

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 10

Reference No: READT 013/2021

IN THE MATTER OF

A charge laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY

**COMPLAINTS ASSESSMENT
COMMITTEE 2103**

AGAINST

DAVID SHARMA
Defendant

Tribunal:

D J Plunkett (Chair)
G J Denley (Member)
F J Mathieson (Member)

Appearances:

Counsel for the Committee:
The Defendant:

S McMullan
Self-represented

DECISION (PENALTY)

Dated 08 May 2023

INTRODUCTION

[1] In a decision issued on 14 November 2022, the Tribunal found Mr Sharma guilty of misconduct (disgraceful conduct) under s 73(a) of the Real Estate Agents Act 2008 (the Act).¹

[2] The Tribunal will now determine the penalty.

BACKGROUND

[3] The background facts, as found by the Tribunal, are set out in its earlier decision and are summarised below.

[4] David Sharma, the defendant, was a licensed agent under the Act. He owned and operated a property management company in Auckland known as Property Management Out West Limited, trading as Ray White Henderson. Between 2012 and 2018, Mr Sharma received bonds from tenants in 49 properties, totalling \$92,210, which he failed to forward to Tenancy Services, or otherwise account for to the tenant or the landlord. Instead, he used the money within his property management and/or real estate businesses.

THE TRIBUNAL'S DECISION

[5] In its decision, the Tribunal accepted the evidence of the Committee's witnesses. Indeed, at the hearing, Mr Sharma admitted his wrongful conduct and apologised. The Tribunal found that the theft of just over \$92,000 in almost 50 transactions was a marked and serious departure from the expected standard of a professional real estate agent. It was disgraceful conduct.

PENALTY

Jurisdiction and principles

[6] The Tribunal's jurisdiction to impose penalty orders if misconduct is proven is set out in the Act:

110 Determination of charges and orders that may be made if charge proved

- (1) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that it has been proved on the balance of probabilities that the licensee has been guilty of misconduct, it may, if it thinks fit, make 1 or more of the orders specified in subsection (2).

¹ *Complaints Assessment Committee 2103 v Sharma* [2022] NZREADT 24.

- (2) The orders are as follows:
- (a) 1 or more of the orders that can be made by a Committee under section 93 (except under section 93(1) (ha)):
 - (b) an order cancelling the licence of the licensee and, in the case of a licensee that is a company, also cancelling the licence of any officer of the company:
 - (c) an order suspending the licence of the licensee for a period not exceeding 24 months and, in the case of a licensee that is a company, also suspending the licence of any officer of the company for a period not exceeding 24 months:
 - (d) an order that a licensee not perform any supervisory functions until authorised by the Board to do so:
 - (e) an order, in the case of a licensee who is an employee or independent contractor, or former employee or former independent contractor, that any current employment or engagement of that person by a licensee be terminated and that no agent employ or engage that person in connection with real estate agency work:
 - (f) an order that a licensee who is an individual pay a fine not exceeding \$15,000 and order a licensee that is a company pay a fine not exceeding \$30,000:
 - (g) where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct and the order is one that a court of competent jurisdiction could make in relation to a similar claim in accordance with principles of law, 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.

...

[7] The Committee can make the following orders:

93 Power of Committee to make orders

- (1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:
- (a) make an order censuring or reprimanding the licensee:
 - (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:
 - (c) order that the licensee apologise to the complainant:
 - (d) order that the licensee undergo training or education:
 - (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint:
 - (f) order the licensee—
 - (i) to rectify, at his or her or its own expense, any error or omission; or

(ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:

(g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company:

(h) order the licensee, or the agent for whom the person complained about works, to make his or her or its business (including any records, accounts, and assets) available for inspection or take advice in relation to management from persons specified in the order:

...

(i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee

(2) An order under this section may be made on and subject to any terms and conditions that the Committee thinks fit.

[8] There are additional requirements in s 110 regarding compensation orders.

[9] In determining the appropriate penalty, it is relevant to note the purpose of the Act:

3 Purpose of Act

(1) The purpose of this 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.

(2) The Act achieves its purpose by—

(a) regulating agents, branch managers, and salespersons:

(b) raising industry standards:

(c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[10] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:²

...It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

² *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[11] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the collective reputation and public confidence in the profession itself.³

[12] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.⁴

[13] The most appropriate penalty is that which:⁵

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

³ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; Z, above n 2, at [151].

⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

⁵ *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

SUBMISSIONS

Submissions of the Committee

[14] In his submissions (12 December 2022), counsel for the Committee submits that Mr Sharma's conduct sits at the high end of misconduct of its type. It was serious in that it undermined the purpose of the Act which is to promote and protect the interests of consumers. Honesty and candour are essential qualities to the proper functioning of the industry. Consumers are entitled to trust licensees to act with honesty and integrity. The Act imposes a positive duty on agents to deal appropriately with money received in the course of business.⁶

[15] There is no place for a person like Mr Sharma in the profession. The general starting point for proven dishonesty is cancellation of a licence.

[16] The Committee understands that Mr Sharma is physically unwell and resides in a rest home. It has no information regarding his financial capacity. It is relevant that Mr Sharma admitted his conduct, as alleged, only at the conclusion of the Committee's case. Any credit for his acceptance of responsibility should therefore be minimal. The Committee submits that Mr Sharma should be:

1. Censured.
2. Ordered to apologise to the tenants of the 49 properties.

[17] If the Tribunal finds that a financial penalty is appropriate, it should be made by way of a compensation payment to Ray White New Zealand.

[18] The Committee also seeks an order requiring Mr Sharma to pay at least 50 per cent of the Committee's costs. While he did accept the charge eventually, it did not result in significant savings of the Committee's resources. The Committee provided a schedule of legal costs amounting to \$34,955.50, excluding GST and disbursements. The costs sought, at 50 per cent, are \$17,477.75.

[19] There are further submissions from Mr McMullan (17 January 2023) replying to a note from the facility manager on behalf of Mr Sharma.

[20] It is difficult to see how the Tribunal could be persuaded Mr Sharma is impecunious based on the material before it. No affidavit has been filed and the note does not address whether Mr Sharma owns any assets. The informal nature of the

⁶ Real Estate Agents Act 2008, s 122.

material affects the weight to be given to it. There is no representation by Mr Sharma or his wife as to his financial position.

[21] Whether Mr Sharma is impecunious or not, the Committee's position is that a costs award should be made. Impecuniosity is relevant to quantum, not necessarily to whether an order should be made. Whether and how that order is enforced is a matter for the Committee.

[22] As for costs, Mr Sharma did not participate in the proceedings in good faith. He failed to meaningfully engage in it. When he did, he sought adjournments. His ultimate acceptance of the charge came at the end of the road. He had no defence to the charge.

[23] The High Court's approach is that impecuniosity generally operates to reduce an otherwise appropriate award.⁷ In the circumstances, the reduction should not be more than five per cent. In contrast to the approach of the High Court, the Tribunal has previously declined to order costs where collection would be futile.⁸ This is out of step with the endorsed approach in other disciplinary contexts. Futility is relevant to enforcement, a matter for the Committee, not whether the Tribunal should make an order.

[24] In any event, enforcement may not be futile. Mr Sharma is eligible for Government superannuation. Moreover, he may have assets. There is no reason for the Tribunal to depart from the orthodox position of an order to pay 50 per cent of the Committee's costs.

Submissions of Mr Sharma

[25] The facility manager at the rest home where Mr Sharma resides sent a brief note to the Tribunal on 9 January 2023. She records that Mr Sharma had requested her support during the hearing. The manager advises that he was admitted to the rest home in November 2019. It has a contract with Taikura Trust which fully funds his care.⁹ While he qualifies for superannuation and it had recently been sought, they had not been able to provide a bank account for him. The banks require a current passport and licence but both documents have expired. Currently, the rest home is holding \$830 in its resident comfort fund account for Mr Sharma. She understands that no monies are held elsewhere.

⁷ *Shousha v A Professional Conduct Committee* [2022] NZHC 1457 at [151]–[153].

⁸ *REAA v Santipongchai* [2015] NZREADT 11, *REAA v Brar* [2015] NZREADT 59.

⁹ Taikura Trust is a not-for-profit organisation in Auckland funded by the Ministry of Disabled People.

[26] A written apology from Mr Sharma (30 December 2022) was provided by the manager. It is set out in full:

To The Tenants of 49 Properties and Ray White New Zealand

I apologise for not depositing your bond money with the Residential Tenancy tribunal. I am truly ashamed of that. I know that I have caused you a lot of stress and pain and I wish I could take that back. I hope you will forgive me.

