

**PURSUANT TO SECTION 108(1)(c) OF THE REAL ESTATE AGENTS ACT  
2008, PUBLICATION OF THE NAME OR ANY IDENTIFYING DETAILS OF  
THE APPELLANT IS PROHIBITED**

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2017] NZREADT 79**

**READT 017/17**

IN THE MATTER OF

An appeal under section 111 of the Real  
Estate Agents Act 2008

BETWEEN

[APPELLANT]  
Appellant

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 410)  
First Respondent

AND

GEOFFREY TWIGDEN  
Second Respondent

On the papers

Tribunal:

Hon P J Andrews, Chairperson  
Mr G Denley, Member  
Ms N Dangen, Member

Submissions received from:

The appellant  
Ms E Mok, on behalf of the Authority

Date of Decision:

18 December 2017

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**DECISION OF THE TRIBUNAL**

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## **Introduction**

[1] On 19 February 2017, Complaints Assessment Committee 401 (“the Committee”) made a finding of unsatisfactory conduct against the second respondent, Geoffrey Twigden (“the substantive decision”).<sup>1</sup> On 19 April 2017, the Committee issued its decision as to penalty (“the penalty decision”).<sup>2</sup> The Committee decided not to make any penalty orders.

[2] [The appellant] has appealed against the penalty decision.

## **Background**

[3] The matters before the Committee arose out of the sale of a property at [Auckland], owned by [three persons], as trustees (“the property”).

[4] Mr Twigden, was the listing agent for the sale of the property, pursuant to an agency agreement dated 9 August 2016. Mr Twigden is a licensed salesperson engaged by Unlimited Potential Real Estate Ltd (“the Agency”). We note that prior to Mr Twigden’s engagement, there had been two unsuccessful auction campaigns. The property was sold under an agreement for sale and purchase dated 28 August 2016.

[5] On 12 September 2016, [the appellant] lodged a complaint against Mr Twigden. The Committee identified 19 allegations against him. In its substantive decision, the Committee found that Mr Twigden had engaged in unsatisfactory conduct under s 72(b) of the Act (contravening a provision of the Act or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”) by:

[a] failing to provide a written appraisal of the property, in breach of r 10.2 of the Rules; and

[b] failing to provide [the appellant] with the approved guide as to the sale of a residential property, in breach of s 133 of the Act.

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<sup>1</sup> Complaint No 16823, re Geoffrey Twigden, “Decision finding unsatisfactory conduct”, 19 February 2017.

<sup>2</sup> Complaint No 16823, re Geoffrey Twigden, “Decision on Orders”, 19 April 2017.

[6] The Committee dismissed the remaining allegations made by [the appellant]

### **The penalty decision**

[7] [The appellant] was invited to make submissions to the Committee as to penalty. [The appellant] submitted that the Committee should consider making penalty orders:

- [a] to refund the commission in full, including that part of it that went to the Agency;
- [b] to refund all legal costs relating to the sale (or at least those parts relating to discussions about proceeding with the sale);
- [c] that the licensee, or agent, for whom Mr Twigden worked to make his or her business available for inspection in relation to management; and
- [d] that Mr Twigden undergo training or education.

[8] [The appellant] submitted to the Committee that Mr Twigden's conduct had ended [the appellant's] marriage, taken away [the appellant's] family home and rental property, impacted on [the appellant's] retirement options, completely undermined [the appellant's] confidence in real estate agents and the industry, taken away the option of [the appellant] viewing any property listed with the Agency, and made [the appellant] feel sad and upset when returning to [the location of the property].

[9] Mr Twigden accepted that there was absolutely no excuse for his breaches of r 10.2 and s 133, and he would not make the same mistake again. He asked the Committee to take into account that he was the third agent to gain the listing (where the property had been on the market for the better part of a year), and that he was dealing with [two trustee owners] who were experienced real estate salespersons. Mr Twigden submitted that he genuinely believed that he was doing his best for his vendor clients throughout the process of listing and selling the property.

