BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 36

READT 002/2021

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 1907
AGAINST	BRUCE ANDREW LINDSAY Defendant
Hearing	24 May 2021 (further submissions received after the hearing)
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Mr N O'Connor, Member
Appearances:	Mr T Wheeler, on behalf of the Committee Ms P Allan and Ms G Moore, on behalf of Mr Lindsay
Date of Decision:	13 July 2021

DECISION OF THE TRIBUNAL
(Charge and Penalty)

Introduction

[1] Mr Lindsay has admitted two charges of misconduct:

[a] First charge: under s 73(b) (seriously incompetent or seriously negligent real estate agency work) of the Real Estate Agents Act 2008 ("the Act"), in relation to his failure to properly supervise a salesperson; and

[b] Second charge: under s 73(c) (wilful or reckless contravention of a provision of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), in relation to his failure to report to the Authority his suspicion that a salesperson may have been guilty of misconduct.

[2] An agreed summary of facts has been filed and the hearing was for the purpose of hearing penalty submissions. At the hearing, timetable directions were made for counsel for the parties to file further submissions in relation to applications by Mr Lindsay and the Committee for orders for costs, and an application by Mr Lindsay for an order restricting publication.

Relevant background

[3] Mr Lindsay is a licensed agent. Between 2000 and 2016 he was involved in the management of Phoenix Real Estate Ltd ("the Agency"). Pursuant to section 50 of the Act he was, as from 17 November 2009,[1] responsible for supervision of Ms Shirley Johnston, a licensed salesperson engaged by the Agency. The Tribunal was advised that Mr Johnson is no longer working with or involved in the Agency.

[4] Between 2007 and 2015 the Selwyn District Council ("the Council") developed and sold industrial and commercial sections at its Izone Business Park in Rolleston. The Council outsourced its management of Izone sales to Hughes Development Ltd (HDL). HDL sold land directly and through real estate licensees. If a purchaser were

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1 Section 50 of the Act came into force on 17 November 2009: see s 2 of the Act.

introduced through a real estate licensee, a commission would be payable for the introduction.

[5] Mr Stephen Gubb was contracted to HDL to oversee the Izone subdivision sales and administration. He was the first point of contact for purchasers and was in charge of negotiating sales prices and commission payments. Ms Johnston is Mr Gubb's wife. Between March 2007 and July 2015, 15 Izone sections were claimed to have been sold after an introduction by Ms Johnston ("the Izone transactions"). The Agency invoiced, received, and disbursed the commissions claimed for the introductions.

[6] In 2016 the Serious Fraud Office ("SFO") initiated an investigation into Mr Gubb in relation to the Izone transactions. It was alleged that Mr Gubb together with Ms Johnston had submitted false invoices to the Council, on the basis of introductions which had not occurred. The investigation found that 13 of the transactions involved false commission invoices.

First charge

[7] Section 50 of the Act provides

> **50 Salespersons must be supervised**
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> (1) A salesperson must, in carrying out real estate agency work, be properly supervised and managed by an agent or a branch manager.
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> (2) In this section **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure–
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> (a) that the work is performed competently; and
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> (b) that the work complies with the requirements of this Act.

[8] The SFO investigation disclosed that Ms Johnston had filed incomplete and inadequate documentation through the Agency, including:

[a] Only eight of the 13 fraudulent transactions had listing agreements;

[b] There was no evidence of written appraisals for any transaction;

[c] Listing agreements for several transactions did not have a basis for calculation of commission and/or were not signed by Ms Johnston or the Agency and/or were completed on the Agency's residential forms when the Izone properties were industrial or commercial;

[d] By an email dated 16 August 2012, Ms Johnston sent Mr Lindsay a copy of a listing authority in respect of lot 31 to which he responded querying the basis for calculation of commission. The Committee submitted that as a result of that email, Mr Lindsay was aware of at least one instance of an incomplete listing agreement.

[9] The Committee alleged that Mr Lindsay had a duty to supervise Ms Johnston in relation to the work performed on the Izone transactions, to ensure that the work was performed competently and complied with the requirements of the Act, and that he failed to do so. The Committee alleged that Mr Lindsay's failure to supervise Ms Johnston constituted seriously incompetent or seriously negligent real estate agency work, and thus misconduct under s 73(b) of the Act. In the alternative, the Committee alleged that it constituted unsatisfactory conduct under s 72 of the Act.

[10] Mr Lindsay gave evidence at the hearing. He told the Tribunal that while he had a general day to day overview of Ms Johnston's activities, he did not see her diary each day, he was not made aware of each individual sale and he was not aware that she was receiving commissions from the Council for Izone sales.

[11] Mr Lindsay was asked whether the Agency had a general listing agreement for Izone. He could not recall whether it did. He accepted that there were individual listing agreements for some properties but said there could still have been a general listing. He accepted that he should have known what the listing arrangements were.

