

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 48

READT 007/2021

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

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE
1901

AGAINST DESMOND KAN
Defendant

On the papers

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

Submissions received from: Mr T Wheeler, on behalf of the Committee
Mr Kan

Date of Decision: 30 August 2021

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] In a decision issued on 17 June 2021 the Tribunal found Mr Kan guilty of misconduct under s 73(a) (disgraceful conduct) of the Real Estate Agents Act 2008 (“the Act”) (“the Tribunal’s substantive decision”).¹ The Tribunal has now received submissions as to penalty.

Facts

[2] The background facts are set out in the Tribunal’s substantive decision, and are summarised below.

[3] At the time of the relevant events Mr Kan was a licensed agent under the Act, and was the property manager of a property at Browns Bay, Auckland (“the property”). Rental payments were made to the owners’ solicitors’ trust account up until April 2016, then ceased. The owners contacted their solicitors in early April 2019 to advise that they had not heard anything from Mr Kan for about 18 months, despite requests for information. The solicitors contacted Mr Kan who provided statements for the period to December 2016. While those statements referred to sums paid to the trust account, those payments had not in fact been made. A payment of \$10,390.48 was made on 17 April 2019

[4] As at 19 April 2019 there was a shortfall of about \$42,000 in the accounting for rent paid to Mr Kan, after deduction of fees and expenses.

[5] The solicitors made a complaint to the Real Estate Authority, and to the Police. Both the Authority and the Police commenced investigations. As at 6 February 2020 \$52,796.99 was owed to the owners (being rental income less invoices paid by Mr Kan and distributions to the owners, together with interest and an allowance for costs). Mr Kan agreed to pay this amount to the owners, on the basis that they would withdraw the Police complaint. However, it was made clear to Mr Kan that the complaint to the Authority was still proceeding.

¹ *Complaints Assessment Committee 1901 v Kan* [2021] NZREADT 30.

[6] The Police complaint was withdrawn on 4 June 2020, following confirmation that Mr Kan had completed payment to the owners.

[7] An Authority investigator, Ms Stevens, met with Mr Kan in December 2019 in relation to the complaint. Mr Kan did not provide a response to the complaint until 18 February 2020. He said that his work as a property manager was as a private individual, not as a licensee, and no real estate agency work was involved. He also said that as the Police complaint had been withdrawn the matter was at an end. He did not address the core issue of the complaint, that he had misappropriated rental payments. He declined requests for an interview

[8] Mr Kan advised Ms Stevens on 14 February 2020 that he had decided to relinquish his involvement in real estate. Ms Stevens advised him in response that the complaint procedure would continue regardless of whether he continued as a licensee. Mr Kan's current licence expired on 31 March 2020 and has not been renewed.

The charge and the Tribunal's substantive decision

[9] The charge against Mr Kan was filed on 26 March 2021. It was alleged that his conduct in misappropriating rent money generated from the property he managed would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful, and was therefore misconduct under s 73(a) of the Act. Pursuant to reg 7 of the Real Estate Agents (Complaints and Discipline) Regulations 2009) Mr Kan was required to file a written response to the charge within ten working days, that is, by 13 April 2021. Mr Kan did not file a response within that period, or at all. After an email reminder was sent to him by the Tribunal on 16 April 2021 (which also advised him that a telephone conference would be scheduled to make timetable directions to progress the matter) Mr Kan advised the Tribunal:

To whom it may concern

Firstly, if there has been any indiscretion that has occurred, I truly and fully apologise. Any complaint made by [the solicitor] was withdrawn on 03 June 2020.

[Mr Kan referred to the death of his partner, and his own health issues.]

I do not wish to participate in your phone conference as it may cause me extreme distress and anxiety. I am unable to afford any professional advice which may be required.

Again, I truly apologise for any indiscretion that may have occurred.

[10] Mr Kan did not attend the telephone conference held on 7 May 2021. He was advised in the Tribunal’s Minute of the telephone conference that unless he advised that he wished to participate in the proceeding, the hearing would proceed in his absence, by way of formal proof.

[11] The charge was set down for hearing before the Tribunal on 15 June 2021. Mr Kan was advised of the hearing date on 1 June 2021, but did not attend at the hearing. The hearing proceeded in his absence, by way of formal proof.

