

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 17

READT 028/18

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

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 416

AGAINST INDRA PRASAD
Defendant

On the papers

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

Submissions received from: Mr M Mortimer, on behalf of the Committee
Mr T Rea, on behalf of Ms Prasad

Date of Decision: 29 April 2019

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] In its decision issued on 23 January 2019 the Tribunal found Ms Prasad guilty on a charge of misconduct under s 73(b) of the Real Estate Agents Act 2008 (seriously incompetent or seriously negligent real estate agency work), and on a charge of misconduct under s 73(a) of the Act (disgraceful conduct).¹ The Tribunal has received submissions from counsel for the Committee and Ms Prasad as to penalty.

Facts

[2] The two charges related to Ms Prasad's marketing of a property at Goodwood Heights, Auckland. The charges were laid following the Committee's investigation of a complaint by the purchaser of the property that she had not told him, or the Agency's selling agent he dealt with, that the property would be affected by a road-widening proposal, pursuant to which 107 m² of the front part of the property would be taken.

[3] The property was listed by Ms Prasad pursuant to a listing agreement dated 11 December 2015. She conducted open homes from early January to 6 February 2016. During or after one of the open homes, the resident of a neighbouring property told her about the road widening. The property was sold at auction on 6 February. Another salesperson engaged at the Agency (Mr Verma), bid at the auction on behalf of the complainant.

[4] The complainant carried out renovations on the property and it was listed for sale by Mr Verma. The property went to auction again on 2 July. The successful bidders withdrew their offer after discovering that the road-widening proposal affected the property. The Tribunal was advised that the complainant had not re-listed the property.

¹ *Complaints Assessment Committee 416 v Prasad* [2019] NZREADT 1.

The Tribunal's findings

Disclosure of road widening proposal

[5] On the first charge, the Tribunal found that there was no advice of the road widening proposal in any written marketing material, and that Ms Prasad failed to inform all attendees at open homes, and all her fellow salespersons, of the proposal. While accepting that Ms Prasad told some prospective purchasers (those who expressed a particular interest in purchasing) about the proposal, the Tribunal found that it was not for her to select who should be informed. The Tribunal found that in light of the significant effect road widening would have on the property, the failure to disclose the proposal to all prospective purchasers had to be regarded as seriously incompetent or seriously negligent real estate agency work, and thus misconduct under s 73(b) of the Act.²

Additions to diary notes and transaction report

[6] The Committee alleged in the second charge that Ms Prasad retrospectively added or expanded entries in her diary relating to the marketing of the property, and in an Agency transaction report relating to the property, so as to record that she had disclosed the road-widening project to potential purchasers and colleagues, and had facilitated disclosure of the road-widening at the auction of the property.

[7] The Tribunal found that diary entries recording information given to open home attendees, and a specific reference in the transaction report as to having informed Mr Verma (the selling agent) of the road widening proposal, had been added after Ms Prasad became aware of the complaint made by the purchaser, and for the purpose of supporting her contention that she told everyone (Mr Verma in particular) about the proposal.³

² At paragraphs [73]–[74].

³ At paragraphs [84] and [90].

[8] The Tribunal concluded that Ms Prasad’s conduct in doing so would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful, and found her guilty of misconduct under s 73(a) of the Act.⁴

Sentencing principles

[9] 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 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.⁶ Penalties for misconduct and unsatisfactory conduct are determined in the context of 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 both personal and general 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.⁷

[11] 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 impose under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);
- [b] Order cancellation or suspension of the licensee’s licence;
- [c] Impose a fine of up to \$15,000.

⁴ At paragraph [91].

⁵ Section 3(1) of the Act.

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].

[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.⁸

Submissions

[13] Mr Mortimer submitted for the Committee that in this case, it is necessary to respond to Ms Prasad’s conduct, and to send a strong message to other licensees about the consequences of failures in disclosure, and dishonesty in the course of an investigation.

[14] Mr Mortimer submitted that Ms Prasad’s evidence that she informed those open home attendees who expressed interest in the property, and advised them to do their own due diligence before the auction, was an inherently risky strategy which increased the level of serious negligence. He submitted that Ms Prasad opted to take this course in respect of a matter that she knew was significant, and should be disclosed to all prospective purchasers.

[15] Mr Mortimer further submitted that Ms Prasad’s actions had real consequences, in that the complainant bought the property, not knowing of the road widening proposal.

