BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 20

Reference No: READT 008/2022

IN THE MATTER OF	Charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	**COMPLAINTS ASSESSMENT COMMITTEE 2107**
AGAINST	**MICHAEL SHELDON** Defendant

Hearing in Auckland on 23 May 2023

Tribunal:	D J Plunkett (Chair) P N O'Connor (Member) F J Mathieson (Member)

Appearances:

Counsel for the Committee:	E Mok
Counsel for Mr Sheldon:	R B Hern

DECISION (PENALTY)
Dated 14 August 2023

INTRODUCTION

[1] In a decision issued on 13 June 2023, the Tribunal found Mr Sheldon's communication with a prospective purchaser of a property fell short of the expected standard and was therefore unsatisfactory conduct under s 72(a) of the Real Estate Agents Act 2008 (the Act).[1]

[2] The Tribunal will now determine the penalty.

BACKGROUND

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

[4] Michael Sheldon is a licensed real estate salesperson under the Act. At the relevant time, he was working for Elysium Realty Ltd, trading as Harveys Te Atatu Peninsula, Auckland (the agency). Mr Sheldon was engaged as the listing agent for a residential property in Titirangi.

[5] A prospective purchaser made an offer on the property on 1 September 2020, conditional on finance and a building report. He instructed a private building inspector to provide a report. The property was inspected on 2 September 2020 and significant issues relating to the decks and water ingress were identified. A report was provided to the prospective purchaser on the same day and to Mr Sheldon one day later.

[6] The prospective purchaser informed Mr Sheldon on 9 September 2020 over the phone that he was withdrawing the offer due to the report. Mr Sheldon then explained the process to him as the prospective purchaser had come from another country and was buying his first house in New Zealand. He advised the prospective purchaser that withdrawing an offer because of a negative building report could have a significant impact on a vendor, compared to withdrawing due to finance. The latter reason would be less off-putting to future buyers.

[7] Mr Sheldon's response left the prospective purchaser to understand that he was being asked to change the reason for the withdrawal and to say the offer was withdrawn due to finance, not a building report.

THE TRIBUNAL'S DECISION

[8] In its decision, the Tribunal found it to be unproven that Mr Sheldon dishonestly asked the prospective purchaser to change the reason for withdrawing the offer. The

[1] *Complaints Assessment Committee 2107 v Sheldon* [2023] NZREADT 14.

charges of misconduct were dismissed. Mr Sheldon admitted, however, unsatisfactory conduct, on the basis that his miscommunication had left the prospective purchaser to understand that he was being asked to change the reason for the withdrawal. The Tribunal accordingly found unsatisfactory conduct pursuant to s 72(a) of the Act (conduct falling short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee).

PENALTY

Jurisdiction and principles

[9] The Tribunal's jurisdiction to impose penalty orders where it finds that the licensee has engaged in unsatisfactory conduct is set out in s 110(4) of the Act, which provides for it to make any order that a Committee could make under s 93 (except under s 93(1)(ha)):

> **93 Power of Committee to make orders**
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> (1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:
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> (a) make an order censuring or reprimanding the licensee:
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> (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:
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> (c) order that the licensee apologise to the complainant:
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> (d) order that the licensee undergo training or education:
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> (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.

[10] 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.

[11] 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.
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> …
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> 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.
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> …
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> 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.

[12] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public

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

good, but also to protect the collective reputation and public confidence in the profession itself.[3]

[13] 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]

[14] 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.

SUBMISSIONS

Submissions of the Committee

[15] In her submissions (5 July 2023), Ms Mok contends that Mr Sheldon's conduct sits at the low to moderate end of the spectrum in terms of unsatisfactory conduct cases. It was a brief conversation which left the prospective purchaser with the impression he was being asked to change the reason for withdrawing his offer. Clear communication by a licensee is critical. As an experienced licensee, Mr Sheldon ought to have appreciated that communicating with his customer in the way he did risked leaving the customer with the wrong impression.

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

[16] Mr Sheldon cannot rely on an unblemished disciplinary history. The Tribunal has recently found him to have engaged in unsatisfactory conduct.

[17] In terms of personal mitigating factors, it is acknowledged by the Committee that Mr Sheldon accepted his behaviour amounted to unsatisfactory conduct in advance of the hearing and before he filed his evidence. It is further acknowledged he was undergoing personal and health difficulties around the time of the relevant conduct, though this does not excuse his conduct. Finally, he has voluntarily undertaken additional training in disclosure obligations.

