

**THE TRIBUNAL HAS MADE AN ORDER PURSUANT TO S 108(1)(c) OF
THE REAL ESTATE AGENTS ACT 2008, PROHIBITING PUBLICATION OF
THE NAME OR ANY PARTICULARS OF THE COMPLAINANT**

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 56 READT 020/16

UNDER	THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF	OF A CHARGE LAID UNDER SECTION 91 OF THE REAL ESTATE AGENTS ACT 2008
BETWEEN	THE COMPLAINTS ASSESSMENT COMMITTEE (CAC 408)
AND	NICHOLAS SCHEMBRI First Defendant
AND	JOSEPH LUPI Second Defendant
AND	TIMOTHY KEARINS Third Defendant

Penalty Hearing: On the papers

Tribunal:	Ms K Davenport QC	–	Deputy Chairperson
	Mr G Denley	–	Member
	Ms C Sandelin	–	Member

Appearances: Ms C Paterson for the Authority
Mr T Gee and Ms A Payne, counsel for First and Second
Defendants
Ms R Riddell-Garner for Third Defendant
Ms C, the complainant, in person

Substantive Decision: 10 April 2017 [2017] NZREADT 24

Penalty Decision: 15 September 2017

DECISION OF THE TRIBUNAL AS TO PENALTY

- [1] At a hearing held in Wellington on 13/14 February 2017, The Tribunal heard evidence on the charges that were laid against Messrs Schembri, Lupi and Kearins. These charges were brought under s 91 of the Real Estate Agents Act 2008 (**the Act**).

The Facts: A Summary

- [2] The defendants were charged following a complaint by Ms C (**the Complainant**). This complaint arose out of an agreement for sale and purchase for a property owned by the Complainant in Wellington. Mr Schembri drafted this agreement with Mr Lupi's help. Significant issues arose because of the drafting of this agreement and in particular to whether the agreement was subject to a fixed-term tenancy or sold with vacant possession. The issue became acute when the tenants refused to vacate prior to the expiry of their fixed term. Ms C was required to resolve this issue with the purchasers of the property. While Ms C subsequently withdrew her complaint, the CAC carried on with the inquiry and laid charges against the defendants.
- [3] The Tribunal heard evidence and issued its decision on 31 July 2017.
- [4] There have been related charges arising out of this matter and brought against Century 21 First Choice Wellington (**Century 21**) under READT 056/16. Century 21 were found guilty of unsatisfactory conduct and the following penalty was imposed:
- (a) Century 21 was censured.
 - (b) Century 21 was ordered to reduce, cancel or refund the fees charged for the work that was the subject of the complaint to the amount of \$23,920.00; and
 - (c) Century 21 was ordered to pay the Complainant costs and expenses incurred in bringing the complaint to the amount of \$4,347.83 plus GST.
- [5] This decision was confirmed on appeal.

Mr Schembri

- [6] The Tribunal found that Mr Schembri breached s 36(2A) of the LCA (Lawyers & Conveyancers Act) as he had prepared the sale and purchase agreement while newly qualified. The Tribunal concluded that Mr Schembri breached Rule 5.2 as he did not appreciate the obligations and restrictions on him as a new agent, but that this breach was not serious enough to amount to misconduct under s 73(c). Mr Schembri's conduct was not a wilful or reckless breach, nor did he demonstrate serious negligence or incompetence. A finding of unsatisfactory conduct was imposed.

Mr Lupi

- [7] Mr Lupi was charged with misconduct under s 73(c) or s 73(b) of the Act, in that his conduct was said to constitute seriously incompetent or seriously negligent real estate agency work.
- [8] The Tribunal found that Mr Lupi failed to properly supervise Mr Schembri and thus failed to ensure that s 36(2A) of the LCA was complied with. He also breached Rule 5.1 (failure to exercise due skill and care) and Rule 5.2 (failure to have a sound knowledge of the Act and Rules).
- [9] Mr Lupi was found guilty of misconduct.

Mr Kearins

- [10] Mr Kearins was charged with misconduct under s 73(c)(i) or s 73(b) of the Act.
- [11] The Tribunal found Mr Kearins, while paid to carry out supervision of agents, did not actually supervise the agents. Instead, Mr Kearins left the supervision to Mr Lupi, who was not the officer authorised to supervise staff. Accordingly he had breached his professional obligations. The Tribunal accepted, however, that during the time at which the events occurred, there was some doubt about the exact legal requirement as to how "hands on" Mr Kearins' supervision had to be under s 50 of the Act. In light of this, his conduct could not be said to be a wilful or reckless breach of the Act, but was a breach of Rule 5.1 in his failure to properly supervise Mr Schembri.