[16] With regard to the second charge, Mr Mortimer submitted that honesty, candour, and co-operation with the industry regulator are essential to the proper functioning of the industry. He submitted that licensees have a professional obligation to co-operate with the Authority in responding to a complaint.⁹

⁸ *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] NZHC 83; [2013] 3 NZLR 103, at [185]–[189].

⁹ Citing *Piper v Real Estate Agents Authority (CAC 408)* [2017] NZREADT 32, at [4].

[17] Mr Mortimer submitted that the level of Ms Prasad's dishonesty level was high, in that she had altered records that were meant to stand as contemporaneous records, and presented them as accurate; the alteration was a specific and calculated course of action, involving multiple diary entries, and seeking out and obtaining access to the property transaction report; and the entries represented things the Tribunal found did not occur – this was not a case where a licensee was only attempting to bolster a true account. He submitted that Ms Prasad knew that her conduct would be under scrutiny by the Agency and Authority. Her conduct was designed to mislead and conceal, with the motivation being to cover her tracks.

[18] He further submitted that Ms Prasad continued to present the documents as true in her evidence to Tribunal. He submitted that this was not consistent with any acceptance of wrongdoing, or insight into her offending. He submitted that there is a risk of Ms Prasad engaging in the same conduct in the future.

[19] Mr Mortimer submitted that the finding of disgraceful conduct is a finding of proven dishonesty, which warrants an order cancelling Ms Prasad's licence. He submitted that while in rare cases the Tribunal has stepped back from cancellation as a penalty for dishonesty, this is not one of those cases. He submitted that the Tribunal should guard against reasoning that because there was in this case no theft of client funds, Ms Prasad's dishonesty automatically fell into a category where cancellation is not warranted.

[20] Mr Mortimer referred to observations made in the judgment of his Honour Justice Woodhouse in *Morton-Jones v Real Estate Agents Authority*, as to the appropriate penalty where a licensee is found guilty of misconduct under s 73(a) of the Act.¹⁰ He submitted that his Honour had confirmed that any species of proven dishonesty would “almost invariably” lead to cancellation.¹¹

[21] Mr Mortimer further submitted that the finding of misconduct under s 73(b) of the Act compounded the issues of Ms Prasad's dishonesty by calling into question her

¹⁰ *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [92]-[94].

¹¹ Citing *Bolton v Law Society* [1994] 1 WLR 512 (UKCA) at 518.

competence as well as her honesty. He submitted that cancellation is the appropriate penalty, in an industry where trust is important.

[22] Mr Rea recorded that Ms Prasad maintains that she has incorrectly been found guilty of the charges against her. Nevertheless, she acknowledges that penalty submissions are not an opportunity to challenge the Tribunal's findings.

[23] Mr Rea submitted that the finding on the first charge that Ms Prasad's conduct constituted serious negligence or serious incompetence means that the conduct was at a lower end of the range of misconduct than it would have been, had she been charged with wilful or reckless contravention of the Act or Rules under s 73(c) of the Act.

[24] He submitted that Ms Prasad's conduct was less serious because of the disclosure she did make, as shown by the Committee's having accepted that she informed some prospective purchasers of the road widening proposal. He further submitted there had been no attempt by Ms Prasad to prefer her own interests over those of any other party. That is, there was no personal financial motive for her conduct.

[25] Mr Rea recorded Ms Prasad's acknowledgement that it would have been better if she had disclosed the road widening proposal in writing, so as to ensure that all prospective purchasers, and other licensees, clearly understood the disclosure, leaving no room for any dispute.

[26] Mr Rea acknowledged that the finding on the second charge is the more serious of the charges, as it involves findings of dishonesty in relation to documentary evidence.

[27] He submitted that the Committee's reliance on *Morton-Jones*, as authority for the proposition that any species of proven dishonesty will almost invariably lead to cancellation, does not accurately reflect the wording of the judgment. Mr Rea submitted that his Honour Justice Woodhouse's observation was made in the context of dishonesty when handling clients' money, and was expressly limited to that context.

[28] Mr Rea submitted that the integrity of trust monies is fundamental to licensees' fiduciary obligations to their clients. However, he submitted, Ms Prasad's conduct, as found by the Tribunal, did not place any client funds at risk, nor place any member of the public at risk of any loss.

