

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2017] NZREADT 78**

**READT 062/16**

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

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 409

AGAINST ANDREW RANKIN  
Defendant

On the papers

Tribunal: Hon P J Andrews, Chairperson  
Mr G Denley, Member  
Ms C Sandelin, Member

Submissions received from: Mr S Waalkens, on behalf of the Committee  
Mr M Dennett, on behalf of Mr Rankin

Date of Decision: 15 December 2017

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**DECISION OF THE TRIBUNAL  
(PENALTY)**

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## **Introduction**

[1] In its decision issued on 6 October 2017, the Tribunal found two charges of misconduct under s 73(b) of the Real Estate Agents Act 2008 (“the Act”) proved against Mr Rankin (“the substantive decision”).<sup>1</sup> The Tribunal has now received submissions from counsel as to penalty.

## **Facts**

[2] Mr Rankin was the salesperson for a property at Pahiatua (“the property”). The purchasers were Mr and Mrs Brogden (“the Brogdens”). They bought the property for their daughter and her two young children to live in.

[3] Before marketing the property to the Brogdens, Mr Rankin had been provided with an initial report which stated that the property had been tested for methamphetamine contamination, with a positive result. Mr Rankin withheld this information from the Brogdens.

[4] A detailed site investigation after the Brogdens bought the property, and became aware of the initial report, disclosed an overall moderate level of methamphetamine contamination inside the property. Six of the locations sampled (including bedrooms) had levels above Ministry of Health Guidelines.

[5] On the first charge against Mr Rankin, the Tribunal found that he had breached rr 6.4 (by withholding information as to the report) and 10.7 (by failing to disclose a known defect) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”).

[6] In respect of the second charge, Mr Rankin admitted that he had allowed the Brogdens to access the property, despite a warning in the initial report, and failed to make enquiries or take advice as to whether it was safe to access the property. The Tribunal notes that Mr Rankin admitted the facts relating to this charge shortly before

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<sup>1</sup> *Complaints Assessment Committee 409 v Rankin* [2017] NZREADT 59.

the hearing, but submitted that he should be found guilty of unsatisfactory conduct rather than misconduct.

[7] The Tribunal found that Mr Rankin's conduct amounted to seriously incompetent or seriously negligent real estate agency work, and was therefore misconduct under s 73(b) of the Act.

### **Sentencing principles**

[8] 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.”<sup>2</sup> 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.<sup>3</sup>

[9] 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.

[10] 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.<sup>4</sup>

[11] 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:

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<sup>2</sup> Section 3(1) of the Act.

<sup>3</sup> Section 3(2) of the Act.

<sup>4</sup> 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;
- [d] Order that the licensee pay compensation of up to \$100,000 to any person who has suffered loss by reason of the licensee's conduct.

[12] 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.<sup>5</sup>

### **Submissions**

[13] Mr Waalkens submitted for the Committee that Mr Rankin's inaction after he received the initial report, and his failure to ascertain adequately whether the property was safe for access, undermined that Act's clear consumer protection objectives, which should be considered a serious breach of acceptable standards. He submitted that the following should be regarded as aggravating factors:

- [a] The combination of Mr Rankin's failures left the Brogdens in a particularly vulnerable position where they bought the property, and their daughter and her two young children moved into it, without knowing of the methamphetamine contamination.

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<sup>5</sup> *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] NZHC 83; [2013] 3 NZLR 103, at [185]–[189].

[b] Mr Rankin put the Brogdens at risk of harm by allowing them access to the property and failing to tell them about the initial report; and

[c] While Mr Rankin visited the property with the Brogdens in mid-March 2015, it was not until December of that year that they were alerted (by the person who had originally requested it) to the initial report. Accordingly, Mr Rankin's failure to disclose the initial report, and to allow the Brogdens access to the property without warning them of the methamphetamine contamination, continued over several months.

[14] Mr Waalkens also referred to a previous finding of unsatisfactory conduct against Mr Rankin, in respect of which a penalty decision was issued on 6 October 2015, in which he was censured, ordered to pay a fine of \$1,000, and ordered to complete specified training.