[10] The Committee decided to make none of the orders available to it under s 93 of the Act. In reaching this decision the Committee accepted that there were "strong

mitigating circumstances”, in that [two trustee owners] were qualified real estate agents,<sup>3</sup> the property had been the subject of two recent auction campaigns, Mr Twigden had discussed the value of the property with the vendors and reasonably believed that a written appraisal would be of no benefit to them, and that Mr Twigden reasonably believed that all three vendors well understood the contents of the approved guide (such that it would be pointless for him to provide it).<sup>4</sup>

[11] While recording that, pointless or not, Mr Twigden was obliged under the Act and Rules to provide a written appraisal and the approved guide, the Committee also took into account that it had inquired into a total of 19 complaints, out of which it had found 17 to be unjustified. The Committee assessed Mr Twigden as having overall acted in a professional manner, in the best interests of his clients. The Committee did not accept [the appellant’s] characterisation of Mr Twigden’s work as reprehensibly poor, and as having been the cause of her unfortunate personal circumstances.<sup>5</sup>

### **Appeal submissions**

[12] In part, [the appellant’s] submissions addressed the substantive decision, and were not relevant to [the appellant’s] appeal against the penalty decision. [The appellant’s] submissions also addressed the Committee’s processes in investigating and determining her complaint, and again were not relevant to her appeal against the penalty decision. With respect to the penalty decision, [the appellant] submitted that the Committee’s decision not to make penalty orders was “out of character” for a finding of unsatisfactory conduct.

[13] [The appellant] also asked whether the Committee had undertaken a “comprehensive literature review” of all cases available online to check for precedents and direction, and [the appellant] asked whether the Committee had found any cases where the current or past employment of the complainant and/or the complainant’s spouse were considered to be a mitigating factor. Finally, [the appellant] asked why,

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<sup>3</sup> [The appellant’s] licence had been voluntarily suspended]; [One other trustee] was actively engaged in the real estate.

<sup>4</sup> Penalty decision, at paragraphs 3.1–3.3.

<sup>5</sup> At paragraphs 3.4 and 3.5.

if the Committee were going to discriminate by using a vendor's employment, it did not cite this in advertising material when promoting its service.

[14] Ms Mok submitted for the Authority that the Committee had not been wrong to decline to make penalty orders against Mr Twigden.

[15] Ms Mok submitted that the Committee's decision was in fact consistent with its previous findings regarding the nature of Mr Twigden's conduct; in particular;

- [a] he had provided [the appellant] with an oral appraisal;
- [b] the Committee considered that his failure to provide a written appraisal and approved guide was reasonable in the circumstances that there had been two previous auction campaigns and both [trustee owners] would have been aware of the value of the property and the contents of the guide;
- [c] the two breaches were not sufficiently serious as to amount to misconduct under s 73 of the Act;
- [d] apart from the two specific breaches concerning the written appraisal and approved guide, Mr Twigden had otherwise acted on the sale in a professional manner, in the best interests of his clients; and
- [e] the vendors had sold the property for \$105,000 more than had been offered at the previous auctions, and had the benefit of a reduced commission, such that the unsatisfactory conduct the Committee had found against Mr Twigden had not led to any detrimental consequences for [the trustee vendors].

[16] With respect to [the appellant's] submission that the Committee had improperly taken her experience in the real estate industry into account, Ms Mok submitted that the Committee had not erred. She submitted that while [the trustee owners'] experience in the industry was not relevant to the Committee's finding of breaches of r 10.2 and s 133, it was open to it to take that experience into account when considering the impact of those breaches on the sale process.

[17] We record that Mr Twigden did not wish to make submissions.

## **Discussion**

[18] Section 93 of the Act provides that, having made a determination of unsatisfactory conduct, the Committee *may* do one of the things set out in s 93(1)(a) to (i) of the Act. Section 93 does not provide that the Committee *must* make one or more of those orders. The Committee is not required to make any particular order, or orders; it has a discretion as to whether to make any order at all and, if so, what particular order or orders.

*Was the Committee’s decision “out of character”?*

[19] We take this to be a submission that the decision to make no order was inconsistent with the finding of unsatisfactory conduct. We have concluded that it was open to the Committee to make no penalty orders, on the basis of the reasoning set out in its decision.

[20] The Tribunal accepts without question that r 10.6 and s 133 are in mandatory terms. A *written* appraisal *must* be provided, and a copy of the approved guide *must* be provided. The Committee was correct to find that Mr Twigden had breached these provisions. However, the Committee had a discretion as to what penalty, if any, it ordered, and it was entitled, at the penalty stage, to take mitigating factors into account when determining what penalty, if any, should be imposed. It was within its discretion not to impose any penalty.

[21] Ms Mok referred the Tribunal to its decisions in *Rodgers v Real Estate Agents Authority*,<sup>6</sup> and *Lee v Real Estate Agents Authority (CAC 10048)*.<sup>7</sup> In *Rodgers*, a licensee did not provide a written appraisal, however, the Tribunal noted “in terms of penalty”, the licensee had had a very reputable valuer provide sound advice. On that basis, the fine of \$5,000 imposed by a Complaints Assessment Committee was reduced to \$1,500. In *Lee*, where a licensee failed to provide a written appraisal, the Tribunal

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<sup>6</sup> *Rodgers v Real Estate Agents Authority*, [2016] NZREADT 7, at [65]. The licensee was also found to have breached other Rules.

