

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 46

READT 001/2021

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

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE
1907

AGAINST MARY TAPU
Defendant

On the papers

Tribunal: Hon P J Andrews, Chairperson
Mr N O'Connor, Member
Ms F Mathieson, Member

Submissions received from: Mr S Waalkens and Ms E Bergin, on behalf of the
Committee
Mr R Hern, on behalf of Ms Tapu

Date of Decision: 23 August 2021

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] In a decision issued on 22 June 2021 (following a hearing on 31 May and 1 June 2021), the Tribunal found Ms Tapu guilty on a charge of misconduct under s 73(b) of the Real Estate Agents Act 2008 (“the Act”) (“the substantive decision”).¹ The Tribunal found that Ms Tapu’s conduct in failing to inform the purchaser of a property she was marketing (Ms Drummond) that the next door property (referred to in the substantive decision as “No. 105”) had a connection to a local gang constituted seriously incompetent or seriously negligent real estate agency work.

[2] The Tribunal has now received submissions as to penalty. The parties have agreed that the Tribunal may determine penalty on the papers.

Facts

[3] The Tribunal records that at the beginning of the hearing, it was advised that Ms Tapu acknowledged that she had not told Ms Drummond of No. 105’s gang connection. However, she denied that her conduct amounted to misconduct. The parties agreed on a summary of the relevant background facts and those facts, together with a summary of the evidence given to the Tribunal are set out in the substantive decision.²

[4] The Tribunal found that there was no dispute as to No 105’s gang connection and while the connection was known to Ms Tapu and the vendor of the property, it was not known to Ms Drummond, and not obvious when Ms Drummond viewed the property.³ The Tribunal noted that when Ms Drummond subsequently raised the issue of No. 105’s gang connection Ms Tapu offered to re-sell the property free of commission but Ms Drummond did not accept the offer.⁴ Ms Drummond told the Tribunal she could not afford to buy another property.

¹ *Complaints Assessment Committee 1907 v Tapu* [2021] NZREADT 32.

² Substantive decision, at [8]–[33].

³ At [34].

⁴ At [20].

[5] The Tribunal also found that Ms Drummond clearly advised Ms Tapu when she first contacted her, and before she viewed the property, that she was looking for a property that would be safe and secure for herself as an older single woman, and her two specialist working dogs, and accepted her evidence that had she known of No. 105's gang connection she would not have ignored the issue or been comfortable with purchasing the property.⁵ The Tribunal found that the vendor told Ms Drummond that youths slept at No. 105 from time to time and had parties there, but neither the vendor nor Ms Tapu told her of its gang connection.⁶

[6] The Tribunal found that No. 105's gang connection was a matter which, in fairness, ought to have been disclosed to Ms Drummond and that in not disclosing the gang connection Ms Tapu was in breach of r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), pursuant to which a licensee "must not ... withhold information that should by law or in fairness be provided to a customer or client". The gang connection was information that should have been provided so that Ms Drummond could make an informed decision as to whether the property she was considering buying met her requirements of safety and security in her particular circumstances.⁷

[7] The Tribunal did not accept Mr Waalkens' submission for the Committee that Ms Tapu's breach of r 6.4 was "wilful or reckless", and therefore misconduct under s 73(c)(iii) of the Act. The Tribunal accepted that it was reasonably possible that Ms Tapu had assumed that Ms Drummond had understood the vendor's references to youths who occasionally slept at No. 105 and had parties there as being a reference to a gang connection, and that as she had not raised any particular issue following the vendor's advice, she was comfortable with proceeding to buy the property.⁸

[8] However, the Tribunal found that in the particular circumstances of this case, disclosure of No. 105's gang connection was a matter of particular importance for Ms Drummond, and was not something that could be left to the vendor. Rather, it should have been attended to by Ms Tapu in person, and in clear terms. The Tribunal found

⁵ At [35].

⁶ At [35] and [26].

⁷ At [44]–[46].

⁸ At [48]–[51].

that Ms Tapu’s failure to do so could only be regarded as seriously incompetent or seriously negligent real estate agency work.⁹

Penalty principles

[9] The principal purpose of the Act is to “promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.¹⁰ 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.¹¹

[10] 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.

[11] 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.¹²

[12] 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);

⁹ At [54]–[57].

¹⁰ Section 3(1) of the Act.

¹¹ Section 3(2).

¹² 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 an individual licensee to pay a fine of up to \$15,000;
- [d] (if it appears to the Tribunal that any person has suffered loss by reason of the licensee's conduct) order the licensee to pay compensation of up to \$100,000.

Submissions

[13] Mr Waalkens submitted that adherence to r 6.4 of the Rules is a fundamental obligation under the Rules, as it ensures that purchasers are aware of all known factors that may influence their decision to buy (including making an offer), and can make an informed decision about whether or not to purchase a property. He submitted that a failure to comply with fundamental disclosure obligations can have significant financial consequences on purchasers, as occurred for the purchaser in the present case. He submitted that the obligations of disclosure are key factors in ensuring consumer protection and the maintenance of public confidence in the real estate industry.