Submissions

[12] Mr Wheeler submitted for the Committee that Mr Lindsay had been put on notice as to the inadequate documentation (shown by his email to Ms Johnston on 16 August 2012), and this should have been a red flag indicating the need for closer supervision.

He submitted that Mr Lindsay's approach to his supervision role was clearly inadequate, and that he had exercised significantly poor judgment when assessing the required intensity of supervision required to ensure that Ms Johnston's work was competent and compliant with the Act.

[13] He submitted that the obligation under s 50 is a vehicle for consumer protection, by providing a safeguard in the form of experienced licensed agents in place to appropriately manage and supervise salespeople. He submitted that a failure to meet supervision obligations cuts across the consumer-protection purpose of the Act and falls well short of the expectations of experienced licensees.

[14] Ms Allan submitted for Mr Lindsay that he accepted he should have been aware that Ms Johnston had filed numerous incomplete documents relating to the Izone transactions. However, she submitted, Mr Lindsay was not in fact aware of them, and as an experienced salesperson (since 2005), Ms Johnston did not require the same level of supervision as a new salesperson would, and relevant documents were reviewed by other staff members in the Agency's office and by outside people dealing with the transactions. She submitted that Ms Johnston had taken advantage of the trust Mr Lindsay had in her.

[15] Ms Allan also submitted that the supervision obligation under s 50 of the Act (which came into effect as from 17 November 2019) did not apply for the entire period of the Izone transactions. She submitted that out of the 15 transactions between 2007 and 2015 (referred to in paragraph [6], above) some occurred after s 50 came into effect.

Finding

[16] In its decision in *Maserow v Real Estate Agents Authority (CAC 404)*, the Tribunal said in respect of supervision under s 50 of the Act:[2]

> Supervision must be actual, it must be tailored to the circumstances of the agent and the property being sold, it must involve active involvement by the branch manager with the agent(s), including a knowledge and understanding of the issues with each of the properties being sold by the

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2 *Maserow v Real Estate Agents Authority (CAC 404)* [2016] NZREADT 19, at [25].

> agency, if any. … Agencies must demonstrate that agreements which are drafted by all agents are well written and the clauses on their face sensible and understandable. The branch manager should be alert to identifying potential problems rather than waiting for a possibly inexperienced agent to identify them. At regular meetings of staff branch managers should ask questions to elicit matters which might be of concern such as issues with the boundary, lack of code compliance, and disclosure of known defects and issues with the LIM. All of these matters should be considered by the branch manager and agent when a property is listed for sale and in regular reviews relating to the sale process.

[17] Supervision is an active process, and in order to comply with s 50, it involves being aware of what salespersons are doing, how they are performing their duties, and whether they are complying with their obligations under the Act and Rules. As part of the supervision process a supervising licensee should, among other things, see the relevant listing authority in order to ensure that it is in order.

[18] In the light of the admitted facts, and his admissions, we find Mr Lindsay guilty of misconduct under s 73(b) of the Act under the first charge, in that his failure to provide effective supervision of Ms Johnston constituted seriously incompetent or seriously negligent real estate agency work.

Second charge

[19] Rule 7.2 of the Rules provides that:

> A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct must make a report to the Authority.

[20] On or around 28 June 2016, the Agency received a notice from the SFO (pursuant to s 9 of the Serious Fraud Office Act 1990) requiring it to produce documents relating to Izone transactions. Among other things, it required the Agency to provide details of all commission payments received, and of all commission payments to Ms Johnston, in relation to the sale of land or buildings in the Izone development. Mr Lindsay was interviewed twice in the course of the SFO investigation.

[21] Ms Johnston resigned from the Agency on 28 September 2016. At the time, she assured the Agency that she had acted transparently, honestly, and legally when acting on behalf of Mr Gunn in relation to Izone sales.

[22] On or about 2 November 2016 the Council gave notice to the Agency that Ms Johnston had not introduced any purchasers for the Izone transactions, and requested reimbursement of commissions paid out in relation to those transactions. The Agency and the Council entered into a settlement agreement on 3 March 2017 which involved reimbursement of the commissions for all but two of the sales claimed to have been initiated by Ms Johnston, without the Agency accepting liability.

[23] On 11 July 2018, Ms Johnston pleaded guilty to a representative charge of obtaining by deception under s 240(1)(a) of the Crimes Act 1961.

[24] On 13 May 2019, the Agency obtained an order for summary judgment against Ms Johnston for the recovery of commissions paid to her.

[25] On 6 June 2019, the Real Estate Authority contacted the Agency and Mr Lindsay concerning their involvement with the Izone development and Mr Lindsay's supervision.

