BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 02

READT 017/19

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BROUGHT BY	NEIL CLOUGH Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 520) First Respondent
AND	JENNY BUNN and JOHN CHRISTIANSEN Second Respondents

On the papers

Tribunal:	Hon P J Andrews, Chairperson Mr J Doogue, Member Mr N O'Connor, Member
Submissions received from:	Mr Clough Ms E Woolley, on behalf of the Authority Mr C Child, on behalf of Ms Bunn and Mr Christiansen
Date of Decision:	5 February 2020

DECISION OF THE TRIBUNAL
(PENALTY)

Introduction

[1] In its decision issued on 5 November 2019, the Tribunal allowed Mr Clough's appeal against the decision of Complaints Assessment Committee 520 (dated 24 May 2019) to take no further action on his complaints concerning Mr Christiansen and Ms Bunn, and found that they had engaged in unsatisfactory conduct.[1] The Tribunal has received submissions by or on behalf of the parties as to penalty.

Facts

[2] Mr Clough was the sole shareholder and director of Clough Investments Ltd, which owned a property at Inglewood. In July and August 2011, the property was marketed for sale by two salespersons, Ms Willis and Ms Linley, engaged by Team Taranaki Ltd, trading as Harcourts New Plymouth ("the Agency"). The first-named second respondent, Ms Bunn, was the manager of the Agency's Inglewood branch. The second-named second respondent, Mr Christiansen, was the principal of the Agency.

[3] Between 1993 and 2004, Mr Clough and Rachel Joanne Prouse owned the property. On 10 May 2004, a change of name for Ms Prouse to Rachel Joanne Clough was registered, at the same time as the property was transferred to Clough Investments Ltd.

[4] An offer to purchase the property for $180,000 was received on or about 22 August 2011. However, that offer was declined, as Mr Clough was able to re-finance the property and it was taken off the market. The listing agreement with the Agency was cancelled.

[5] Mr and Mrs Clough were subsequently engaged in relationship property proceedings. The Tribunal's finding related to a letter dated 8 June 2013, written at Mrs Clough's request, signed by Ms Linley, and produced by Mrs Clough at a Family Court hearing. This letter was addressed "To Whom It May Concern", and recorded that the Agency had marketed the property in July and August 2011, during which

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1 *Clough v The Real Estate Agents Authority (CAC520)* [2019] NZREADT 46.

time an offer of $180,000 was obtained, but not accepted by "the owners", then the property was withdrawn from the market.

[6] The Tribunal found that Ms Linley sought advice from Ms Bunn regarding Mrs Clough's request for the letter, and that Ms Bunn in turn sought advice from Mr Christiansen before advising Ms Linley to sign the letter, and approving it. The Tribunal said:[2]

> [56] In the present case, one of two clients of the Agency (Mrs Clough) requested a letter confirming than an offer was made to buy the property. The property was not owned by either Mr or Mrs Clough, it was owned by Clough Investments Ltd. The request was made nearly two years after the property was withdrawn from the market and the listing agreement had ended. Ms Linley would have known that Mrs Clough already knew about the offer for the property, having been party to the agency agreement when the offer was made. Ms Linley would therefore have known that the letter was not needed to inform Mrs Clough of the offer, as she already knew about it. The purpose of the letter requested by Mrs Clough could only have been to disclose information about the offer to a third party.
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> [57] The letter provided to Mrs Clough was not addressed to her, or to Mr Clough, or to Clough Investments Ltd, it was addressed to "To Whom It May Concern". Plainly, the letter was intended for delivery beyond Mrs Clough, Mr Clough, and Clough Investments Ltd. It was intended for anyone who might be concerned about the matters referred to in the letter, without limitation; that is, the world at large.
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> [58] By including the amount of the offer made to Clough Investments Ltd, the letter set out information that was confidential to Clough Investments Ltd, the owner of the property. By addressing the letter "To Whom It May Concern", Ms Linley placed no limit on further disclosure of the information, and was therefore disclosing confidential client information, beyond the extent of any permitted purpose.
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> [59] In the circumstances described above, it was reasonable for Ms Linley to seek advice from her manager, Ms Bunn, and that Ms Bunn in turn sought advice from Mr Christiansen. A reasonably competent manager advising Ms Linley would have known that care had to be taken before the requested letter was provided. On being asked for advice, Ms Bunn should have asked why the letter was required, and who its intended recipient(s) was, or were. Without such key information, Ms Bunn would not have been in a position to advise whether it was acceptable to provide the requested letter, in which confidential client information was able to be disclosed to a third party.
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> [60] Similarly Mr Christiansen, on being asked to advise Ms Linley, should have ensured that he was given key information of what the letter was going to say, and to whom it was addressed. He and Ms Bunn should have considered whether the Agency should seek further advice, whether

