did not arise in any of *Goyal*, *Reed*, *Zhang*, or *Singh*. Section 110A was not in the Act at the time of the first three decisions, and had only recently come into effect at the time submissions were made in *Singh*. Those decisions therefore have no relevance in considering the quantum of an order for costs in the present case. Further, orders for costs serve different purposes from fines. An order to pay a fine addresses the principles and purposes of penalties, which include both specific and general deterrence, while an order for costs recognises the principle that members of professional groups should not be expected to bear the full costs of the disciplinary regime.

[56] It was not submitted that Mr Brady would not be able to meet an order for costs, and a defended hearing was required, occupying two days. We are not persuaded that there are grounds for anything beyond a modest reduction from the starting point of an order to pay 50 percent of the Committee's costs.

Orders

[57] The Tribunal orders as follows:

[a] Mr Brady is censured and ordered to pay a fine of $4,000. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[b] Mr Brady is ordered to undertake further training by completing Unit Standards 23136 ("Demonstrate knowledge of consumer protection law related to real estate practice") and 23149 ("Demonstrate knowledge of licensing and code of professional conduct under the Real Estate Agents Act 2008") within six months of the date of this decision.

[c] Mr Brady is ordered to pay $10,000 to the Authority as contribution towards the Committee's costs. The payment is to be made to the Authority within 20 working days of the date of this decision.

[58] 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