[26] The Committee alleged that as from 28 June 2016 (when the Agency received the notice requiring it to produce documents to the SFO), Mr Lindsay had reasonable grounds to suspect that Ms Johnston may have been guilty of misconduct, but did not at any time prior to 6 June 2019 (when the Authority contacted him) make any report to the Authority notifying it that he had reasonable grounds to suspect that Ms Johnston had been guilty of misconduct.

[27] The Committee alleged that Mr Lindsay's failure to make a report was a wilful or reckless contravention of r 7.2, and therefore misconduct under s 73(c)(iii) of the Act. In the alternative, the Committee alleged that his failure to report constituted seriously incompetent or seriously negligent real estate agency work, and was therefore misconduct under s 73(b) of the Act.

[28] In response to the charge, Mr Lindsay said that at all times prior to Ms Johnston pleading guilty to the SFO charges he understood that he was prohibited by s 41 of the Serious Fraud Office Act (and as set out in the SFO notice) from making a report to

the Authority as required by r 7.2. He also recorded that the Agency had repaid all disputed commissions to the Council.

[29] Mr Lindsay also said that he did not discuss his obligations under the Rules with the SFO, or take steps to clarify that he was unable to report Ms Johnston to the Authority, as the SFO had advised him that he might be required to give evidence at trial and must keep all matters relating to its investigation confidential.

[30] In his evidence at the hearing, Mr Lindsay said that the response to the SFO notice was handled by an office administrator who knew the filing system and had the paper files. He did not personally retrieve the files. He accepted that he should have raised his obligations under r 7.2 with the SFO. He said that after Ms Johnston resigned, he failed to turn his mind to r 7.2.

[31] Mr Lindsay also said that he had provided the funds for the Agency to reimburse the Council for commissions paid to Ms Johnston.

Submissions

[32] Mr Wheeler submitted that Mr Lindsay's failure to make a report to the Authority constituted a reckless breach of his obligation under r 7.2, and was serious.

[33] He submitted that there were several trigger points where Mr Lindsay had reasonable grounds to suspect that Ms Johnston had been guilty of misconduct; most significantly when the SFO notice was served, but also when put on notice of incomplete documentation, when the Council demanded reimbursement of commissions, when proceedings were issued against Ms Johnston, and when the SFO laid charges against Ms Johnston. He submitted that the severity of the consequences of Ms Johnston's conduct should have stood out to Mr Lindsay, and conveyed the importance of the reporting obligations. He submitted that Ms Johnston's conduct did not simply constitute substandard filing of requisite paperwork, but was rather an instance of a persisting and calculated fraud for the purpose of obtaining commission to which she was not entitled.

[34] Mr Wheeler further submitted that if it is accepted that Mr Lindsay understood that he was prohibited from disclosing information on the basis of the SFO notice, a reasonable licensee in those circumstances would have made efforts to reconcile his reporting obligation with any confidentiality required by the SFO. He submitted that Mr Lindsay could have made a report after Ms Johnston pleaded guilty to the charge against her, which ended the need for confidentiality. He submitted that Mr Lindsay's failure to take any steps to confirm whether he was not able to make a report to the Authority, and then not make a report after Ms Johnston pleaded guilty, was reckless.

[35] Ms Allan submitted that Mr Lindsay reasonably believed he was prohibited from making a report to the Authority, as a result of the advice in the SFO's letter accompanying the notice that:

> The information supplied in the notice is confidential information and relates to the exercise of a power conferred under Part 2 of the SFO Act. This means that the information is protected by the secrecy provisions of section 36 of the SFO Act and, in accordance with s 41 of the Act you must not disclose that information in any way whatsoever to any other person (other than your legal adviser) unless so authorised by the Director. If you do disclose the information in breach of s 41 you may be liable to a fine of $5,000.

[36] She also submitted that although the Agency submitted information to the SFO, Mr Lindsay did not review it himself, and was not aware of Ms Johnston's conduct when the SFO first contacted the Agency in June 2016. She further submitted that when Mr Lindsay was interviewed by the SFO in February 2019, he was told to keep matters relating to the investigation secret as he might be required to give evidence at trial. She submitted that as a result, Mr Lindsay understood that the requirement for confidentiality would continue until charges had been laid against Ms Johnston and a trial had taken place.

[37] At the hearing, Ms Allan submitted that Mr Lindsay accepted that he did not take any steps to clarify with the Director whether he could make a report to the Authority and thus comply with his obligation under r 7.2. He also acknowledged that after Ms Johnston resigned from the Agency and was no longer working as a real estate salesperson, he failed to turn his mind to his obligation to make a report.

Finding

[38] We accept the Committee's submission that at the latest from the time he was interviewed by the SFO, Mr Lindsay had reasonable grounds to suspect that Ms Johnston had been guilty of misconduct, and he was required under r 7.2 to make a report to the Authority. He should (as he acknowledged) have advised the SFO of his obligation to make a report, and sought the Director's authority to enable him to comply with his obligation, on a confidential basis.

