

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 76

READT 061/16

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

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 403

AGAINST SHALENDRA GOUNDAR
Defendant

Hearing 30 November 2017

Tribunal: Hon P J Andrews, Chairperson
Ms N Dangen, Member
Ms C Sandelin, Member

Appearances: Mr M Hodge, on behalf of the Committee
Ms S Lucas, on behalf of Mr Goundar

Date of Decision: 12 December 2017

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] In its decision issued on 5 September 2017, the Tribunal found Mr Goundar guilty on a charge of misconduct under s 73(b) (seriously incompetent or seriously negligent real estate agency work) of the Real Estate Agents Act 2008 (“the Act”) (“the substantive decision”).¹ The Tribunal has now heard submissions as to penalty.

Facts

[2] The charge related to Mr Goundar’s role in two transactions during 2014, in which Mr Khulbushan Joshi and Mrs Jeevan Joshi bought two properties in Papatoetoe, Auckland.

[3] Mr Goundar is a licensed branch manager and has owned and operated Main Realty Limited (trading as Century 21 Main Realty) (“the Agency”) since 1996. Each property was owned by a relative of Mr Goundar. One property (referred to as “the Coronation Road property”) was owned by Mr Goundar’s sister. The other property (referred to as “the Central Avenue property”) was owned by the sister of Mr Goundar’s brother in law.

[4] Neither of the owners was a licensed salesperson. Mr and Mrs Joshi were introduced to each property by Mr Goundar’s relatives, and dealt only with them. They had no dealings (either in person, or by telephone) with Mr Goundar, or any other licensed salesperson at the Agency. Mr Goundar’s role was limited to preparing the sale and purchase agreement for each transaction.

The substantive decision

[5] In relation to the Committee’s allegations regarding Mr Goundar’s compliance with specific obligations under the Act and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, (“the Rules”), the Tribunal found that he:

¹ *Complaints Assessment Committee 403 v Goundar* [2017] NZREADT 52.

- [a] in breach of s 133 of the Act, failed to provide Mr and Mrs Joshi with a copy of the approved guide relating to the purchase of a residential property, before they signed the sale and purchase agreement;²
- [b] in breach of r 9.7 of the Rules, failed to recommend to Mr and Mrs Joshi that they obtain legal advice, and allow them the opportunity to do so;³
- [c] in breach of rr 12.2 and 12.3 of the Rules, failed to ensure that Mr and Mrs Joshi were aware of the Agency's in-house complaints procedures, and/or that they were aware that they could access the Real Estate Agents Authority's complaints procedures;⁴
- [d] (in relation to the Coronation Road property), in breach of s 136 of the Act, failed to disclose to Mr and Mrs Joshi, in writing, that the vendor was his sister and that she would benefit financially from the transaction;⁵

[6] The four findings of breaches of ss 133 and 136 of the Act, and rr 9.7, 12.2, and 12.3 of the Rules, will be referred to as "the specific breaches."

[7] The Tribunal also considered Mr Goundar's overall conduct in relation to Rules which relate to general standards of professional competence and professional standards and found that he:

- [a] in breach of r 5.1 of the Rules, failed to exercise care, skill, competence and diligence when carrying out real estate agency work, in that he did not personally comply with his specific obligations set out above, or take any steps to ensure that those obligations were complied with;⁶
- [b] in breach of r 6.2 of the Rules, failed to act in good faith and deal fairly with Mr and Mrs Joshi, in that he failed to comply with provisions of the

² Substantive decision, at paragraph [49].

³ At paragraph [55].

⁴ At paragraph [57].

⁵ At paragraph [69].

⁶ At paragraph [81].

Act and Rules designed to further the Act's purpose to "promote and protect the interests of consumers";⁷

[c] in breach of r 6.3 of the Rules, Mr Goundar's conduct was likely to bring the real estate industry into disrepute, in that it was more likely than not to lead members of the public to think that licensees should not condone it, or find it to be acceptable.⁸

[8] The Tribunal also considered a charge that, in breach of r 6.4 of the Rules, Mr Goundar misled Mr and Mrs Joshi, or provided false information, or withheld information that should by law or in fairness have been provided to them. The Tribunal found that as Mr Goundar had not had any contact with Mr and Mrs Joshi, and had not turned his mind to providing any information, at all, he could not be said to have "misled" them, or provided "false information", or "withheld" any information.⁹

[9] The Tribunal recorded that its findings that Mr Goundar had breached general standards of professional competence and professional standards did not duplicate the findings of specific breaches of the Act and Rules. Rather, they underlined the significance of the specific breaches in assessing Mr Goundar's in the context of the purpose of the Act.¹⁰

[10] Mr Goundar was charged with misconduct under s 73(c)(i) and (iii) of the Act (that his conduct consisted of a wilful or reckless contravention of the Act or Rules) and, in the alternative, misconduct under s 73(b) of the Act (that his conduct constituted seriously incompetent or seriously negligent real estate agency work).