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2 At [56]–[60].

> Mrs Clough should be asked why the information was required, and whether Ms Linley should be advised to inform Mr Clough that she had been asked to provide the letter. A reasonably competent manager would also have considered whether Ms Linley should be advised to decline the request.

[7] The Tribunal found that in the circumstances described, and in not informing Mr Clough that the letter was being provided to Mrs Clough, Ms Bunn and Ms Christiansen were in breach of their fiduciary obligations to their client (r 6.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012), their duty to act in good faith and deal fairly with all parties engaged in a transaction (r 6.2), their duty not to withhold information that should by law or in fairness be provided to a customer or client (r 6.4), and their obligation to comply with rr 9.17 and 9.18, as to the disclosure of confidential information.

[8] The Tribunal also found that Ms Bunn and Mr Christiansen were in breach of the obligations under s 50 of the Act to ensure that Ms Linley was properly supervised and managed, so as to ensure that her work was performed competently and complied with the requirements of the Act.

Penalty 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."[3] 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.[4]

[10] 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.

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3 Section 3(1) of the Act.
4 Section 3(2).

[11] 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.[5]

[12] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. Following its finding of unsatisfactory conduct, the Tribunal may make any of the orders that a Complaints Assessment Committee may make under s 93 of the Act, after a finding of unsatisfactory conduct. These include (as may be relevant in this case) censuring or reprimanding the licensee (s 93(1)(a)), ordering the licensee to undergo training or education (s 93(1)(d)), ordering the licensee to pay a fine of up to $10,000 (s 93(1)(g)), and ordering a licensee to pay a complainant "any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee" (s 93(1)(i)).

Submissions

[13] Mr Clough submitted that Mr Christiansen should be ordered to make an apology to him, under s 93(c) of the Act. He did not seek an order for an apology by Ms Bunn.

[14] Mr Clough also submitted that an order should be made for "full compensation for the loss incurred due to the release of information", of $17,500, under s 93(1)(f) of the Act. This was in accordance with his claim in his complaint that Ms Linley's letter had resulted in the Family Court increasing its assessment of the value of the property, at a direct cost to him of that amount. He further submitted that an order for "full compensation for costs" should be made, of $1281.00. He submitted that this was made up of "legal and personal costs involved".

[15] On behalf of Mr Christiansen and Ms Bunn, Mr Child submitted that their offending falls towards the lower end of the scale of unsatisfactory conduct, in that the circumstances of the complaint were unique and unlikely to be repeated, there was no

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5 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].

suggestion that they acted deliberately or maliciously to harm Mr Clough, and Ms Linley's letter was provided to Mrs Clough in June 2013 – more than six years ago – and Mr Clough did not raise any issue concerning it until November 2017 (more than four years later). He also submitted that neither Mr Christiansen nor Ms Bunn have had any complaint made against them previously.

[16] Taking all relevant matters into account, Mr Child submitted that the appropriate penalty orders are for censure and an apology. He submitted that such orders, together with publication of the Tribunal's decisions, is a sufficient and proportionate response to their offending.