[12] The Tribunal recorded in its substantive decision that pursuant to s 71 of the Act, the disciplinary provisions of the Act apply to a former licensee.² The Tribunal also recorded that a licensee may be found guilty of misconduct under s 73(a) of the Act if the licensee’s conduct meets the ordinary meaning of “disgraceful” (that is, it would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful) regardless of whether the conduct came within the definition of “real estate agency work” in the Act, and that it was not necessary that there be any nexus or connection to real estate agency work.³

[13] The Tribunal found that Mr Kan’s failure to pass on rental payments to the owners of the property, over a lengthy period of time, could only be characterised as disgraceful conduct.⁴

Penalty principles

[14] 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.”⁵ The Act achieves these

² Tribunal’s substantive decision, at [22]–[23].

³ At [24]–[28].

⁴ At [29]–[33].

⁵ Section 3(1) of the Act.

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.⁶

[15] 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.

[16] 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.⁷

[17] 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 an individual licensee to pay a fine of up to \$15,000;

Submissions as to penalty

[18] Mr Wheeler submitted that the Tribunal had made a serious finding of dishonesty against Mr Kan. He submitted that consumers and other interested parties must be able to trust real estate licensees to act with honesty and integrity in transactions related

⁶ Section 3(2).

⁷ 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].

to real estate, and honesty, candour and judgment are essential qualities to the proper functioning of a regulated real estate industry.⁸ Mr Wheeler submitted that Mr Kan's conduct was premeditated, methodical, and repetitive, and he abused the opportunity presented by his trusted role as a letting agent to exploit both the tenants and the landlord of the property.

[19] Mr Wheeler further submitted that Mr Kan failed to properly engage with the proceeding in accordance with his professional obligations. He submitted that Mr Kan's responses to the investigator during the Committee's inquiry were dismissive, and downplayed the seriousness of the inquiry. He referred to the investigator's evidence that Mr Kan provided minimal responses to the complaint and declined requests for interviews, and appeared to refuse to engage fully on the basis that he had relinquished his licence and the Police complaint had been withdrawn.

[20] Mr Wheeler also referred to Mr Kan's failure to participate in any part of the Tribunal proceeding. He submitted that although Mr Kan had admitted the conduct to the complainant and the Police, his non-participation in the proceeding had put the Committee and the Tribunal to the unnecessary task of preparing for and conducting a hearing. Mr Wheeler acknowledged that Mr Kan had advised the Tribunal of personal and health concerns, but submitted that he had had ample opportunity to respond to the charge and bring about a swift resolution of the process.

[21] Mr Wheeler submitted that Mr Kan's conduct would warrant a penalty of cancellation of his licence, had he not already surrendered his licence. He submitted that it would be appropriate for the Tribunal to rule in its penalty decision that cancellation would have formed part of any penalty, had Mr Kan been a current licensee. He submitted that such rulings are important because they can be taken into account by the Registrar in the event an application is made to re-enter the industry.

[22] Finally, Mr Wheeler submitted that as Mr Kan has made payment to the owners of the property, no further penalty orders are necessary.

⁸ Citing *Complaints Assessment Committee 306 v Zhou* [2016] NZREADT 12, at [57].

[23] Mr Kan sent the following email to the Tribunal on 12 July 2021 (following service by email on him of the Committee's penalty submissions):

To whom it may concern

Re: enclosed information

I am in no financial position to appeal this matter and may be put into an undesirable outcome.

I make a plea for clemency and ask for name suppression as it will only cause distress and hurt to what is left of my immediate family.

I truly and unreservedly apologise for this indiscretion.

It has taken an immense toll on my health and is affecting my life deeply.

Sincerely

Desmond Kan

[24] Mr Kan was advised by the Tribunal on 13 July 2021 that if he wished to apply for an order restricting publication of his name, he should do so in writing, and should include submissions in support of the application. Mr Kan has not made any further contact with the Tribunal.

Discussion

[25] The Tribunal referred in its substantive decision to the judgment of his Honour Justice Woodhouse in *Morton-Jones v Real Estate Agents Authority*,⁹ and the Tribunal's decision in *Complaints Assessment Committee 521 v Wright*.¹⁰ Both of these cases related to licensees carrying out property management work. Both licensees had misappropriated moneys paid by tenants of properties the licensees were managing.