[12] This amounted to unsatisfactory conduct.

Submissions on penalty

[13] At the end of our substantive judgment, we invited the affected parties' to make submissions on penalty.¹

(a) Mr Schembri

[14] In their submissions as to the appropriate penalty for Mr Schembri, the CAC referred the Tribunal to its earlier decisions of *Li v REAA*² and *De Heer v REAA*.³ Both decisions concerned similar facts to this case but the CAC submitted that Mr Schembri's conduct was more comparable to the agent in *Li v REAA*. In *Li*, a salesperson with less than six months' experience gave advice to the complainants' concerning their legal rights and obligations in relation to a sale and purchase agreement, breaching s 36(2A) of the LCA. A fine of \$750 was imposed. However, the CAC submitted the Tribunal should not be constrained by the fine imposed in *Li* and submitted that a fine in the range of \$1,000 to \$2,000 was an appropriate penalty for Mr Schembri in the circumstances.

[15] Counsel for Mr Schembri submitted that the Tribunal should maintain consistency with the decision in *Li* and that a fine of \$750 would be appropriate. They submitted that this outcome would also be consistent with *De Heer* where a more culpable licensee was only fined \$1,000. In *De Heer*, a newly qualified salesperson was similarly found to have breached s 36(2A) of the LCA, rr 5.1 and 5.2 of the Rules, but also found to have breached rr 6.2 (duty to act in good faith) and 6.4 (licensee must not withhold information that should be provided to client) in failing to present offers to a vendor. Counsel noted that the CAC had accepted that Mr Schembri's conduct was less serious than the licensee in *De Heer*.

¹ At [42].

² [2015] NZREADT 33.

³ [2016] NZREADT 33.

(b) Mr Lupi

[16] The CAC noted that the cases of *Li* and *De Heer* were relevant to Mr Lupi's penalty as they also involved a failure by supervising licensees to appropriately supervise junior salespersons. In both cases, the supervising licensees were found guilty of unsatisfactory conduct and fined \$2,500 and \$2,000 respectively.⁴ In *Rowe v REAA* an agent who failed to properly supervise was found guilty of unsatisfactory conduct, censured and fined \$1,500.⁵

[17] The CAC submitted that Mr Lupi's conduct warranted a more significant penalty than those imposed in *Li*, *De Heer* and *Rowe* given that the licensees in these cases were found guilty of unsatisfactory conduct and not misconduct. Mr Lupi, however, had not been merely negligent but was recklessly indifferent to the consequences of his actions. The CAC submitted that a censure and a fine of \$5,000 to \$7,000 was appropriate in such circumstances.

[18] Counsel for Mr Lupi submitted that the CAC's suggested penalty was too high and failed to reflect the changes Mr Lupi had implemented in his practice to address the concerns raised by Ms C's complaint. Mr Lupi's counsel submitted that Mr Lupi had "*voluntarily improved and strengthened his own, and the Agency's, process with respect to supervision, management and training of licensees, plus preparation of sale and purchase agreements*". Counsel further submitted the range of an appropriate fine submitted by the CAC was inconsistent with the Tribunal's previous decisions. Counsel did not suggest what an appropriate range for the fine should be, but it can be inferred that it would be less than the CAC's suggested range of \$5,000 to \$7,000.

(c) Mr Kearins

[19] The CAC relied upon the cases *Li* and *De Heer* in their submissions as to the appropriate penalty for Mr Kearins' penalty. These cases also involved separate findings of unsatisfactory conduct for breach of s 50 of the Act in relation to licensees responsible for supervising the junior licensees. The CAC submitted that Mr Kearins' abdication of responsibilities was greater than the

⁴ Note that in the original decision of the Tribunal in *Li* the Tribunal had found the licensee guilty of misconduct, but this was overturned on appeal to the High Court.

supervising licensees in *Li* and *De Heer*. Accordingly, the CAC submitted that a censure and fine in the vicinity of \$2,000 was appropriate.

- [20] Counsel for Mr Kearins submitted that Mr Kearins had consistently acted in good faith and given the context of his offending a censure was not appropriate and a fine of no more than \$1,000 should be imposed. It was submitted that Mr Kearins had an exemplary record and his offending was less serious than the supervisor in *Li*. Ms Riddell-Garner submitted that there was no need for specific deterrence against Mr Kearins, who had changed his supervision practices in light of these proceedings. Lastly, given Mr Kearins was a first-time offender who had fully engaged in these proceedings there was no need for a censure to be imposed to emphasise the seriousness of the breach in his case.