[14] Mr Waalkens submitted that Ms Tapu had many opportunities throughout the sale process to disclose No. 105's gang connection, but failed to do so at each and every step in the process. He submitted that this showed that Ms Tapu's failure was not a one-off accident on a single occasion, but rather a systemic issue demonstrating a poor and careless attitude towards disclosure in general. He submitted that as a licensee with 16 years' experience, Ms Tapu would have been well aware of her obligations, and her failure to comply with her obligations under r 6.4 fell well short of what is expected of licensees.

[15] Mr Waalkens referred the Tribunal to the penalties imposed in previous cases of non-disclosure leading to findings of misconduct. He submitted that the appropriate penalty in light of the seriousness of Ms Tapu's conduct is that she be censured and her licence suspended for a period of up to three months. He also submitted that Ms Tapu should be ordered to complete further training on disclosure-related obligations.

[16] Mr Waalkens further submitted that an order should be made for Ms Tapu to pay compensation for loss suffered by reason of Ms Tapu's misconduct: first, for legal costs of \$1,050 incurred in attempting (unsuccessfully) to obtain compensation from Ms Tapu, and secondly for the difference in value (\$33,000) between a valuation shortly before settlement (which did not take into account No. 105's gang connection) and a valuation after settlement (which took the gang connection into account). He submitted that an order for compensation is appropriate, given that Ms Drummond told Ms Tapu at the outset what type of property she was looking for (a property safe for herself and her dogs) and she would not have bought the property had she known of No. 105's gang connection.

[17] On behalf of Ms Tapu, Mr Hern submitted that in determining penalty the Tribunal must take her personal circumstances and acknowledgement of her conduct into account. He submitted that Ms Tapu did not engage in deliberately misleading or untoward conduct, but rather failed in her professional obligations due to a serious oversight or casual attitude.

[18] He also submitted that the Tribunal should take into account that Ms Tapu had taken responsibility for her actions by immediately offering to re-sell the property, waiving commission and covering marketing costs, had accepted that her failure to disclose No. 105's gang connection was unsatisfactory conduct, had fully co-operated with the investigation, had an impeccable record with no disciplinary history, and was well-respected in the local community both as a real estate agent and as a community member. He submitted that there were no aggravating factors that would elevate the seriousness of Ms Tapu's conduct.

[19] Mr Hern submitted that all of the decisions referred to by Mr Waalkens concerned conduct that was more serious than Ms Tapu's, so are not appropriate yardsticks for determining penalty. He referred to a penalty decision of a Complaints Assessment Committee (following a finding of unsatisfactory conduct) as having the most analogous factual situation to the present case, albeit acknowledging that Ms Tapu's conduct was more culpable.

[20] Mr Hern submitted that to suspend Ms Tapu's licence, for any period, would be excessive, and more punitive than the Tribunal has been in past decisions. He submitted that the appropriate penalty would be an order for censure, an order to pay a fine in the range of \$3,000 to \$4,000, and an order to complete further training.

[21] With respect to compensation, Mr Hern submitted that while the Tribunal has the power to order monetary compensation under s 110(g) of the Act following a finding of misconduct, the primary focus in disciplinary cases is the maintenance of professional standards and protection of the public. He submitted that it is rare for the Tribunal to make orders for compensation, and when such orders have been made the sums concerned have been low. He further submitted that disciplinary hearings do not replicate, and are not a substitute for, private civil proceedings.

[22] On the issue of the quantum of Ms Drummond's loss, Mr Hern submitted that there is no real way for the Tribunal to assess the veracity of the two valuation reports, as valuation evidence was not given at the hearing. However he submitted that the valuer in his second report must have relied on Ms Drummond's accounts of the "mischief" caused by living next door to No. 105, leading to the report not being able to be regarded as properly independent.

[23] He also referred to evidence given at the hearing that the property was previously listed by another agent (who disclosed No. 105's gang connection to every prospective purchaser) at a price that was (notwithstanding the gang connection) \$20,000 more than Ms Drummond paid.

[24] Mr Hern submitted that the quantum of loss caused by Ms Tapu's conduct is by no means concrete and that with such a level of doubt, it would be inappropriate to award the full amount sought. He submitted that Ms Tapu appreciates that her lack of disclosure may have caused Ms Drummond some loss and that some compensatory payment could be justified. He submitted that an award of up to \$10,000 would be appropriate in the circumstances.

Discussion

Penalty

[25] The Tribunal accepts Mr Waalkens' submissions that a breach of the disclosure obligation set out in r 6.4 is a breach of a rule that is fundamental to the Act's purpose of protecting the interests of consumers in real estate transactions, and promoting public confidence in the performance of real estate agency work. Ms Tapu's breach is appropriately placed at the mid-level of misconduct.