[26] In *Morton-Jones*, Woodhouse J referred to the comments of Sir Thomas Bingham MR in *Bolton v Law Society*, in relation to the penalty to be imposed on a solicitor found guilty of a breach of professional duties:¹¹

Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed ... Lapses from the required standard may, of course, take different forms and be of varying degrees.

⁹ *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804.

¹⁰ *Complaints Assessment Committee 521 v Wright* [2019] NZREADT 49.

¹¹ *Bolton v Law Society* [1994] 1 WLR 512, at 518.

The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.

[27] Woodhouse J was satisfied that the general tenor of Lord Bingham's observations is applicable to dishonesty by a licensee under the Act when handling clients' money, whether that arose in relation to real estate agency work or any other work.¹² His Honour ordered cancellation of Mr Morton-Jones' licence.

[28] Mr Wright misappropriated both bond moneys and rental paid by tenants. The Tribunal found him guilty of misconduct under s 73(a) of the Act. He had voluntarily surrendered his salesperson's licence prior to the charges being laid against him. In imposing penalty, the Tribunal said:

An order for cancellation of licence is the appropriate response to Mr Wright's offending. As [counsel for the Committee] submitted, that order is not available to us, as Mr Wright has surrendered his licence. However, we record that had it been open to us to do so, we would have ordered that Mr Wright's licence be cancelled. ...

[29] We accept Mr Wheeler's submission that cancellation would have been appropriate in the present case. As it is not available to us, we record that had it been open to the Tribunal to do so, an order would have been made that Mr Kan's licence be cancelled.

[30] We note Mr Wheeler's submission that as Mr Kan has made payment in full to the owners of the property, no orders as to compensation are sought.

The Committee's application for costs

Submissions

[31] Mr Wheeler sought an order under s 110A of the Act that Mr Kan make a payment as contribution towards the Committee's costs. He submitted that such orders are generally made when charges are brought against licensees, and reflect the fact that the industry should not be expected to bear the full costs incurred in disciplinary

¹² *Morton-Jones* fn 9, above, at [93].

proceedings. He further submitted that in the present case an order for costs is justified in that Mr Kan failed to act in good faith in relation to the proceeding, and failed to act in a manner that facilitated resolution of the issues.

[32] In the present case, the Committee was represented by in-house counsel employed by the Authority. Mr Wheeler submitted a schedule of the Committee's costs, which recorded 33 hours work, and referred the Tribunal to the nominal charge-out rate of \$100 per hour previously accepted in the High Court.¹³

Discussion

[33] Section 110A of the Act provides:

110A Costs

- (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.
- (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—
 - (a) has participated in good faith in the proceedings;
 - (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.

...

[34] Since the introduction of s 110A into the Act¹⁴ 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.¹⁵ This reflects the purposes of the Act, in particular accountability through the disciplinary process, and

¹³ Citing *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* [2019] NZHC 449.

¹⁴ Section 110A was inserted into the Act with effect from 14 November 2018, pursuant to s 244 of the Tribunals Powers and Procedures Act 2018.

¹⁵ 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.

recognises that the costs associated with charges proceedings are borne by members of the industry.

[35] 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:¹⁶

- (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.

[36] Where in-house counsel have acted on disciplinary charges, the Tribunal has accepted that a nominal charge-out rate of \$100 should be adopted when making costs orders.¹⁷

[37] We are satisfied that it is appropriate to make an order in the present case that Mr Kan is to contribute to the Committee’s costs. We accept that his response to the charge and his non-appearance at the Tribunal hearing was not in accordance with his professional obligations to deal in good faith with the Authority and to act in a manner that facilitated resolution of the issues raised by the Committee.

[38] An order will be made that Mr Kan is to pay \$1650 towards the Committee’s costs.

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].

¹⁷ See *Complaints Assessment Committee 107 v Lindsay* [2021] NZREADT [36], at [14] and *Complaints Assessment Committee 1901 v Lee* [2021] NZREADT 39, at [30].

Orders

[39] The Tribunal records that had it been open to it to do so, it would have ordered cancellation of Mr Kan's licence.

[40] Mr Kan is ordered to pay \$1650 as contribution to the Committee's costs. The payment is to be made to the Authority within 20 working days of the date of this decision.

[41] 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