[39] However, we are not satisfied that the Committee has established that Mr Lindsay's failure to make a report under r.7.2 was wilful or reckless. Rather, it resulted from his mistaken belief that he was prohibited by the SFO Act from making a report, and his failure to seek authority to make a report. Then, after Ms Johnston resigned from the Agency, Mr Lindsay did not turn his mind to the issue. We find Mr Lindsay guilty of misconduct on the Committee's alternative charge, under s 73(b) of the Act (seriously incompetent or seriously negligent real estate agency work).

Penalty

Principles as to penalty

[40] 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".[3] 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.[4]

[41] 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.

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3 Section 3(1) of the Act.
4 Section 3(2).

[42] 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.[5]

[43] 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;

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

Submissions

[44] Taking both charges cumulatively, Mr Wheeler submitted that Mr Lindsay's conduct was at the mid to upper level of misconduct. He submitted that a strong message should be sent to all licensees as to the importance of supervising and managing salespeople, and of complying with the mandatory reporting provision in r 7.2. He submitted that all licensees have an obligation to assist in the effective and timely regulation of the industry, and this can only be achieved through licensees meeting their reporting obligations.

[45] Mr Wheeler submitted that the starting point for Mr Lindsay's penalty should be an order for censure and a fine of approximately $10,000. He acknowledged that a "modest credit" would be appropriate to recognise that the conduct which is the subject of the charges occurred between six and ten years ago, that Mr Lindsay has no disciplinary history, and that he accepted the charges at the earliest opportunity.

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5 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].

[46] He noted that the Agency had ensured that there had been full repayment of the fraudulent commissions to the Council, and that the Agency has been unable to recover the portion of the commission paid to Ms Johnston. He submitted that as the Agency and Mr Lindsay are separate entities, this factor is of limited value in determining the appropriate penalty order.

[47] Mr Wheeler submitted that having regard to the nature and gravity of Mr Lindsay's conduct, the relevant personal factors, and the purposes and principles of penalties in disciplinary proceedings, the appropriate orders would be an order for censure and an order that Mr Lindsay pay a fine in the range of $4,000 to $6,000.

[48] Ms Allan submitted that there is no need to consider personal deterrence in determining the penalty to be imposed in this case, as Mr Lindsay is no longer responsible for the management of the Agency and has not been involved in sale transactions for some time, he is no longer responsible for the supervision of any salespersons, and he has suffered significant financial loss and a great deal of shame and embarrassment in the community as a result of his conduct. She submitted that this in itself is a sufficient deterrent.

[49] Ms Allan submitted that at all times Mr Lindsay acted co-operatively and in good faith in his dealings with the Authority, has shown remorse for his conduct and accepted the charges at the earliest opportunity, and has suffered financial loss by having funded the settlement with the Council via the Agency. She also submitted that there is no threat to the interests of any consumers, as Mr Lindsay has stepped down from supervision of salespersons and management of the Agency, as he did not want to bring the Agency into disrepute.

[50] Ms Allan further submitted that Mr Lindsay has an exemplary record and has not been the subject of any complaints or disciplinary process or findings throughout his 30-year career in the industry, and the conduct occurred between six and ten years ago. She also submitted that the Tribunal should take into account the fact that the Committee chose to take no action against Ms Johnston or the Agency. She noted that a key reason for not charging the Agency was the time that had elapsed since the

relevant conduct, yet despite the fact that the same amount of time had elapsed since that conduct, the Committee had chosen to lay charges against Mr Lindsay.

[51] In the light of the matters set out above, Ms Allan submitted that the appropriate penalty would be an order for censure of Mr Lindsay, with no order to pay a fine.

Discussion

[52] It is appropriate to consider Mr Lindsay's conduct as a whole, taking into account his admissions of a failure to provide effective supervision of Ms Johnston, and his failure to make a report to the Authority under s 72.

[53] We accept that s 50 of the Act applied as from 17 November 2009, and that some of the transactions occurred between then and 2015. Mr Lindsay accepted at the hearing that his supervision of Ms Johnston was inadequate.

[54] Both counsel referred in their submissions to the penalties imposed in *Complaints Assessment Committee 412 v Grewal*.[6] In that decision the Tribunal imposed penalties on Mr Voordouw and Mr Mason (both licensed agents) who were found guilty of misconduct under s 73(b) of the Act after they failed to make reports under r 7.2 about Mr Grewal when they were made aware that approximately $1 million was missing from the Agency's trust account.

[55] The Tribunal found that there were a number of "trigger points" after the initial discovery of the missing money at which a reasonable licensee would have concluded there were reasonable grounds to suspect that Mr Grewal had been guilty of misconduct. It also found that the agents could not rely on the agency's auditor to take steps, and had wrongly given Mr Grewal a chance to remedy the situation, waited to advise the agency's franchisor before taking action, and relied on solicitors' advice (as reported by Mr Grewal) that they were "doing the right thing".