[11] The Tribunal did not find Mr Goundar guilty of misconduct under s 73(c)(i) and (iii). The Tribunal said:¹¹

... while he acknowledged that he was aware of his obligations under the Act and Rules, the evidence points to Mr Goundar having not given any thought to them, at all, at the time of the two transactions. In the

⁷ At paragraph [82]. The purpose of the Act is set out in s 3 of the Act.

⁸ At paragraph [84].

⁹ At paragraph [85].

¹⁰ At paragraphs [86] and [87].

¹¹ At paragraph [93].

circumstances, we are not satisfied that he wilfully breached the Act and Rules, or that he foresaw that what he was doing (or rather, not doing) would be breached. Accordingly, we do not find him guilty of misconduct under s 73(c)(i) and (iii).

[12] The Tribunal went on to say:¹²

We are, however, satisfied that cumulatively, Mr Goundar's breaches can only be regarded as seriously incompetent and seriously negligent real estate agency work under s 73(b) of the Act.

Sentencing principles

[13] 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.”¹³ The Act achieves these purposes by regulating agents, branch managers, and salespersons, raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.¹⁴

[14] These purposes are best met by penalties for misconduct and unsatisfactory conduct being determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, and the maintenance of confidence in the industry, and the need for deterrence.

[15] 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.¹⁵

[16] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case the Tribunal may:

¹² At paragraph [94].

¹³ Section 3(1) of the Act.

¹⁴ Section 3(2).

¹⁵ 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].

- [a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);
- [b] Impose a fine of up to \$15,000;
- [c] Order cancellation or suspension of the licensee's licence; and
- [d] Order that the licensee not perform any supervisory functions until authorised to do so.

[17] In determining the appropriate penalty for misconduct, the nature of the misconduct will be considered along with other factors. In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* (in relation to a lawyer), the High Court noted that the “ultimate issue” is as to the practitioner’s fitness to practise, and factors which will inform this decision include the nature and gravity of the charges, the manner in which the practitioner has responded to the charges (such as the practitioner’s willingness to co-operate in the investigation, to acknowledge error or wrongdoing, and to accept responsibility for the conduct), and the practitioner’s previous disciplinary history.¹⁶

Submissions

[18] Mr Hodge submitted for the Committee that the gravity of Mr Goundar’s conduct should be placed at least at the mid-level of misconduct. He submitted that Mr Goundar’s total inaction served to undermine the Act’s clear consumer protection objectives, which should be considered a serious breach of acceptable standards.

[19] In particular, he submitted that the specific obligations Mr Goundar was found to have breached are all mechanisms designed to protect consumers, and the combination of his breaches left Mr and Mrs Joshi in a particularly vulnerable position where they were essentially taken advantage of by Mr Goundar’s relatives. Mr Goundar had no meaningful or substantive communication with Mr and Mrs Joshi, and appeared to have left important professional obligations to his secretary, without

¹⁶ *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] NZHC 83; [2013] 3 NZLR 103, at [185]–[189].

any proper follow up or oversight. Further, Mr Goundar's breaches occurred in the course of two separate occasions, several months apart, so could not be viewed as an aberrant, isolated, event.

[20] Mr Hodge further submitted that the overarching standards set out in rr 5.1, 6.2, and 6.3, which Mr Goundar was found to have breached, are fundamental to the Act's consumer protection objectives. As a senior licensee, with over twenty years' experience in the real estate industry, and having for much of that time owned and operated the Agency, he ought to have had a much greater appreciation of his professional obligations.

[21] Mr Hodge also submitted that in the light of the Tribunal's "pivotal" finding that Mr Goundar had not given any thought to his professional obligations, at all, at the time of the two transactions¹⁷ (which he described as a "damning" finding), the finding that Mr Goundar had engaged in conduct that brought the industry into disrepute was well justified, and required a meaningful response from the Tribunal.

[22] Mr Hodge submitted that there were no mitigating factors which could be considered in relation to penalty. With reference to the submissions for Mr Goundar as to mitigating factors, he submitted that personal factors and character references will carry less weight in the context of professional disciplinary proceedings, because of the focus on protecting the public and the reputation of the profession as a whole.¹⁸

[23] He further submitted that any financial benefit that Mr and Mrs Joshi may subsequently have gained is irrelevant. At most, he submitted, while a subsequent loss might be seen as an aggravating factor, a subsequent gain should only be seen as the absence of an aggravating factor.

[24] Mr Hodge submitted that the appropriate penalty would be either censure together with a short period of suspension, or censure together with a fine at the upper end of the available range.

¹⁷ At paragraph [93] of the substantive decision, set out at paragraph [11], above.

¹⁸ Referring to *Auckland Standards Committee 2 v Parshotam* [2016] NZREADT 15, at [58].

[25] Ms Lucas's submissions were based on an assessment of the gravity of Mr Goundar's specific breaches of ss 133 (failure to provide a copy of the approved guide), r 9.7 (failure to recommend legal advice and allow an opportunity to take such advice), rr 12.2 and 12.3 (failure to advise as to complaints procedures), and s 136 (in relation to the Coronation Road transaction, failing to provide written notice as to his sister's financial benefit). She submitted that taken individually, the specific breaches would amount to a finding of unsatisfactory conduct, at most, and that taken cumulative, the specific breaches are at the lower end of seriously negligent or seriously incompetent conduct.