(d) Complainant's Loss

- [21] The Complainant seeks to be recompensed for the legal costs she has incurred in the amount of \$46,977.08. This order was sought pursuant to s 110(4) and s 93(1)(i) of the Act.
- [22] The Tribunal notes that s 110(4) merely refers to the Tribunal's powers to make orders under s 93(1). Under s 93(1)(g) the Tribunal can order a licensee to pay the Complainant any costs or expenses incurred in respect of the inquiry, investigation or hearing. The Tribunal do not consider that these legal fees directly arise out of the inquiry, investigation and hearing. Rather they are the consequences of the agent's actions and the sale process itself.
- [23] In the alternative, the Complainant seeks an order pursuant to s 110(2)(g) that Mr Lupi pay compensation to the Complainant for loss incurred through his misconduct in the form of legal fees totalling \$46,977.08. Section 110(2)(g) provides that where a person has suffered loss by reason of a licensee's misconduct, they may recover it. While s 110(2)(g) is framed broadly, this is not a catch-all provision which allows a Complainant to seek any

⁵ [2015] NZREAA 58.

compensation against a licensee. As the High Court in *Quin v REAA* noted, the jurisdiction to award compensation is limited, and:⁶

[t]here is nothing in the 2008 Act which demonstrates that Parliament intended to confer on a Committee or the Tribunal a general power to order a licensee to compensate a complainant for any and all loss or harm to the complainant resulting from a real estate transaction in which the licensee acted below the standard expected. That would be a sweeping change to the obligations of a licensee. It could result in liability being imposed beyond that which would be available under the general law. If that were intended by Parliament then I would expect it to be stated explicitly in the purpose section of the 2008 Act, explicitly set out in the remedies provisions of the Act, and for the concept to have been at least raised in the readings of the Bill.

[24] The Complainant also sought an order pursuant to s 110(2)(g) that Mr Lupi pay the Complainant for the loss sustained by the Complainant due to Mr Schembri's mistake in selling the property under current registered market valuation. The Complainant suffered a loss of \$115,000 in this sale. The Complainant submitted that she did not seek repayment of the full loss and that the Tribunal should award a sum it believed was reasonable in the circumstances. The Tribunal have no information on this loss and cannot see how it could have been caused by Mr Schembri or Mr Lupi's actions and the finding of unsatisfactory conduct. Ms C accepted the purchase price with no evidence of coercion.

[25] Overall, the Complainant sought a total of \$46,977.08 from Messrs Schembri and Kearins for their unsatisfactory conduct, or, alternatively, Mr Lupi for his misconduct. The Complainant also sought a reasonable amount of compensation against Mr Lupi for the loss the Complainant suffered due to Mr Schembri's valuation mistake.

[26] Counsel for Mr Kearins submitted that Mr Kearins did not have any submissions in response, as Counsel had understood the Complainant to be asking for financial compensation from Mr Lupi or Mr Lupi's agency.

⁶ [2012] NZHC 3557 at [56].

[27] Counsel for Messrs Lupi and Schembri submitted that there were no grounds on which Ms C could claim compensation. The claim for her legal costs was under s 110(4) (Schembri/Kearins) and from Mr Lupi under s 110(2)(g). Counsel submitted that the legal costs claimed were inflated and should not be ordered in whole. Counsel for Messrs Lupi and Schembri further noted that most of the Complainant's legal costs were not causally connected to her complaint to the CAC.

[28] Further, as regards the loss allegedly sustained due to Mr Schembri's mistake in selling the property undervalue, it was submitted that this loss was not causally linked to Mr Lupi's misconduct. It was submitted that the Complainant would have suffered a significant loss in this sale in any event, given that she needed to sell the Wellington property to fund the purchase price for an Auckland property she had purchased.

Principles of Sentencing

[29] The principles of sentencing are well established, and have been set out in prior decisions of the Tribunal such as *CAC v Black*,⁷ *REAA v Lum-on*,⁸ *CAC v Walker*,⁹ and *REAA v Kumandan*.¹⁰

[30] A penalty must fulfil various functions in a disciplinary case. These functions are discussed below.

(a) Protecting the public

Section 3 of the Act sets out the purposes of the legislation. The 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. One of the ways in which the Act tries to achieve this purpose is by providing accountability through an independent, transparent and effective disciplinary process.

(b) Maintenance of professional standards

⁷ [2016] NZREADT 64.

⁸ [2012] NZREADT 47.

⁹ [2011] NZREADT 4.