[56] The Tribunal placed the agents' conduct in the upper range of serious misconduct. Both had had long careers in the real estate industry and had contributed

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6 *Complaints Assessment Committee 412 v Grewal* [2018] NZREADT 70.

significantly to the industry. There had been significant personal and financial implications for both agents as a result of the charges. Neither had previously faced any form of disciplinary action. The Tribunal accepted that the finding of misconduct would be a significant penalty in itself.

[57] Orders for censure were made against both agents. Mr Voordouw (who had been found guilty on a charge of misconduct under s 73(b) in relation to signing incorrect trust account reconciliations as well as the charge of failing to make a report under r 7.2) was ordered to pay a fine of $6,000 (reduced from a starting point of $8,000 for personal mitigating factors). Mr Mason was ordered to pay a fine of $4,000 (reduced from a starting point of $6,000).

[58] Mr Wheeler submitted that Mr Lindsay's conduct was of similar severity to that of Mr Voordouw. Ms Allan submitted that Mr Lindsay's conduct was less serious than Mr Voordouw's, as Mr Lindsay was not aware of Ms Johnston's misconduct when it occurred, whereas Mr Voordouw was, and was alert to potential breaches of the Act and the duty to make a report under r 7.2, yet did not make a report.

[59] Like Mr Voordouw, Mr Lindsay has been found guilty of misconduct on two charges. That fact must be taken into account when determining the appropriate penalty. That said, we accept that overall Mr Lindsay's conduct is less serious than that of Mr Voordouw. We assess the severity of Mr Lindsay's conduct as being at the mid to upper range of misconduct. At that level, the appropriate starting point for penalty is an order for censure and a fine of $6,000.

[60] We do not accept Ms Allan's submission that no fine should be ordered. As recorded earlier, the SFO's reference to the prohibition against disclosure was accompanied by a statement to the effect that disclosure could be authorised by the Director of the SFO, and Mr Lindsay took no steps to raise the matter of his reporting obligation under r 7.2 with the SFO. Further, he failed to make a report even after any SFO prohibition was spent, following Ms Johnston's conviction. Accordingly, we can give little reduction on account of the SFO prohibition.

[61] We take into account that Mr Lindsay has had a long career in the industry, with no previous disciplinary concerns, and that he has suffered personal financial loss as a result of Ms Johnston's conduct. We note Ms Allan's submission that he financed the repayment of commissions to the Council, in the sum of $245,549.04.

[62] We also take into account that Mr Lindsay admitted the charges at the earliest opportunity, the time that has elapsed since the conduct, and that the fact of the findings against him will in itself constitute a penalty. Taking all of those matters into account we have concluded that the appropriate final order is that Mr Lindsay is censured and ordered to pay a fine of $3,000.

Applications for costs

[63] Section 110A of the Act (inserted into the Act as from 14 November 2018) provides:

> **110A Costs**
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> (1) In any proceedings 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:
>
> (c) Has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.
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> …

The Committee's application for costs

[64] The Committee has applied for an order that Mr Lindsay pay a contribution towards the Committee's costs in bringing the charges. Mr Wheeler submitted that a licensee found guilty of charges should generally be expected to pay at least some of the Committee's costs. 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 matters are borne by members of the profession, but the profession should not be expected to bear all of the costs of the disciplinary regime.

[65] Mr Wheeler submitted that the usual starting point for an award of costs is 50 per cent of the Committee's actual costs. As the Committee was in this instance represented by in-house counsel, he submitted that the Tribunal could make an award of costs on the basis of a nominal charge-out rate of $100 per hour, for 21 hours (the time spent for this proceeding, excluding preparation of submissions on the costs application for costs).[7]

[66] Ms Allan submitted that Mr Lindsay had participated in the proceedings in good faith. She submitted that he and the Agency had engaged with and assisted the Authority during its inquiry (including collating and providing a significant amount of information between August 2019 and July 2020), and provided further information in July 2020 despite having been told that the inquiry had been completed and passed to the Committee for review. She also submitted that Mr Lindsay had been forced to wait some eight months before the Committee released its decision to lay charges against him in March 2021.

[67] She further submitted that Mr Lindsay had facilitated resolution of the charges by accepting the charges immediately after receiving them, taken steps to reduce costs by suggesting and agreeing to an agreed summary of facts, and by appearing at the hearing and willingly and openly answering questions from the Tribunal in circumstances where the Tribunal had not had the benefit of reading his submissions in advance.