I intended to pay the money back, but because of my financial situation, I was not able to do that.

Yours Sincerely,

David Sharma

[27] The Tribunal wrote to the manager on 24 January 2023 requiring a letter from Mr Sharma setting out details of his income and assets by 17 February 2023. The manager responded on 24 February 2023 to advise she was unable to support Mr Sharma, as she was no longer at the rest home where he resided. She was unable to seek superannuation for him as he did not have current identity documents and she understood he had no bank accounts.

[28] On 9 March 2023, the Tribunal wrote to Mr Sharma giving him “one last opportunity to provide comprehensive evidence of [his] financial position”. He was given until 14 April 2023. The Tribunal advised that in the absence of full disclosure, it would assume he had the means of meeting an order for a fine and/or compensation and/or costs. There was no reply from Mr Sharma.

DISCUSSION

[29] The theft of approximately \$92,000 is, self-evidently, particularly serious. Such dishonesty is at the high end of misconduct. As the Committee contends, it undermines the very purpose of the Act which is to protect the interests of consumers. It is axiomatic that consumers are entitled to expect licensees to act with honesty and integrity. We agree with the Committee that there is no place for a person like Mr Sharma in the profession.

[30] Misconduct of this gravity calls for the imposition of a severe penalty to mark our condemnation and to punish Mr Sharma. He will be censured. Had Mr Sharma retained a licence, it would have been cancelled.

[31] It is appropriate to consider a fine. Instead of a fine, the Committee seeks a compensation order in favour of Ray White, but we have been presented with no such claim. We decline to investigate precisely what it has lost. Subject to limitation issues,

Ray White will have rights to pursue compensation in the general courts. We intend to impose a fine to punish Mr Sharma. It is noted that the maximum is \$15,000.

[32] Mr Sharma has declined to put before us evidence of his financial circumstances. We do not know what happened to the stolen money but it appears to have disappeared within his previous businesses which incurred significant debt.¹⁰ We accept that Mr Sharma's physical health is precarious, so he has no ability to earn an income apart from government superannuation and any investment income he receives.¹¹

[33] While this is Mr Sharma's first appearance before the Tribunal, his previously clear disciplinary record must be seen in the context of 49 separate thefts of his clients' money over a prolonged period from 2012 to 2018. His wrongdoing was not an isolated incident in an otherwise exemplary career. It involved a substantial sum of money, \$92,210. It is to Mr Sharma's credit that he has admitted his misconduct and apologised, though that only occurred at the very last moment at the hearing. Given the gravity of the wrongdoing, the fine will be the maximum of \$15,000.

[34] We do not intend to formally direct any further apology. Mr Sharma has apologised twice now in the course of the proceedings. The logistics of apologies to individual clients would be problematic.

Costs

[35] The Tribunal's discretion to award costs is set out in s 110A of the Act, which lists certain factors to take into account. The relevant principles established by the High Court are also well known.¹²

[36] The Committee's costs of \$34,955.50 are reasonable. The Committee would ordinarily be entitled to recover 50 per cent of its costs as a contribution and Mr Sharma has provided no evidence of his means which might appropriately reduce this level of contribution. We will accordingly order the usual 50 per cent.

¹⁰ See the brief of Ms Waddell (21 July 2022) at [2.2(a)] and her interview with the Authority's investigator (10 September 2018) at 718 and 729 respectively of the Committee's bundle.

¹¹ Mr Sharma's health is detailed in the Tribunal's Minute 5 (20 September 2022) and Minute 6 (4 October 2022).

¹² *McCaig v Professional Conduct Committee* [2015] NZHC 3063 at [21], citing *Vatsyayann v Professional Conduct Committee of New Zealand Medical Council* [2012] NZHC 1138 at [34]. Relied on by the Tribunal in numerous cases. See, for example, *Complaints Assessment Committee 2108 v Rankin* [2022] NZREADT 15 at [128].

ORDERS

[37] Mr Sharma is:

1. Censured.
2. Ordered to pay to the Registrar within one month a fine of \$15,000.
3. Ordered to pay to the Registrar within one month costs of \$17,477.75.

[38] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

PUBLICATION

[39] Having regard to the interests of the public, it is appropriate to order publication of this decision.¹³

D J Plunkett
Chair

G J Denley
Member

F J Mathieson
Member

¹³ Real Estate Agents Act 2008, s 108.