[17] Mr Child further submitted that Mr Clough has not established that he is entitled to an order for compensation under s 93(1)(f). In particular, he submitted that Mr Christiansen's and Ms Bunn's error or omission was in failing to make further enquiries of Ms Linley and Mrs Clough about the request for the letter, and failing to inform Mr Clough that the request had been made. He submitted that as the letter was provided, the error cannot be rectified. He submitted that Mr Clough had provided no evidence in support of his claim that Ms Linley's letter caused the Family Court to order him to pay a higher than expected settlement figure for the property in the relationship property proceedings. He noted that the Committee referred to the letter as having been used "as a factor in fixing an appropriate valuation for the property".[6]

[18] Mr Child also submitted that Mr Clough's claim for an order for costs cannot be sustained. He submitted that "the usual position" is that a self-represented litigant such as Mr Clough is not entitled to recovery of legal costs, and that while he may be entitled to recover reasonable disbursements necessary for the conduct of the proceedings, he had provided no evidence in support of the claim.

[19] On behalf of the Authority, Ms Woolley submitted that Mr Christiansen's and Ms Bunn's conduct is properly placed at the lower end of the scale of unsatisfactory conduct, as it was a one-off, isolated incident, it was the result of inadvertent or careless behaviour involving their failure to turn their minds to limits that should have been placed on the disclosure of information, a relatively long period of time had

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6 Committee's decision to take no further action, 24 May 2019, at paragraph 3.6.

passed between the time when the offer was made on the property and Ms Linley's letter being provided, and it was questionable whether the conduct had resulted in any loss to Mr Clough.

[20] Ms Woolley submitted that the appropriate penalty orders were for censure, an apology, and fines in the order of $1,500.

[21] Ms Woolley also submitted that Mr Clough has not satisfied the requirements for an order under s 93(1)(f). She submitted that without delving into the full record of the Family Court proceedings, and having further knowledge of what documents were before the Family Court (or may have been placed before the Court in the absence of Ms Linley's letter), it is speculative to suggest that the letter was the cause of Mr Clough being ordered to pay a higher settlement figure.

[22] Ms Woolley further submitted that as a self-represented litigant, Mr Clough cannot recover legal costs, and that he has provided no evidence that would support any order concerning disbursements.

Discussion

[23] It was accepted that the Tribunal should make orders for censure, and for an apology. The submissions on behalf of Mr Christiansen included an expression of apology, but we consider it appropriate that Mr Christiansen provide an apology direct to Mr Clough.

[24] At issue is whether Mr Christiansen and/or Ms Bunn should be ordered to pay a fine, and if, so, the quantum of such fine. We accept the Authority's submission that Mr Christiansen's and Ms Bunn's conduct was the result of a failure to turn their minds adequately (or at all) to Ms Linley's request for advice as to Mrs Clough's request for a letter, and not intentional or reckless. That does not necessarily reduce the seriousness of the conduct within the scale of unsatisfactory conduct, as conduct which is an intentional or reckless breach of the Rules or the Act should be the subject of a charge of misconduct under s 73 of the Act.

[25] Mr Child submitted that the conduct arose in a "unique situation". He offered no evidence to support that submission, and we must question whether it is so unusual (as to be "unique") for a licensee to market a property which later becomes the subject of relationship property proceedings.

[26] Further, licensees in a management and supervisory position must always be alert to the ramifications and possible consequences about issues on which their advice is sought. Licensees' supervisory obligations are an important element of achieving the purpose of the Act of promoting and protecting the interests of consumers in real estate transactions, and in promoting public confidence in the performance of real estate agency work.

[27] As a party to the agency agreement, Mrs Clough was entitled to be provided with information as to the offer made on the property during the period of the agency. Further, Mr Christiansen and Ms Bunn could reasonably have believed that she had some relationship property interest in the property. The breaches of the Act and Rules were in the disclosure of the information without any limitation, and in not advising Mr Clough that it had been requested, and was being disclosed. While the circumstances in which that unauthorised release of information occurred does not excuse them, the breaches are at least partially understandable.

[28] It is also relevant to our decision that Mr Clough did not raise any issue regarding disclosure until late 2016, more than three years after the letter was provided. Mr Clough explained the delay by saying that he had been concentrating on dealing with family issues, but it meant that Mr Christiansen and Ms Bunn's ability to respond to his complaint was restricted by the passage of time.

