

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2021] NZREADT 38**

**READT 032/19**

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	HULAN FENG and JIARUI LI Applicant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First respondent
AND	RUOFEI WU Second Respondent

On the papers:

Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Ms C Sandelin, Member
-----------	---

Submissions:	Mr Tim Rea, on behalf of the Appellant Ms Elena Mok, on behalf of the First Respondent
--------------	---

Date of Decision:	29 July 2021
-------------------	--------------

---

**DECISION OF THE TRIBUNAL - PENALTY**

---

[1] The hearing and disposal of these proceedings were approached in two stages. Questions of liability were dealt with in the revised decision of the Tribunal.<sup>1</sup> There remains the question of the penalty appeal which was part of the appeal that the appellants have filed. This decision considers that issue.

[2] The decision should be read in conjunction with the revised decision on the question of liability<sup>2</sup>. In particular, consideration of the penalty appeal requires brief reference to the background of this matter before assessing the merits of the arguments that were advanced on behalf of the appellants.

[3] In our revised decision we concluded that the advertisements for the property had been misleading. The Tribunal considered that the advertising materials prepared by the appellants ought to have contained two qualifications:

(a) That one of the carparks, although owned by the purchaser of the property, could not be rented out to other persons; and

(b) That the second carpark was not owned by the purchaser, and nor could it be rented out to third parties.

[4] We concluded that even if the appellants had subsequently provided Mr Wu with accurate information concerning the arrangements with regard to the car parks, the appellants had nonetheless engaged in unsatisfactory conduct in putting forward the advertisements in the first place.

[5] We accept that on the basis of the evidence that was given before the Tribunal and having regard to our previous findings of fact, it is open to the appellants to submit that statements were made - subsequent to the advertising- to the purchaser/complainant, Mr Wu, correcting any erroneous view that he might have had about the number of car parks that came with the property. In particular, the evidence of the appellants was that they had made it clear to the complainant that the title to the property came with only one car park.

---

<sup>1</sup> *Feng and Li Real Estate Agents Authority* [2021] NZREADT 15

[6] The Tribunal also dealt with the question of whether the Committee had been correct in finding that the appellants failed to tell the second respondent about the prohibition on subleasing the car parks or renting them out to non-residents. We considered that the evidence did not establish that there had been such a failure on the part of the appellants. Consistent with our findings on this point in the revised decision, when imposing penalty, the correct approach is to assume that the appellants did not mislead the complainant concerning the restrictions on the ability to rent car parks to 3rd parties.

[7] The key matter that remains to be considered is whether, and to what extent the appellants' efforts to correct any misunderstanding that Mr Wu might have obtained from reading the advertisement were relevant to the question of penalty.

[8] We accept that there was acceptable evidence placed before the Tribunal that while the statements in the advertisement concerning the car parks were wrong and misleading, corrective information was subsequently provided to the second respondent to clarify that the title to the property came with only one car park. Such corrective information could not, we found, be a defence to the misleading advertising. It can however be relevant to the question of the harm that was done to the second respondent and it is therefore relevant to the matter of penalty. Because the appellants did provide information to the complainant which gave him a correct understanding of the position about ownership of the car parks before he committed himself to buying the property the harm done was limited. That is to say, had the complainant not been provided with accurate information at the relevant point, he could have entered into the contract subject to a continuing misunderstanding about the ownership of the car parks. Were the Tribunal imposing penalty in a hypothetical case where corrective information was not provided, the harm would have been greater and the penalty, commensurably higher. We consider that this is the correct approach to determining the effect of providing corrective information was in this case. It is not a matter of viewing the actions of the appellants as mitigating the effect of the offending. Rather, it a question of accurately ascertaining the harmful consequences that actually flowed from the appellants' breaches of the Act.

---

<sup>2</sup> Refer to footnote 1 above

[9] The penalty that ought to be imposed must of course reflect only the substance of the charge that has been proved and factual matters connected with the charge.

[10] We accept that having regard to the fact that the breach on the part of the licensees was narrower in scope than the one upon which the Committee proceeded when imposing penalty, some reduction in penalty is now called for.

[11] Some additional matters need to be considered before the Tribunal arrives at what it considers is the appropriate penalty.

[12] The culpability of the appellants carried out advertising of the property in a way that was inherently misleading. Even without proof that consequential harm was caused to third parties, the advertising on its own amounted to unsatisfactory conduct. Misleading advertising such as occurred here contravenes the objectives of the Act set out in s 3 of the Real Estate Agents Act 2008.

[13] Another matter that the appellants raised was the fact that the inaccurate description of the property that they inserted in the advertisement was no different from that which other licensees had adopted when advertising the property for earlier transactions. We do not consider that those considerations justify a reduction in the penalty. The appellants themselves were subject to an obligation to make their own investigations about matters such as the Title and carpark issues so as to ensure that the description that they include in any advertisement is correct. The fact that other licensees may have infringed the regulations in the same way as they have does not lessen the appellants' culpability.

[14] A further matter that counsel for the appellants, Mr Rea, raised was the finding of unsatisfactory conduct on its own was a sufficient penalty. It was his further contention that no other penalty was justified in the circumstances.

[15] The Tribunal is not able to accept that submission. We do agree that the making of a finding of unsatisfactory conduct against a licensee on its own does have some punitive effect. However, we do not consider that the objectives of the Act which include the protection of the interests of consumers in respect of transactions

that relate to real estate and the necessity for promoting public confidence in the performance of real estate agency work would be satisfactorily reinforced by a finding of unsatisfactory conduct on its own. It is our view that to adopt the approach argued for could lead other licensees to the view that there was little risk to them arising from including material in advertisements which had not been properly checked or which was even knowingly incorrect.

[16] In its decision fixing penalty, the Committee said:

4.10 In making a decision to impose a higher fine of \$4,000 [on the first named appellant] we decided that the two prior disciplinary matters against licensee one, including a charge of misconduct in 2011, warranted a meaningful increase in the amount as a reflection of the Committee's view that licensee one needed to focus carefully on improvements which she needed to make in her performance as a licensee.

[17] We agree with the approach which the Committee adopted in this regard that there should be a differentiation between the penalties to be imposed on the first named and second named licensees. Having regard to the factors which we have discussed, we consider the financial penalty on Ms Feng should be reduced to \$3,000 and that on Mr Li to \$1,500. Subject to those amendments, the orders set out in part 2 of the decision of the Complaints Assessment Committee dated 15 August 2019 are to stand.

[18] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

---

Mr J Doogue  
Deputy Chairperson

---

Mr G Denley  
Member

---

Ms C Sandelin  
Member