[15] Mr Waalkens submitted that Mr Rankin's conduct falls in at least the mid-range of seriousness, and that censure and a period of suspension for six months would be appropriate as a general and personal deterrent, to protect the public, and to emphasise the high standards required of licensees when dealing with prospective purchasers.

[16] Mr Dennett submitted for Mr Rankin that the Tribunal should assess penalty on the basis that Mr Rankin did not engage in deliberately misleading conduct, but that he failed in his professional obligations due to serious oversight and a potential lack of adequate training.

[17] Mr Dennett also submitted that the Tribunal should disregard the previous finding of unsatisfactory conduct, as the facts and circumstances of that matter were different from the present case.

[18] With respect to the severity of Mr Rankin's conduct, Mr Dennett submitted that the Tribunal should take into account that not all of the levels of contamination, while identified as being above Ministry of Health Guidelines at the time, would now be regarded as such under Guidelines issued in October 2016. Under the new Guidelines, only two areas in the property showed levels of contamination above the Guidelines.

[19] Mr Dennett further submitted that the Tribunal should consider as mitigating factors that:

- [a] Mr Rankin had admitted the second charge, and took responsibility for allowing the Brogdens to access the property. He submitted that although Mr Rankin had only formally admitted this charge shortly before the hearing, the Tribunal should still consider a discount for an early guilty plea, as the plea had been indicated to counsel for the Committee approximately one month before the hearing.
- [b] He is well-respected in the Pahiatua community, both as a real estate salesperson and as a member of the community. Mr Dennett referred to character references annexed to his submissions. He also referred to the further training Mr Rankin has undertaken, and his greater engagement with, and supervision by, his branch manager.

[20] Mr Dennett accepted that Mr Rankin should be censured, but submitted that his license should not be suspended. In support of this submission, Mr Dennett submitted that Mr Rankin is the sole earner in his family, and supports his wife and two children. If he were suspended, he would lose significant earning capacity. Further, he submitted that any period of suspension would be likely to lead to a further period of five to six months without an income after his licence is restored, bearing in mind the time required to restore real estate listings, and the time properties in Pahiatua are on the market before selling.

[21] Mr Dennett further submitted that suspension would adversely affect Mr Rankin's reputation for a significant period of time (more so than would be the case in a larger market), extending the time it would take him to gain new listings.

[22] Mr Dennett submitted that Mr Rankin has the ability to pay a fine, but any fine should not be predicated on his earning a high income.

## Discussion

[23] The only penalty decision referred to by counsel was that in *The Real Estate Agents Authority (CAC 306) v Murphy*.<sup>6</sup> There, the licensee had arranged for the property to be tested for methamphetamine contamination. After the licensee received the (positive) test results, there was a delay in advising prospective purchasers of the methamphetamine exposure, and the licensee failed to warn viewers of the health risks of entering the property. The Tribunal dismissed a charge of misconduct, but found the licensee guilty of unsatisfactory conduct in relation to allowing prospective purchasers to view the property when they knew it was contaminated. However, people who viewed the property were given, inter alia, a copy of the contamination report. The licensee and the agency in which he was engaged were each fined \$2,000.

[24] We accept Mr Waalkens' submission that the present case is distinguishable from *Murphy*, in that the exposure-related risk in *Murphy* was much more confined, and in the present case, the Brogdens bought the property, having not been advised of the initial report of methamphetamine contamination.

[25] We do not accept Mr Dennett's submission that the actual level of contamination is a relevant factor. It is the fact of the initial report's identification of contamination that is relevant. It does not assist Mr Rankin that the contamination levels in some areas of the property might now be below Ministry of Health guidelines. Once there is any report of contamination, prospective purchasers must have the opportunity to make their own assessment of any risk.

[26] The Brogdens did not have that opportunity. Ms Brogden and her two young children lived in the property for several months before they learned of the methamphetamine contamination. The fact that Mr Rankin did not advise them of the initial report, and provide them with the opportunity to make their own assessment of the risk, must be regarded seriously.

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<sup>6</sup> *The Real Estate Agents Authority (CAC 306) v Murphy* [2015] NZREADT 88.

[27] We have reviewed the previous disciplinary finding against Mr Rankin. It concerned a quite different factual situation (and in particular, did not involve any issue of a risk such as that in the present case), and we do not propose to take it into account.