[29] Finally, there is no record of any previous complaint to the Authority against either Mr Christiansen or Ms Bunn, let alone any disciplinary finding. They are entitled to the benefit of their unblemished records. We accept Mr Child's submission that publication of the decision will in itself constitute a significant penalty.

[30] We have concluded that in the particular circumstances of this case, we should not order either Mr Christiansen or Ms Bunn to pay a fine.

Claim for compensation

[31] We turn to Mr Clough's request for "full compensation" of $17,500. He submitted at the appeal hearing that he and his counsel had been taken by surprise by the production of Mrs Linley's letter at the Family Court, and that the letter caused the Family Court to place a higher value on the property, and to order him to pay $17,500 more than it otherwise would have.

[32] Both Ms Woolley and Mr Child referred us to the judgment of his Honour Justice Brewer in the High Court in *Quin v Real Estate Agents Authority*, as to the application of s 93(1)(f) of the Act.[7] We accept as correct Ms Woolley's summary of the effect of his Honour's judgment. That is:[8]

[a] the primary focus of the complaints regime is the regulation of the real industry so as to promote and protect the interests of consumers;

[b] s 93(1)(f) confers a limited jurisdiction, to order a licensee to rectify an error or omission (s 93(1)(f)(i)) or, if that is nor practicable, to provide relief in whole or in part from the consequences of the omission (s 93(1)(f)(ii));

[c] the power under s 93(1)(f) does not give the Committee the power to order a licensee to pay compensatory damages, either by way of indemnity or for loss of expectation; and

[d] factors bearing on the amount to be ordered include whether such an order would be costly, the culpability of the licensee compared to other parties, the complexity of causation issues, and remedies available to the complainant under the general law.

[33] We accept that Mr Christiansen's and Ms Bunn's error cannot be "rectified". Mrs Linley's letter was issued. That cannot be undone. In seeking compensation

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7 *Quin v Real Estate Agents Authority* [2012] NZHC 3557, [2013] NZAR 38.
8 See *Quin at* [44], and [56] – [68].

under s 93(1)(f)(ii), Mr Clough must establish that the order that he was to pay $17,500 more than he expected to was caused by Ms Linley's letter. We are not persuaded that he has done so.

[34] We agree with Ms Woolley's submission that without delving into the full record of the Family Court proceedings, and having full knowledge what documents or other evidence was before the Family Court Judge, or might have been put before the Judge, it is speculative, and simplistic, to suggest that Ms Linley's letter caused the Judge to order a higher (by $17,500) settlement figure.

[35] We therefore decline to make an order for payment of compensation of $17,500 to Mr Clough.

[36] We record that pursuant to s 110(4)(b) of the Act (inserted as from 29 October 2019 by s 243(3) of the Tribunals Powers and Procedures Legislation Act 2018), the Tribunal now has the power, if it appears to it that a person has suffered loss by reason of a licensee's unsatisfactory conduct, to make an order that the licensee pay to that person a sum not exceeding $100,000 by way of compensation, if:

[a] the unsatisfactory conduct is more than a minor or technical contravention of the Act, regulations, or rules; and

[b] the order is one that a court of competent jurisdiction could make in relation to a similar claim in accordance with the principles of law.

[37] Section 110(4)(b) of the Act can have no application in this case, as Mr Christiansen's and Ms Bunn's conduct occurred many years before it was inserted into the Act. We observe, however, that even if that were not the case, a claim by Mr Clough would have faced the same difficulty in relation to causation.

Claim for costs

[38] Mr Clough sought an order for payment of $1,281.00 for "legal and personal costs incurred".

[39] Section 93(i) gives the Tribunal the power to order a licensee "to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee". A claimant for such an order must establish that the costs or expenses have been "incurred". Mr Clough has provided no such evidence. Accordingly, his request for an order must be declined.

Orders

[40] The Tribunal orders as follows:

[a] Each of Mr Christiansen and Ms Bunn is censured;

[b] Mr Christiansen is ordered to provide an apology addressed to Mr Clough, in a form approved by the Authority;

[41] 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.

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Hon P J Andrews
Chairperson

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Mr J Doogue
Member

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Mr N O'Connor
Member