[18] The Committee submits that the appropriate penalty would be:

1. Censure.

2. A fine in the vicinity of $2,000 to $3,000.

[19] Such an outcome would be broadly consistent with other cases involving communication related failings. In *Spencer* and *Saywell*, the practitioners were fined $2,000.[6] In neither case did the practitioner have a disciplinary history, in contrast to Mr Sheldon.

[20] The Committee further seeks an order requiring Mr Sheldon to pay a contribution towards its costs in prosecuting this matter. The orthodox position is that a licensee found guilty pays 50 percent of the Committee's costs, but in light of the factors (discussed later), the Tribunal may consider a reduction from the starting point of 50 percent. It is submitted that a contribution in the vicinity of 30 percent would be appropriate.

Submissions of the defendant

[21] In his submissions (19 July 2023), Mr Hern points out that neither the prospective purchaser nor the complainant building inspector experienced any adverse consequences from Mr Sheldon's comments. It is submitted that his conduct, speaking in a garbled way which left the wrong impression of what he was saying, amounts to low-level unsatisfactory conduct.

[22] It is acknowledged that the previous finding of unsatisfactory conduct against Mr Sheldon is an aggravating factor. However, the previous decisions of the Tribunal were after the unsatisfactory conduct here and were of a different type, so Mr Sheldon is not a licensee who failed to improve his conduct following an adverse finding.

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[6] *Complaints Assessment Committee 20006 v Spencer* [2013] NZREADT 55; and *Saywell v Real Estate Agents Authority* [2016] NZREADT 74.

Furthermore, Mr Sheldon has since undertaken additional training following the previous finding.

[23] As Mr Sheldon has already explained, he was suffering from health and personal issues at the relevant time, as well as preparing for the hearing of the earlier disciplinary charges. Those personal and professional circumstances do not excuse his conduct, but they do reduce his culpability.

[24] The two cases referred to by the Committee are appropriate comparators, though in *Spencer* the complainants had been left significantly disadvantaged (whereas Mr Sheldon's error did not result in any disadvantage) and in *Saywell*, the Tribunal did not make an order for costs.

[25] A fine of not more than $2,000 would be appropriate. It would not be appropriate to make a costs order for reasons which are discussed later in this decision.

[26] The appropriate penalty orders would be:

1. Censure.

2. A fine of not more than $2,000.

DISCUSSION

[27] As Ms Mok observes, Mr Sheldon cannot rely on an unblemished disciplinary history. In a decision issued by the Tribunal on 19 February 2021, Mr Sheldon was found to have engaged in unsatisfactory conduct.[7] He had breached certain provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) by:

1. Sending texts to prospective buyers saying that interest in the relevant property was expected in excess of $1.1M when he did not have instructions to do so and it was contrary to the vendors' interests, in breach of r 9.1 (must act in the best interests of the client).

2. Misleading buyers in the texts by saying interest was expected in excess of $1.1M when that was below the vendors' bottom line, in breach of r 9.4 (must not mislead as to price expectations).

[7] *Complaints Assessment Committee 2001 v Sheldon* [2021] NZREADT 8.

3. Providing false information to the vendors as to feedback on the value of the property, in breach of r 6.4 (must not mislead or provide false information).

[28] In a penalty decision issued on 5 May 2021, the Tribunal described the seriousness of Mr Sheldon's conduct as moderate. He was censured, fined $3,000 and ordered to undergo training (in the laws relating to consumer protection).[8]

[29] Mr Sheldon's wrongdoing in the case now before the Tribunal was to communicate with a customer in such a way as to leave the latter with the impression that he was being asked to attribute withdrawal of an offer to a more palatable but false reason. In our decision, we described Mr Sheldon's communication as garbled. There was no deceit involved on his part. It is correctly described by Mr Hern as low-level unsatisfactory conduct.

[30] The Tribunal in the previous case found Mr Sheldon misled the parties, but did not expressly find there was a wilful intent to mislead. It described his breaches of the Rules as being at a moderate level of seriousness within the range of unsatisfactory conduct, which is a higher level of gravity than the low level we find in the current case.

[31] We note Mr Sheldon's personal and medical circumstances at the time. It is a relevant but not important factor in our deliberations.

[32] This brings us to consideration of the penalty.

Censure or reprimand

[33] Had this been Mr Sheldon's first appearance in the Tribunal, a reprimand would have been appropriate given the low level of wrongdoing. We agree though with the parties that censure is appropriate for a second complaint.