Another way in which the Act tries to achieve its overall purpose is by raising industry standards. The need to maintain professional standards has also been raised in professional disciplinary proceedings involving other professions. For example, this factor was emphasised in the medical disciplinary proceeding *Taylor v The General Medical Council*,¹¹ and *Dentice v The Valuers Registration Board* – a disciplinary proceeding involving valuers.¹²

(c) Punishment and Deterrence

The Supreme Court in *Z v CAC* noted that the purpose of professional disciplinary proceedings is not to punish the practitioner but to ensure the maintenance of appropriate standards in the profession.¹³ However, the Court also accepted that there was an element of punishment inherent in achieving this goal (see also the discussion in *Clyne v NSW Bar Association*).¹⁴ Furthermore, as Lang J noted in *Patel v Dentists Disciplinary Tribunal*,¹⁵ disciplinary proceedings inevitably involve issues of deterrence. Penalties that deter the offender and others in the same profession from offending in a like manner helps to protect the public.

(d) Rehabilitation

Where appropriate, rehabilitation of the agent must also be considered in imposing a penalty (see *B v B*)¹⁶.

[31] The Tribunal also adopts the statement of principle from *REAA v Kumandan*, that in applying any penalty, the Tribunal must have “*regard to the law, the previous decisions of the Tribunal (to ensure consistency) and most importantly the facts of each case and the circumstances of the agent.*”¹⁷

¹⁰ [2012] NZREADT 32.

¹¹ [1990] 2 All ER 263.

¹² [1992] 1 NZLR 720

¹³ [2009] 1 NZLR 1 (SC) at [97].

¹⁴ (1960) 104 CLR 186 (HCA) at 201-202.

¹⁵ HC Auckland CIV 2007-404-1818, 13 August 2007.

¹⁶ HC Auckland

Discussion

[32] The Tribunal wishes to thank all counsel involved for their helpful submissions on penalty and accompanying documents.

[33] It is important that this penalty also reflect the penalty decision imposed by Tribunal in the related decision READT 056/16 *Century 21 Wellington Limited v Real Estate Agents Authority CAC412*. This is of particular importance when considering Ms C's claims for compensation in this case.

[34] The Tribunal do not consider that there should be any duplication in this respect, and after having carefully considered Ms C's claim for compensation, the Tribunal does not consider that Ms C has established to our satisfaction that the costs that she has incurred (being her loss of profit and her legal fees), arise directly out of the actions of Mr Schembri, Mr Lupi or Mr Kearins in terms of the penalty provisions under the Act. Accordingly, the Tribunal decline to order any compensation payments to Ms C. The repayment of the commission will assuage some of Ms C's financial concerns.

(a) Mr Schembri

[35] The Tribunal are aware that Mr Schembri was a young agent who was trying to do his best for Ms C who was in a difficult situation. The Tribunal take into account that he was naïve concerning the extent of his need for supervision and his obligations not to give legal advice. The Tribunal do not consider that he was significantly at fault in this case, and accordingly consider that a censure and a modest fine would be penalty for Mr Schembri. Further, Mr Schembri has left the real estate industry, which in itself is a significant punishment and does not allow the Tribunal to consider any potential rehabilitative measures which would otherwise have been an important consideration.

[36] Accordingly, the Tribunal fine Mr Schembri the sum of \$750. The Tribunal consider that a modest fine of this level is the appropriate level and is in line with the *Li* and *De Heer* decisions.

¹⁷ [2012] NZREADT 32 at [15].

[37] Mr Schembri is also censured. The Court of Appeal, in the context of a disciplinary action against a lawyer, has considered the definition of the term “censure”. In *New Zealand Law Society v B* the Court of Appeal noted that the word “censure” and “reprimand” were generally synonymous, and that “[b]oth words envisage a disciplinary tribunal [...] making a formal or official statement rebuking a practitioner for his or her unsatisfactory conduct”.¹⁸ In these circumstances a censure is appropriate to reprimand Mr Schembri for his conduct.

(b) Mr Kearins

[38] The Tribunal consider that Mr Kearins has a similar level of responsibility for these events as Mr Schembri. Whilst he did not supervise Mr Schembri at all, the Tribunal’s decision made it clear that what the Tribunal considered necessary as an effective aspect of supervision was not as clearly articulated in its decisions as it is now. There is also no doubt that Mr Kearins took steps to attempt to educate, inform and support the agents that he was supervising. He should be censured for his role in this matter and subject to a modest fine, but that is all.

[39] Mr Kearins also has had an exemplary record which should be recognised in this decision and we have reduced the fine from \$1,000 to \$500. Although we accept his conduct was not seriously culpable, we do consider that a censure would be appropriate given that he was at a similar level of culpability as Mr Schembri.