[29] He submitted that there are penalties available to the Tribunal, short of cancellation, which can satisfy the Act's purposes of protecting consumers and maintaining public confidence in the industry. He submitted that suspension of Ms Prasad's licence would be sufficient to serve those purposes, and the purposes of personal and general deterrence. He submitted that there is little prospect of Ms Prasad offending (or re-offending) in the future; she is acutely aware of the potential consequences and the scrutiny she would undoubtedly face in any future dealings. He further submitted that while no financial penalty was sought by the Committee, a fine is neither necessary nor appropriate, given the financial hardship Ms Prasad will suffer as a consequence of the findings against her and the imposition of a period of suspension.

[30] Mr Rea advised that Ms Prasad had worked in the real estate industry for 15 years, and had not been the subject of any other disciplinary finding. He submitted that there has already been a significant personal impact on Ms Prasad, as a result of publication of the Tribunal's misconduct findings on the Authority's public register and in the media.

Discussion

[31] The Tribunal is required to determine the appropriate penalty where there have been two findings of misconduct. We accept Mr Mortimer's submission that the first charge raises a competence issue. The Tribunal accepted that Ms Prasad disclosed the road widening proposal to people who expressed interest in buying the property. But it was not for her to decide to whom that disclosure should be made. The nature of the information of which Ms Prasad gave only limited disclosure meant that there was a likelihood that a person who was not informed would buy the property, and suffer loss.

[32] While clearly misconduct, we assess Ms Prasad's conduct in this respect as being at the lower end of the range.

[33] In respect of the second charge, the Tribunal is required to consider a licensee's dishonesty in relation to her response to a complaint and the ensuing investigation.

[34] We refer first to the judgment in *Morton-Jones*. Mr Morton-Jones was found guilty by the Tribunal under s 73(a) of the Act (disgraceful conduct) on three charges brought by a Complaints Assessment Committee that he short paid property management rental money to clients. As set out in the charges, the total of the short payments was approximately \$45,000. Mr Morton-Jones was also found guilty on a charge of misconduct under s 73(c)(i) of the Act: that he wilfully or recklessly contravened s 85 of the Act by failing to produce information or documents to a Complaints Assessment Committee when given notice to do so. Mr Morton-Jones' appeal against the Tribunal's findings was dismissed.

[35] The Tribunal suspended Mr Morton-Jones' licence for nine months, ordered him to pay a fine of \$2,000, and ordered him to complete various educational courses. The Complaints Assessment Committee's appeal against the Tribunal's penalty orders was allowed. The High Court ordered cancellation of Mr Morton-Jones' licence.

[36] The focus in *Morton-Jones* was on the licensee's "serious dishonesty in the handling of money for clients",¹² where he had "used money which should have been paid to the landlord clients of the business he controlled", "coupled with [his] steadfast refusal to provide any evidence of his primary defence", and the fact that Mr Morton-Jones "went out of his way to avoid providing any information as to what happened to the money".¹³ His Honour Justice Woodhouse found that "the gravity of [Mr Morton-Jones'] misconduct was aggravated by his steadfast refusal to meet his obligations, as a real estate agent, to respond to the notice from the Authority under s 85 of the Act."¹⁴

¹² *Morton-Jones*, above n 10, at [95].

¹³ At [102].

¹⁴ At [103].

[37] We note that his Honour Justice Woodhouse was referred to cases where the Tribunal had not cancelled a licence notwithstanding findings of dishonesty. His Honour observed that:¹⁵

... A number of those decisions are materially different on the facts, notwithstanding elements of dishonesty. To the extent that some cases may be more comparable to the present case, they do not justify a conclusion that the Tribunal's decision in this case should be upheld on the basis of a principle of parity or consistency.

[38] The circumstances of the present case are quite different from those considered in *Morton-Jones*. While proven dishonesty will certainly be regarded as serious misconduct, and cancellation must be the starting point, we are not persuaded that *Morton-Jones* is authority for an order for cancellation being the “invariable” outcome in the present case.

[39] Mr Mortimer referred to the Tribunal's penalty orders in *Complaints Assessment Committee 409 v Ganesh*.¹⁶ Mr Ganesh was found guilty of unsatisfactory conduct for failing to give written disclosure of his connection to a transaction, in breach of s 136 of the Act. He was found guilty of disgraceful conduct under s 73(a) of the Act for lying to an Authority investigator as to that connection. Mr Ganesh's circumstances were compared with those of the licensee in *Complaints Assessment Committee (CAC 20009) v Li*,¹⁷ which (notwithstanding a number of differences) was considered to be the most relevant case for comparison. Mr Li's licence was suspended for 17 months (after a discount given for an early guilty plea and acknowledgement of wrongdoing) and he was ordered to pay a fine of \$10,000. Mr Ganesh's licence was suspended for 18 months and he was ordered to pay a fine of \$5,000.