<sup>7</sup> *Lee v Real Estate Agents Authority (CAC 10048)*, at [40].

upheld the decision of a Complaints Assessment Committee not to make any penalty orders. The Tribunal observed in that case that the licensee “did everything he could to sell [the complainant’s] house and whilst ultimately unsuccessful has been put to an enormous amount of stress and strain”.

[22] [The appellant] referred the Tribunal (in “Statement Two” of her submissions) to the decision of a Complaints Assessment Committee in *Fan*.<sup>8</sup> We note that in that case the licensee was found to have breached r 10.2, and to have failed to provide a listing agreement (a breach of r 9.6). Further, the licensee did not provide any oral appraisal, as occurred in the present case. Notwithstanding the greater seriousness of the offending in that case, the Committee was satisfied that censure was the appropriate penalty.

*Was the Committee wrong to refer to [the trustee owners’] experience in the real estate industry?*

[23] [The appellant’s] submission is, in essence, that [the trustee owners’] experience in the industry was irrelevant to the penalty (if any) to be ordered. We do not accept that submission.

[24] In reaching decisions as to penalty, the impact of the particular offending on the affected person may be a relevant factor. It is common for the Tribunal to consider it an aggravating factor when assessing penalty if the offending has affected a person who has little or no knowledge of real estate transactions.<sup>9</sup> An affected person’s knowledge of and experience in the industry may equally be regarded as a relevant mitigating factor when assessing penalty.

[25] The purpose of the requirement to provide written appraisals, and copies of the approved guide, is to protect the interests of who use licensees’ services, as vendors or as customers. We accept Ms Mok’s submission that in the present case, it was open to the Committee to take into account [the trustee owners’] experience in the real estate industry, and their experience and knowledge gained over the course of marketing the property, as a mitigating factor.

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<sup>8</sup> Complaint No C06197, 27 January 2016.

<sup>9</sup> See, for example, *Martin v Real Estate Agents Authority* (CAC 407), at [27]-[28].

[26] The Tribunal is not persuaded that in this case the Committee erred in making no penalty orders, following its findings that Mr Twigden breached r 10.2 of the Rules and s 133 of the Act.

## **Suppression**

### *Submissions*

[27] [The appellant] has sought an order that “the case” not be published, that is, that neither the Committee’s nor the Tribunal’s decisions be published. The grounds for seeking this order were that:

- [a] The Agency, the Authority, and the Committee have used emotive opinions that undermine [the appellant’s] status in the community.
- [b] Mr Twigden had observed that [the appellant] was pressured, unwell, unhappy, and unable to make an informed decision.
- [c] Publication would have a detrimental effect in [the appellant’s] workplace, as it would seem highly probable that news media would insist on publishing the whole sordid story.

[28] Ms Mok referred to the standard principles regarding the Tribunal’s power to make an order prohibiting the publication of a decision. She submitted that given the importance of openness and transparency of the disciplinary process, and the public being able to know about the nature of a licensee’s conduct, the Tribunal should not make an order prohibiting publication of its decision.

[29] However, Ms Mok submitted that the Authority is neutral as to there being a prohibition on [The appellant]’s name and identifying details being suppressed, as there is no public interest in her name being published. Ms Mok submitted that [The appellant]’s name and identifying details could be redacted from the decision.



## *Discussion*

[30] Pursuant to s 108(1) of the Act (as relevant to this case):

- (1) If [the Tribunal] is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make 1 or more of the following orders:
  - (a) An order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:  
...
  - (b) An order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.

[31] It is in the public interest that disciplinary proceedings be open and transparent, that the disciplinary process be accountable, that the public knows the identity of a licensee charged with a disciplinary offence, to have regard to the importance of freedom of speech, and the risk that if a licensee is not named, other innocent licensees might be unfairly impugned.<sup>10</sup>

[32] It is rare for the Tribunal to prohibit publication of a decision.

[33] We accept Ms Mok's submission that an order prohibiting publication of this decision is not justified. However, we accept that there is justification for privacy reasons for prohibiting publication of [the appellant's] name, or any details which may identify her.

## **Outcome**

[34] [The appellant]'s appeal against the penalty decision is dismissed.

[35] Pursuant to s 108(1) of the Act, we make an order prohibiting publication of [The appellant]'s name and any details which may identify her. This order applies to both the Tribunal's and the Committee's decisions.

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<sup>10</sup> See *O v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 15, at [48].

[36] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, 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 N Dangen  
Member