[26] Mr Waalkens referred to the penalty decisions in *Complaints Assessment Committee 409 v Rankin*,¹³ *Complaints Assessment Committee 409 v Cartwright*,¹⁴ and *Complaints Assessment Committee 416 v Prasad*¹⁵ (together with the High Court judgment on appeal: *Prasad v Real Estate Agents Authority (CAC 416)*).¹⁶ Mr Hern referred to the penalty decision in *Real Estate Agents Authority (CAC 20005) v Cui*,¹⁷ and to the penalty decision of Complaints Assessment Committee 401 in *Robson*.¹⁸

[27] In *Rankin*, the licensee was found guilty on two charges of misconduct under s 73(b) of the Act: he had failed to disclose to a purchaser that he had been provided with a report that the property concerned had tested positive for methamphetamine contamination (in breach of rr 6.4 and 10.7 (failure to disclose a known defect)) and had allowed the purchaser access to the property despite a warning in the methamphetamine report, and failed to make enquiries as to whether it was safe to access the property. Although he had a previous finding of unsatisfactory conduct, it concerned a quite different factual situation so was not taken into account. The licensee was censured, ordered to pay a fine of \$3,000, and his licence was suspended for three months. As he had taken steps regarding further training, the Tribunal considered that no further order for specified training was required.

¹³ *Complaints Assessment Committee 409 v Rankin* [2017] NZREADT 78.

¹⁴ *Complaints Assessment Committee 409 v Cartwright* [2018] NZREADT 25.

¹⁵ *Complaints Assessment Committee 416 v Prasad* [2019] NZREADT 17.

¹⁶ *Prasad v Real Estate Agents Authority (CAC 416)* [2020] NZHC 335.

¹⁷ *Real Estate Agents Authority (CAC 20005) v Cui* [2015] NZREADT 23.

¹⁸ Complaint No CO6032 re Robson "Decision on Orders", 14 May 2015.

[28] In *Cartwright*, the licensee pleaded guilty to one charge of misconduct under s 73(b) of the Act. He marketed a property for sale by tender, and did not disclose to the successful tenderer that a prior tender (which had been accepted by the vendor) had not proceeded because a building inspection identified defects in the property. The licensee misrepresented the reason for the earlier tender not proceeding (referring to financial difficulties) and had downplayed and minimised the building inspection report (describing it as “picky”). The licensee had also failed to point out defects in the property which were obvious to him but not to the purchaser, had recommended that the purchaser rely on a building inspection report commissioned by the vendor, and had submitted a blank agreement for sale and purchase to the purchaser for signature, which lacked material particulars.

[29] The Tribunal took into account that the licensee was relatively new and inexperienced, he had written a letter of apology to the purchaser, had acknowledged his wrongdoing and given an early indication of a guilty plea to the misconduct charge, and recognised his need for further education. Suspension of the licensee’s licence was not sought, and the Tribunal ordered censure of the licensee, that he pay a fine of \$5,000, and that he complete specified further training.

[30] In *Prasad*, the licensee was found guilty on a charge of misconduct under s 73(b) of the Act, for having failed to disclose to a purchaser that the property concerned would be affected by a road-widening proposal, pursuant to which 107 m² of the property would be taken. She was also found guilty of misconduct under s 73(a) of the Act (disgraceful conduct) as she had retrospectively added or expanded entries in her diary relating to the marketing of the property for the purpose of supporting her contention that she had made the required disclosure. The Tribunal ordered censure, suspension of the licensee’s licence for 18 months, and the completion of further specified training.

[31] The High Court heard appeals by the licensee and the Complaints Assessment Committee. The Court found that the appropriate penalty was cancellation of the licensee’s licence, and made an order accordingly.

[32] In *Cui* the licensee was found guilty of misconduct under s 73(c)(iii) of the Act (wilful or reckless breach of the Rules) for failing to disclose to a purchaser that the property concerned was subject to a Notice to Fix and that significant remedial works had not been completed (meaning that one unit of a two-unit property was illegal and could not be rented out), failed to have particulars of an auction sale available in sufficient time before the auction, failed to read important correspondence from the vendor client and failed to view the Council file for the property before sending it to purchasers, and failing to ensure that the issues with the property were fully and clearly highlighted to the purchaser in simple language. The licensee was censured, ordered to pay a fine of \$6,000 and to contribute \$3,500 towards the costs of the disciplinary proceeding.

[33] In the case of *Robson*, the purchaser of a property advised the licensee that he had a young family and because of that, and the purchaser's work requirements, a safe and secure home environment was of paramount importance. The licensee failed to disclose to the purchaser that the property concerned, which was marketed as a family-friendly home in a quiet street, was next door to an addiction treatment centre. The licensee learned about the addiction treatment centre after an open home but when he questioned the vendor, was told that it had been the best of neighbours with whom the vendor had a good relationship. The licensee did not consider he was obliged to disclose the existence of the addiction centre to the purchaser.