[28] We have also considered the character references provided in support of Mr Rankin. We accept Mr Waalkens' submission that in light of the Act's focus on protection of the public and the reputation of the industry as a whole, personal circumstances and character references carry less weight in the disciplinary context than they might in other contexts.<sup>7</sup>

[29] Finally, we have considered Mr Rankin's guilty plea in relation to the second charge. However, while accepting that he accepted the facts of that charge, Mr Rankin did not accept that he should be found guilty of misconduct, as charged. The guilty plea did not therefore reduce the time or complexity of the hearing to any significant extent.

[30] Bearing in mind the seriousness of Mr Rankin's conduct, together with the principles as to sentencing set out earlier at paragraphs [8] to [10], we have concluded that the least punitive penalty that is appropriate is for Mr Rankin to be censured, ordered to pay a fine of \$3,000, and that his licence is suspended for a period of three months. In the light of the steps Mr Rankin has already taken regarding training, no further order for specified training is required.

### **Compensation**

[31] The Brogdens seek compensation totalling \$146,429.01, comprising remediation costs, compensation for income deprivation, compensation for loss of wages for remediation work, devaluation of the property because of stigma, and legal costs.

### *Submissions*

[32] While acknowledging the Tribunal's power to award monetary compensation under s 110(g), Mr Waalkens referred to the primary focus of disciplinary cases, which

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<sup>7</sup> See *Auckland Standards Committee 2 v Parshotam* [2016] NZLCDT 15, at [58].



is on maintenance of professional standards and protection of the public. Thus, charges are brought by the Committee in the general public interest and do not replicate, and are not a substitute for, private civil proceedings.

[33] Mr Dennett also referred to the focus of disciplinary cases being on disciplinary standard but submitted that in any event, the losses and costs claimed by the Brogdens are inappropriate and not adequately supported by evidence. In particular, he submitted (among other things) that:

- [a] Mr Rankin does not have the opportunity to assess the veracity of the claims – that is, what work the alleged costs relate to and the effect on the value of the property.
- [b] Some of the costs involved may have been unrelated to any misconduct by Mr Rankin, or be unnecessary or betterment.
- [c] The claim for 79 weeks of the property being vacant (approximately 18 months) is unreasonable, the property had not been rented before the methamphetamine contamination was discovered, and there was no evidence that Ms Brogden was required to pay rent.
- [d] There was no evidence that the value of the property had lowered due to any stigma.
- [e] It is rare for the Tribunal to make orders for compensation, and when ordered, the sums concerned have been low.
- [f] It is not possible to determine what part, if any, of the solicitors' costs relate specifically to the charge. Mr Dennett submitted that the Brogdens have sought compensation from Mr Rankin outside the disciplinary process, and it is therefore likely that at least some of the costs claimed relate to that claim, rather than to the Committee's inquiry and investigation, and the hearing.

## *Discussion*

[34] Section 111(g) of the Act provides that the Tribunal may make:

- (g) where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct, an order that 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.

[35] The Tribunal has found it difficult to assess whether the Brodgens' particular claims for compensation, if any, may properly be the subject of an order under s 110(g) of the Act. Many of Mr Dennett's concerns appear to be justified.

[36] For example, we accept that there is no explanation for the claim for "rental deprivation", nor any evidential support for the claim for devaluation of the property. Further, we are concerned that there may be at least some duplication between the quoted remediation costs from Clearview Property Care Limited and the work undertaken by the Brodgens: there is no explanation as to the distinction between these claims. We also accept Mr Dennett's submission that the account from the solicitors is not sufficiently itemised so as to give the Tribunal that the costs are indeed able to be claimed under s 110(g).

[37] We have concluded that we do not have sufficient information on which we could with confidence make any order for Mr Rankin to pay compensation under s 110(g). We observe that the Tribunal's finding is not to be taken as in any way an indication as to what might be able to be claimed in civil proceedings.

## **Orders**

[38] We order that Mr Rankin is censured, and his licence is to be suspended for three months from the date of this decision. Mr Rankin is also to pay a fine of \$3,000 to the Authority, within 20 working days of the date of this decision

[39] We make no order as to payment of compensation.

[40] 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.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Ms C Sandelin  
Member