Training or education

[34] Given that Mr Sheldon has recently undergone relevant training,[9] we will not order any further training and nor does the Committee seek such an order.

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[8] *Complaints Assessment Committee 2001 v Sheldon* [2021] NZREADT 20.
[9] See the evidence of Mr Crews referred to in *Complaints Assessment Committee 2107 v Sheldon*, above n 1, at [42].

Fine

[35] The Committee seeks a fine in the vicinity of $2,000 to $3,000 and relies on two cases where the fine for unsatisfactory conduct was $2,000. It is submitted on behalf of Mr Sheldon that $2,000 would be appropriate.

[36] We agree that $2,000 is an appropriate fine. While this is the second time Mr Sheldon has been found guilty of unsatisfactory conduct, the low level of wrongdoing does not warrant a higher fine.

Costs

[37] Ms Mok notes the orthodox position that a licensee found guilty of misconduct pays 50 per cent of the Committee's costs. Ms Mok recognises that Mr Sheldon was successful in the sense he was found guilty of unsatisfactory conduct only, a level of offending he had conceded prior to the hearing. Furthermore, many of the underlying factual circumstances were not disputed which reduced the hearing time. The Committee therefore seeks an order that Mr Sheldon contribute 30 per cent of the Committee's costs of prosecution. A schedule produced to the Tribunal shows costs of $18,364.50 (excl. GST and disbursements), of which $5,509.35 is sought.

[38] Mr Hern submits that it would not be appropriate to order costs. Mr Sheldon was not found guilty of misconduct, only of unsatisfactory conduct, so there is no orthodox position or presumption. Penalty orders for unsatisfactory conduct do not routinely include orders for costs. It is further submitted that the costs order sought, over $5,000, would greatly increase the overall punishment. It would make the penalties significantly more onerous than in other cases of unsatisfactory conduct. It is noted that in *Spencer* an award of $2,000 was made towards the Tribunal's costs.[10]

[39] The Tribunal may make any award of costs that it thinks fit.[11] It may take into account whether a party:[12]

1. Participated in good faith in the proceedings.

2. Facilitated or obstructed information gathering by the Tribunal.

3. Facilitated the resolution of the issues.

[10] *Spencer*, above n 6, at [27(d)].
[11] Real Estate Agents Act 2008, s 110A(1).
[12] Section 110A(2).

[40] The High Court has identified the relevant considerations relating to the award of costs in professional disciplinary cases:[13]

1. Professional groups should not be expected to bear all the costs of the disciplinary regime.

2. Members who appeared on charges should make a proper contribution towards costs.

3. Costs are not punitive.

4. The practitioner's means, if known, are to be considered.

5. A practitioner's defence should not be deterred by the risks of a costs order.

6. In a general way, 50 per cent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

[41] The Tribunal has already accepted that the principles established by the High Court in *TSM* are applicable to cases where unsatisfactory conduct is found, not just misconduct.[14]

[42] The presumption that the guilty licensee should bear some of the Committee's costs of prosecution applies here. However, that presumption or at least the orthodox 50 per cent contribution can be displaced. That must be particularly so in cases where, like here, the Committee failed on all its charges and the outcome of unsatisfactory conduct was not advanced in the alternative by the Committee but was found by the Tribunal under a statutory option open to it.

[43] Moreover, Mr Sheldon had admitted the underlying facts very early in the investigation, as early as his first response to the Authority on 27 April 2021, though he did not concede it was unsatisfactory conduct until just before the hearing (see Mr Hern's opening submissions of 18 May 2023 at [1.8]).

[44] It is further noted that none of the factors specified in s 110A of the Act would indicate that any costs should be awarded against Mr Sheldon.

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[13] *TSM 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].

[14] *Complaints Assessment Committee 1901 v Lowndes* [2021] NZREADT 43 at [42]–[43].

[45] We decline to make an order for costs in favour of the Committee. It is rare for the Tribunal to make an order in respect of its own costs (as occurred in *Spencer*) and we are not minded to do so here.

ORDERS

[46] Mr Sheldon is:

1. Censured.

2. Ordered to pay a fine of $2,000 to the Authority within one month of this decision.

[47] 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

[48] Having regard to the interests of the public in the transparency of the Tribunal and knowing of wrongdoing by licensees, it is appropriate to order publication of this decision.[15]

D J Plunkett
Chair

P N O'Connor
Member

F J Mathieson
Member

[15] Real Estate Agents Act, s 108.