[34] The Complaints Assessment Committee found the licensee guilty of unsatisfactory conduct, on the grounds of his breach of r 6.4. The Committee considered that his unsatisfactory conduct was towards the higher end of the scale of such conduct, as it profoundly impacted on the purchaser's ability to make an informed decision as to whether or not to purchase. The Committee took into account that the licensee had apologised, was contrite, and had offered to act on re-sale of the property on favourable terms. The licensee was censured and ordered to pay a fine of \$5,000.

[35] While the Tribunal is conscious of the need for consistency in penalties imposed, it is rarely, if ever, the case that the circumstances of one case are completely analogous to those of another case. While the element of disclosure in *Prasad* bears some resemblance to the present case, the element of the licensee's dishonesty means that

the case cannot be considered as a useful comparator. Both *Rankin* and *Cartwright* involved more than one type of breach of the Rules, while the present case involves only one.

[36] We accept Mr Hern's submission that the factual background of the *Robson* penalty is closer to the present case (put in general terms, a failure to disclose a negative aspect of a neighbouring property), but that case led to a finding of unsatisfactory conduct, not a charge of misconduct. That said, we note that the Complaints Assessment Committee said in its penalty decision that the licensee's conduct was "towards the higher end of the scale" of unsatisfactory conduct, and the fine imposed (after taking account of mitigating factors) is commensurate with that assessment.

[37] The Tribunal heard evidence at the hearing of the charge that Ms Tapu is well regarded as a licensee and in her local community. She had no record of any previous disciplinary proceedings against her. She accepted that it was her responsibility to disclose No. 105's gang connection, and that her failure to do so constituted unsatisfactory conduct (albeit not misconduct). Taking all factors into account, we are not persuaded that it is necessary to order suspension of Ms Tapu's licence, and the principles as to penalty can be met by the imposition of orders for censure, to pay a fine of \$4,000, and to undertake specified further training.

Compensation

[38] Section 110(2)(g) of the Act provides that the Tribunal may make:

where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct and the order is one that a court of competent jurisdiction could make in relation to a similar claim in accordance with the principles of law, an order the licensee pay to that person a sum by way of compensation as is specified in the order, being a sum not exceeding \$100,000.

[39] In *The Real Estate Agents Authority (CAC 10063) v Rajneel Raj* (referred to in Mr Waalkens' submissions), the licensee was ordered to pay compensation to purchasers of properties where the licensee had been part of a fraudulent scheme whereby properties were bought by an associate then immediately on-sold at a higher

price.¹⁹ For one complainant, the amount ordered was approximately 58 percent of that claimed, for another, it was approximately 14 percent. In *Cartwright* the licensee was ordered to pay compensation to the purchaser of approximately 15.5 percent of the amount claimed.

[40] In *Rankin*, compensation was sought but not ordered by the Tribunal, as it concluded that it did not have sufficient information on which it could with confidence make any order. In *Cui*, compensation was sought but not granted, as the Tribunal concluded that the purchaser had not demonstrated that any compensation was justified. In *Robson*, the complainants sought an order that the licensee repay legal fees of \$6,060.50 (in relation to advice given as to their rights and remedies following the non-disclosure), but the Complaints Assessment Committee declined to make an order on the grounds that it would amount to compensation, which the Committee has no jurisdiction to make following a finding of unsatisfactory conduct.

[41] We are satisfied that in the present case Ms Drummond suffered loss by reason of Ms Tapu's misconduct, and that compensation should be ordered. We accept that the invoice for legal fees associated with making a claim (amounting to \$1,050) establishes a claim for that amount. With respect to the claim based on the valuations, we accept that had she known of No. 105's gang connection Ms Drummond would not have bought the property, but we acknowledge Mr Hern's submission that the quantum of the purchaser's loss is "by no means concrete".

[42] We have concluded that a compensation order should be made, but for a lesser amount than that sought. We have concluded that the appropriate order is for compensation of \$15,050, comprising \$14,000 (approximately 40 percent of the amount claimed) and \$1,050 (legal fees).

Orders

[43] Ms Tapu 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. Ms Tapu is also ordered to complete Unit Standards 23136 ("Demonstrate knowledge of consumer

¹⁹ *The Real Estate Agents Authority (CAC 10063) v Rajneel Raj* [2013] NZREADT 52.

protection law related to real estate practice”) and 26149 (“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.

[44] Ms Tapu is ordered to pay compensation in the sum of \$15,050 to Ms Drummond, within 20 working days of the date of this decision.

[45] 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 N O’Connor
Member

Ms F Mathieson
Member