[68] Ms Allan also referred to matters raised in Mr Lindsay's submissions as to penalty: that the factual matrix involved his failure to supervise and report a salesperson who engaged in a serious, deliberate and calculated fraud of the Council, leading to the SFO investigation, Mr Lindsay had accepted that notwithstanding his understanding that he was prohibited from making a report he could have clarified his

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7 Citing *McGuire v Secretary for Justice* [2018] NZSC 116, at [88] as authority that parties represented by in-house counsel are entitled to awards of costs; and *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* [2019] NZHC 449, at [31] as authority for a nominal rate of $100 per hour for in-house counsel.

reporting obligation with the SFO and the Authority, there was no complaint from a member of the public, Mr Lindsay has already suffered significantly, including funding the repayment of commissions to the Council, and that although a number of other parties had obligations under the Act and Rules, no action has been taken against those parties.

[69] Ms Allan further submitted that the Committee's claim for the costs of in-house counsel is unprecedented, unsupported by evidence as to the actual time spent, and the claim at $100 per hour is an arbitrary, and too high, amount. She submitted that a more appropriate rate would be $60 per hour, and that Mr Lindsay is entitled to a discount of at least 50 per cent. She submitted that at an hourly rate of $60, the Committee's total costs would be $1,260 resulting (after a 50 per cent reduction) in a possible award of $630. She submitted that this should then be reduced to a nil amount after consideration of Mr Lindsay's own claim for costs.

Mr Lindsay's application for costs

[70] Ms Allan submitted that the "continuing delays and ongoing breaches of the timetable by the Committee" had caused Mr Lindsay significant procedural prejudice and forced him to bear unnecessary costs. She submitted that after the Tribunal made timetable directions on 26 March 2021 (which provided for an agreed summary of facts to be filed and served by 9 April 2021), the following occurred:

[a] Counsel for Mr Lindsay sought updates from the Committee on 30 March and 7 April as to when it could expect to receive a draft summary of facts for review and comment. On 9 April the Committee sought and obtained an extension of time to 16 April.

[b] On 13 and 14 April counsel for Mr Lindsay sought updates as to when a draft summary could be expected. A draft summary was received at 4.44 pm on 14 April. A further extension of time was then required in order for Mr Lindsay to review and take instructions on the draft summary of facts.

[c] On 15 April the Tribunal directed that the agreed summary of facts was to be filed and served by 23 April, the Committee's submissions on penalty were to be filed and served by 7 May 2021, and Mr Lindsay's submissions on penalty were to be filed and served by 14 May.

[d] The Committee did not file and serve its submissions on penalty on 7 May, and did not contact the Tribunal or Mr Lindsay's counsel to advise it would not be in a position to do so. The Tribunal requested an update from the Committee on 11 May and the Committee advised that it would use its best endeavours to file and serve its penalty submissions on 12 May. The Committee's submissions were filed and served on 12 May.

[71] Ms Allan submitted that the Committee's delays caused prejudice to Mr Lindsay, as counsel had set aside 10 and 11 May to prepare submissions, as she was required to be out of the office on 13 and 14 May, and had attendances and meetings scheduled for the following week (the week prior to the hearing, scheduled for Monday 24 May). The Tribunal granted Mr Lindsay an extension of time and his submissions were filed and served at 4.30 pm on Friday 21 May. However, they were not provided to the Tribunal until the start of the hearing. Ms Allan submitted that this caused significant and unnecessary confusion, complexity and frustration for all parties during the hearing, and led to the Tribunal being unable to conclude all matters at the hearing, such that the parties were directed to file supplementary submissions.

[72] Ms Allan submitted that Mr Lindsay is entitled to an award of costs, but in the circumstances submitted that any award of costs in his favour would negate any possible award in favour of the Committee, such that costs should lie where they fall.

[73] Mr Wheeler submitted that Mr Lindsay's concerns regarding the extensions of time for filing the agreed summary of facts were not entirely of the Committee's making. He submitted that this was a complex matter which required significant discussion in order to record the accepted facts, and Mr Lindsay did not oppose the extensions of time. He also submitted that Mr Lindsay was requested on 18 March (through counsel), to outline the basis on which he was admitting the second charge

and that he did not, at any point, assist with the foundations for the agreed summary of facts.

[74] With respect to filing submissions, Mr Wheeler noted that although the Committee's submissions were filed three days late, Mr Lindsay had not established that the Committee had not participated in good faith in the proceedings, or failed to act in a manner that facilitated resolution of the issues.

Discussion

[75] We note that in a memorandum filed on 12 May 2021 Ms Moore, on behalf of Mr Lindsay, sought an extension of time to file submissions as to penalty (on the grounds of delay by the Committee), and sought costs in respect of preparing and filing the memorandum. In a memorandum in response filed the same day, Mr Wheeler apologised for inconvenience caused to the Tribunal and parties. He submitted that the process of preparing and agreeing to a summary of facts could be an involved process, and the Committee had sought extensions and adjustments to the timetable when it was clear that further time was required. With respect to penalty submissions, he submitted that the delay was caused by an oversight, compounded by counsel being away due to illness. He did not oppose an extension of time being given for Mr Lindsay's submissions to be filed.