[26] Ms Lucas submitted that the Tribunal should take into account, as a mitigating factor, that Mr Goundar is a senior licensee and, until 2015, had not faced any disciplinary action.¹⁹ She referred to his contribution to the community as a Justice of the Peace, and to a character reference. She also referred to the illness Mr Goundar's father was suffering at the relevant time which may, she submitted, have contributed to his failure to ensure that his usual standards were met.

[27] Ms Lucas further submitted that Mr Goundar was not motivated by any personal gain, as no commission was charged on the sale of the Coronation Road property, and a reduced commission of \$2,000 was charged on the sale of the Central Avenue property.

[28] Finally, she submitted that Mr and Mrs Joshi were unlikely to have suffered any financial loss as a result of the two transactions, as the Central Avenue was on-sold in July 2015 (some seven months after they bought it), resulting in a profit of \$110,000 on its purchase price of \$389,000.

[29] Ms Lucas submitted that the appropriate penalty would be censure together with a fine at the lower end of the range.

¹⁹ A previous disciplinary finding against Mr Goundar is considered at paragraph [33], below.

Discussion

[30] Both Mr Hodge and Ms Lucas referred to previous penalty decisions of the Tribunal.²⁰ As is very often the case, none of these was on all fours with the present case. Mr Hodge submitted that the Committee had been unable to identify any case which involved a total lack of communication and engagement by a licensee with complainant purchasers. The fact that none of the decisions referred to involved circumstances with any factual similarity to the present case means that the penalties imposed, and the Tribunal's reasoning in reaching those penalties, are of little assistance in this case.

[31] We would accept that taken individually, each of the specific breaches by Mr Goundar may only warrant a finding of unsatisfactory conduct. It may also be that (leaving aside the breach of s 136 of the Act) the specific breaches taken cumulatively may not warrant a finding of misconduct.

[32] However, we cannot disregard the finding of a breach of s 136 of the Act, and the findings that Mr Goundar breached licensees' fundamental obligations under the Act, designed to reflect, and underpin, the purposes the Act, of consumer protection and maintenance of public confidence in the industry. The penalty to be imposed in the present case cannot be determined by reference to the specific breaches, alone.

[33] It is appropriate to refer at this point to the finding of unsatisfactory conduct made against Mr Goundar in 2015. That finding arose out of an "own motion" inquiry by a Complaints Assessment Committee into Mr Goundar's supervision of a licensed salesperson in the Agency. The Committee found that he had failed to supervise a salesperson properly, and had failed to implement the Agency's disputes resolution process. The Committee found that these failures indicated a total lack of understanding of his supervision and agency responsibilities and brought into question his knowledge of the requirements of the Act. That finding, and the penalty imposed (censure, an order to complete Unit Standard 26154 "Demonstrate knowledge of

²⁰ *Real Estate Agents Authority (CAC 10063) v Picknell* [2013] NZREADT 41; *Complaints Assessment Committee 20003 v Morgan* [2015] NZREADT 21; *Martin v Real Estate Agents Authority (CAC 407)* [2017] NZREADT 14; *Complaints Assessment Committee 408 v Reed* [2017] NZREADT 34.

requirements for properly supervising and managing a real estate business”, and a fine of \$2,500, were upheld on appeal to the Tribunal.²¹

[34] The events to which that finding related occurred in January 2015, so post-date the transactions in the present case. The later events serve to demonstrate that Mr Goundar’s conduct in the present case was not an isolated, aberrant event. That fact, in itself, is sufficient to distinguish the facts in the present case from those considered in, for example, *Martin v Real Estate Agents Authority (CAC 407)*,²² and *Complaints Assessment Committee 408 v Reed*.²³

[35] We take note of Ms Lucas’s submissions as to mitigating factors, but accept Mr Hodge’s submission that personal factors carry less weight in the professional disciplinary context than they may do in other contexts. Any weight personal factors may be given in the present case must be balanced against the cumulative effect of Mr Goundar’s failure to have any regard to his professional obligations, the specific breaches, and his breaches of fundamental obligations under the Act underpinning the purposes of the Act.

[36] We accept Mr Hodge’s submission that Mr Goundar’s conduct should be placed in the mid-range of misconduct. We have concluded that the appropriate penalty must include censure, a period of suspension, an order for further training, and a fine.

Orders

[37] The tribunal orders that:

[a] Mr Goundar is censured;

[b] Mr Goundar’s licence is suspended for a period of three months from the date of this decision;

²¹ *Bahramitash & Goundar v Real Estate Agents Authority (CAC 402)* [2017] NZREADT 8.

²² *Martin v Real Estate Agents Authority (CAC 407)*, above, fn 20.

²³ *Complaints Assessment Committee 408 v Reed*, above, fn 20.

[c] Mr Goundar is ordered to pay a fine of \$2,500. Payment is to be made to the Authority within 20 working days of the date of this decision.

[d] Mr Goundar is ordered to complete Unit Standard 26149 – Demonstrate knowledge of licensing and code of professional conduct under the Real Estate Agents Act 2008, within 12 months of the date of this decision.

[38] 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.

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member