[40] Mr Mortimer also referred to the penalty orders in *Complaints Assessment Committee 413 v Taylor*.¹⁸ Ms Taylor had been instructed by the parties to four real estate transactions to participate in those transactions, purportedly as the selling agent. Her involvement was solely to draw up sale and purchase agreements and arrange for their execution, for which she was paid \$10,000 for each transaction. The Tribunal

¹⁵ At paragraph [107].

¹⁶ *Complaints Assessment Committee 409 v Ganesh* [2018] NZREADT 27.

¹⁷ *Complaints Assessment Committee (CAC 20009) v Li* [2015] NZREADT 48.

¹⁸ *Complaints Assessment Committee 413 v Taylor* [2018] NZREADT 59.

found that the transactions were in substance intended to mislead lending institutions into believing that the properties had a higher value than they in fact did, with the objective that the institutions would lend more money on the security of the properties than they otherwise would have.

[41] The Tribunal observed that:

A licensee who makes herself available to assist individuals engaged in a dishonest scheme crosses the line from legitimate practice into deliberate wrongdoing.¹⁹

[42] The Tribunal concluded that Ms Taylor:²⁰

... knew that there was something amiss. ... She should have appreciated that the persons who engaged in the scheme were not going to pay \$10,000 per transaction to her unless they received some benefit from the involvement in the transaction of the Licensee herself...”

[43] However, while having no doubt that Ms Taylor’s conduct fell below the standard expected of a licensee, the Tribunal accepted that it “was not the worst case of its type which can be imagined”, and it could not “exclude the possibility that she “got involved out of naïveté and that this was not a case of deliberate and cynical offending”.²¹

[44] Ms Taylor’s licence was suspended for 18 months and she was ordered to undertake three training or education sessions (to be agreed with the Authority).

[45] We do not accept Mr Mortimer’s submission that Ms Prasad’s level of dishonesty was “of a much higher degree” than Ms Taylor’s. While Ms Taylor assisted the principals to the transactions, the Tribunal found that she “knew something was amiss” but participated anyway: her conduct may not have been wilful, but it was reckless. Her participation as an assistant does not lessen her culpability to any significant extent. There is also a difference between the two cases arising out of Ms Taylor’s clear personal financial gain from each of the four transactions.

¹⁹ At [18].

²⁰ At [19].

²¹ At [21].

[46] We must determine the appropriate penalty orders on our assessment of the circumstances of the particular case before us, and by applying the relevant penalty principles set out earlier. On the particular facts of this case, and taking the two findings of misconduct into account, we assess Ms Prasad's conduct as serious, but not sufficiently so as to require cancellation of her licence. Albeit different in various aspects, it is within the same range as that considered in *Ganesh* and *Taylor*.

[47] We have taken into account the matters raised by Mr Rea in mitigation. We have concluded that the purposes of promoting and protecting the interests of consumers, promoting public confidence in the performance of real estate agency work, maintaining a high standard of conduct in the industry, the need for both personal and general deterrence, determining a penalty that is appropriate for the particular nature of the misbehaviour, maintaining consistency, and imposing the least punitive penalty that is appropriate in the circumstances, are best met by suspending Ms Prasad's licence. The appropriate period of suspension is 18 months.

[48] The Committee did not submit that Ms Prasad should be ordered to pay a fine. Mr Rea submitted that a financial penalty should not be ordered, as Ms Prasad would suffer financial hardship as a consequence of suspension of her licence. We have concluded that suspension of Ms Prasad's licence, together with the order for further training we intend to make, will adequately address her offending.

Orders

[49] We order as follows:

[a] Ms Prasad is censured.

[b] Ms Prasad's licence is to be suspended for 18 months from the date of this decision.

[c] Ms Prasad is ordered to undertake further training and education, by successfully completing:

- [i] Unit Standard 23136 (Demonstrate knowledge of misleading and deceiving conduct and misrepresentation);
- [ii] Unit Standard 26149 (Demonstrate knowledge of licensing and code of professional conduct under the Real Estate Agents Act 2008); and
- [iii] Unit Standard 26152 (Principles of ethics applying to real estate practice).

[50] Ms Prasad must provide evidence of having successfully completed the above standards before her licence may be reinstated.

[51] 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

Ms N Dangen
Member

Mr N O'Connor
Member