[76] We do not accept that Mr Lindsay has been prejudiced as a result in delays in completing the agreed summary of facts, or in filing submissions. In the end, counsel for Mr Lindsay had time to file submissions. While the submissions were not able to be provided to the Tribunal before the hearing, we recognise that this occurs from time to time. Further, the direction that further submissions were to be filed was not entirely the result of the Committee's late filing of submissions; rather, when it became evident to the Tribunal that the hearing could not be completed within the allocated time it was not possible to change its travel bookings. The Tribunal did not consider that it was at a disadvantage in not being able to complete the hearing on the day.

[77] Since the introduction of s 110A into the Act the Tribunal has accepted that a licensee against whom disciplinary findings are made following charges laid by a

Complaints Assessment Committee should generally (although not invariably) be ordered to pay a contribution towards the Committee's costs.[8] This reflects the purposes of the Act, in particular accountability through the disciplinary process, and recognises that the costs associated with charges proceedings are borne by members of the industry.

[78] The Tribunal follows the principles set out by his Honour Justice Palmer in *TSM v A Professional Conduct Committee* as to orders for costs in professional disciplinary proceedings:[9]

> (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.

[79] We note Ms Allan's submission that the Committee's application for costs is "unprecedented" (as it was represented by the Authority's in-house counsel) but we do not accept that there can be any doubt that an award of costs can be made in such circumstances. In its judgment in *McGuire v Secretary for Justice*, the Supreme Court accepted that parties represented by in-house counsel are entitled to costs.[10] In his judgment in *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council*, his Honour Justice Toogood accepted that $100 per hour was a reasonable rate for in-house counsel, and accepted as "apparently reasonable" the

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8 See *Complaints Assessment Committee v Wright* [2019] NZREADT 56, and *Complaints Assessment Committee 1902 v Hanford* [2020] NZREADT 21, and *Complaints Assessment Committee 1901 v Zeng* [2021] NZREADT 28/

9 *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].

10 *McGuire v Secretary for Justice* fn 7, above. (See also *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16, at [23].)

estimate by counsel for the Society that 90 hours' work had been done on the proceeding.[11]

[80] In the present case, we accept Mr Wheeler's submission that $100 per hour is an appropriate nominal rate, and that 21 hours were spent on the proceeding.

[81] We note Ms Allan's submissions as to Mr Lindsay's co-operation and early acknowledgement of the charges. However, as Mr Wheeler submitted, the effect of that is that the Committee's charges were significantly lower than they might have been had Mr Lindsay been less co-operative and defended the charges. We do not consider that the question whether to award costs, and if so, in what amount, is affected by the fact that this inquiry did not result from a complaint from a member of the public. The Committee was properly exercising its jurisdiction in inquiring into Mr Lindsay's supervision of Ms Johnston and his compliance with r 7.2, and then bringing charges against him, irrespective of how the issues came before it.

[82] We have concluded, however, that in the present case Mr Lindsay is entitled to a reduction of more than 50 percent. We are satisfied that an award of costs should be made in favour of the Committee and that Mr Lindsay should be ordered to pay $650 towards the Committee's costs. We decline Mr Lindsay's application for an award of costs in his favour.

Mr Lindsay's application for an order restricting publication

[83] Section 108(1)(c) of the Act provides:

> **108 Restrictions on publication**
>
> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (of any)) and to the public interest, it may make 1 or more of the following orders:
>
> …
>
> (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.

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[11] *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* fn 7, above at [39].

[84] Ms Allan asked that the Tribunal make a permanent order prohibiting publication of Mr Lindsay's name and that of the Agency, pursuant to s 108(1)(c) of the Act. She submitted that publication in the present case is likely to cause prejudice and undue hardship to the Agency and to its parent group, and it is "proper" to make an order, as:

[a] publication is likely to give new life to the matters before the Tribunal, which are historical and took place approximately a decade or so ago;

[b] although Mr Lindsay is no longer working under or involved in the management of the Agency, publication of the Agency's name would give the appearance of a continued association with his conduct; and

[c] Mr Lindsay, the Agency, and its parent group should not be forced to suffer further harm as result of Ms Johnston's fraudulent conduct, where she went out of her way to deliberately conceal her fraudulent activity and the Agency and Mr Lindsay have gone to great lengths to address the harm she caused.

Submissions

[85] Ms Allan submitted that anonymising the details of Mr Lindsay and the Agency would not detract from the decision, and that the public interests of open justice will be met if the decision and the Tribunal's reasoning is published. She also submitted that there is no strong public interest in publicising Mr Lindsay's name, as he is no longer responsible for the supervision of any salespersons under the Act.