[40] Accordingly, the Tribunal fine Mr Kearins the sum of \$500 and censure him.

(c) Mr Lupi

[41] The Tribunal found Mr Lupi guilty of misconduct and considered that his conduct was the most serious of the three agents. Mr Lupi has, however, made significant attempts to rehabilitate himself since this event and has instigated new supervision procedures and education programmes for his agency to ensure that such a calamity will not happen again. He deserves credit for this.

¹⁸ [2013] NZCA 156.

The Tribunal also note that a financial penalty has already been suffered by him through the order of the Tribunal that his agency returns its commission to Ms C.

[42] In all the circumstances, the Tribunal consider that a fine and a censure is the appropriate penalty for Mr Lupi. His level of fine should be higher than those imposed upon Messrs Kearins and Schembri. This reflects the fact that he has more culpability in this matter.

[43] Accordingly, the Tribunal fines Mr Lupi the sum of \$5,000 and censure him.

(d) Complainant's Loss

[44] The Tribunal, while sympathetic to Ms C's position, considers its jurisdiction to award monetary compensation under s 93 and s 110 of the Act as limited. In respect of her claim for legal costs under s 110(4) against Messrs Schembri and Kearins, the Tribunal considers that these costs are not causally connected to her complaint and are therefore not recoverable. As regards Mr Lupi, the Tribunal dismiss the Complainant's claim against Mr Lupi for the consequences of Mr Schembri's conduct in line with the reasons provided above at [24].

[45] As to the Complainant's claim for compensation under s 110(2)(g) for Mr Lupi's misconduct, the Tribunal accepts that this provision is broader than the scope under s 93 to award monetary compensation against agents guilty of unsatisfactory conduct. However the Tribunal consider that the complainant has not established to our satisfaction that the damages she claims are all causally linked to Mr Lupi's conduct. As the Court said in *Quin v Real Estate Agents Authority* [2012] NZHC 3557 the compensation provisions in the act are not intended to replace the general law as to loss and damage. The refund of the commission paid by the complainant to the agency will compensate her for such loss as the Tribunal consider has been causally established.

Name Suppression

[46] The Tribunal has the power pursuant to s 108 to order the suppression of the name of any person that appears before it. This power is subject to the proviso that the making of such order is “proper”. Ms C, the complainant, has asked the Tribunal to exercise its power under s 108 and order that her name be suppressed in the publication of this decision.

[47] The starting point in the Tribunal’s analysis has to be the principle of open justice. The Courts of New Zealand strive to be places where justice is seen to be done. Transparency of Court proceedings maintains public confidence in the administration of justice. This transparency is achieved through open hearings, and the promulgation of fair, accurate and public reporting of what occurs in Court. As the Supreme Court in *Erceg v Erceg [Publication Restrictions]* noted, the principle of open justice is “*fundamental to the common law system of civil and criminal justice.*”¹⁹ However, the Court equally recognised that it was well-established that there are circumstances in which the interests of justice require the principle to be departed from.

[48] What is always required in analysing any proposed departure from the principle of open justice, is balancing the need for open justice against the personal and private interests of any party. Ms C, the complainant, has sought name suppression. She has provided the Tribunal with some medical certificates which support her claim. These documents show that she suffers from anxiety of a significant nature and has other health problems. Her general practitioner confirms that she considers that any publication of Ms C name would be detrimental to her health. Ms C is not the subject of the disciplinary complaint and is the innocent party in this case as in the (initial) complaint.

[49] In these circumstances the Tribunal consider that it is appropriate that Ms C has her name suppressed. Her personal interests in this case outweigh the need for open justice. The Tribunal order that her name and any detail which might identify her be suppressed. She is to be identified only as the complainant “Ms C” in this and the earlier substantive decision. The name suppression issue was

¹⁹ [2017] 1 NZLR

left unaddressed in the Century 21 decision to be addressed for the complainant in this decision and to then apply to both decisions. For the avoidance of doubt this suppression order also covers [2017] READT 056/16 *Century 21 Wellington Limited v Real Estate Agents Authority* CAC412.

Summary of findings

[50] Mr Schembri censured and fined \$750.

[51] Mr Lupi censured and fined \$5,000.

[52] Mr Kearins censured and fined \$500.

[53] The Tribunal draws the attention of the parties to the appeal provisions of s 116 of the Real Estate Agents Act 2008.

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Ms K Davenport QC
Deputy Chairperson

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G Denly
Member

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C Sandelin
Member