[86] The Committee opposed the application for name suppression. Mr Wheeler submitted that the assessment of whether an order restricting publication under s 108 is "proper" involves weighing the private interests of the person or persons for whom suppression is sought against the public interest in publication. He submitted that the Tribunal has accepted that the starting point must always be publication, because this reflects Parliament's intention to promote and protect consumer interests, and that the Tribunal has previously emphasised the public interest in publishing the names of licensees involved in disciplinary proceedings. He submitted that in most cases it will

be proper for the Tribunal to order publication of the name of a real estate licensee, especially that of a licensee who is subject to a finding of misconduct, and it is a high threshold to displace the presumption of open justice in such cases.

[87] Mr Wheeler submitted that the fact that conduct may be "historic" does not in itself provide a compelling reason for non-publication. He further submitted that in the present case it cannot be said that the matters are sufficiently "historic" (given that it is six years since the Izone transactions and three since Ms Johnston's charges were publicised) to erode the relevancy of the conduct from a consumer protection perspective.

[88] He also submitted that had Mr Lindsay made a report under r 7.2, as he should have done, the matter could have been resolved closer to the time of the initial media coverage of Ms Johnston's fraud. He further submitted that the claim that the events are "historic" and should not therefore be publicised arises from Mr Lindsay's failure to comply with his obligation under r 7.2 and should be dismissed as a ground for restricting publication.

[89] Mr Wheeler further submitted that there is no risk of publication giving an impression of an ongoing working relationship between Mr Lindsay and the Agency, as the Tribunal's decision will clearly record the fact that Mr Lindsay is no longer working with the Agency.

[90] He submitted that by itself, the risk of reputational damage is not generally considered sufficient to displace the presumption of open justice. He submitted that while this proceeding arose from Ms Johnston's fraud any harm (be it reputational or otherwise) Mr Lindsay may suffer is a natural consequence flowing from the disciplinary finding. He submitted that there is nothing exceptional or out of the ordinary in the circumstances of the present case to justify an order restricting publication in order to alleviate any consequences of this nature.

[91] Mr Wheeler submitted that publication, including on the public register, helps to facilitate informed consumer choice, and this is a factor that strongly weighs against an order restricting publication. He submitted that the public register is designed to

convey relevant information about licensees, and the public should be able to know if a licensee has been disciplined within the past three years (as provided for in s 64(a)(iv) of the Act).

[92] Finally, Mr Wheeler submitted that it is highly relevant that Mr Lindsay and the Agency are already publicly linked to the events that are referred to in the Tribunal's decision. He referred to media publications from the time of Ms Johnston's conviction, which refer to her having worked for the Agency, and submitted that a search of the Agency provides a link to Mr Lindsay.

Discussion

[93] All proceedings before the Tribunal (not just disciplinary proceedings) focus on the fundamental purpose of the Act, as set out in s 3 of the Act, "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". The Tribunal accepts the principles of open justice and that there is a public interest in reporting the Tribunal's decisions. The principles, and their relevance to proceedings before the Tribunal, were discussed in *X v Complaints Assessment Committee 10028*,[12] and *Graves v Real Estate Agents Authority (CAC 20003)*.[13] As the Tribunal has said on a number of occasions, it is rare for it to restrict publication.

[94] The Tribunal recently considered and declined an application for an order restricting publication, made on grounds similar to those raised in the present case, in its decision in *Baker v The Real Estate Agents Authority (CAC 1901)*.[14] In that decision, the Tribunal accepted that given the consumer-protection purposes of the Act, it will be proper in most circumstances for the Tribunal to order publication of the name of a licensee who is subject to a disciplinary finding and the threshold to displace the presumption of open justice is high.[15]

[95] We accept Mr Wheeler's submissions (which we do not need to repeat) that an order restricting publication should not be made. We add that while it is accepted that

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12 *X v Complaints Assessment Committee 10028* [2011] NZREADT 2.
13 *Graves v Real Estate Agents Authority (CAC 20003)* [2012] NZREADT 4.
14 *Baker v The Real Estate Agents Authority (CAC 1901)* [2021] NZREADT 24.
15 *Baker*, at [8].

the events that ultimately led to the charges against Mr Lindsay (Ms Johnston's fraudulent claims to commission) occurred between 2007 and 2015, it was Mr Lindsay's failure to make a report to the Authority (which he could have done as from the time of the SFO notice to the Agency in June 2016) that have led to the "historic" element. In the circumstances, that cannot sustain an application to restrict publication. Accordingly, we decline the application for an order restricting publication.

Orders

[96] We find Mr Lindsay guilty under s 73(b) of the Act on each of the two charges.

[97] Mr Lindsay is censured and ordered to pay a fine of $3,000. The fine is to be paid to the Authority within 20 working days of the date of this decision. Mr Lindsay is further ordered to pay $650 to the Authority as contribution to its costs. This payment is to be made to the Authority within 20 working days of the date of this decision.

[98] 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.

_____
Hon P J Andrews
Chairperson

_____
Mr G Denley
Member

_____
Mr N O'Connor
Member