

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2023] NZREADT 24

Reference No: READT 003/2022

**IN THE MATTER OF**

Charges laid under s 91 of the Real Estate Agents Act 2008

**BROUGHT BY**

**COMPLAINTS ASSESSMENT  
COMMITTEE 2103**

**AGAINST**

**TANYA LIEVEN**  
Defendant

Hearing in Wellington on 31 March 2023

Tribunal:

C A Sandelin (Deputy Chairperson)  
P N O'Connor (Member)  
F J Mathieson (Member)

Appearances:

Counsel for the Committee:  
The Defendant:

Ms Nazim  
Mr Hayes

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**DECISION (PENALTY)**  
**Dated 21 August 2023**

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## INTRODUCTION

[1] In a decision issued on 15 May 2023 the Tribunal found Ms Lieven guilty of unsatisfactory conduct under s 72 of the Real Estate Agents Act 2008 (the Act) (the Tribunal's substantive decision).<sup>1</sup> The Tribunal has now received submissions as to penalty.

## BACKGROUND

[2] The background facts are set out in the Tribunal's substantive decision and are summarised below.

[3] As at 26 July 2019, Ms Lieven was the sole director and an employee of Sell New Zealand Real Estate Limited (the agency).

[4] HH, [Redacted], and Ms Lieven were the landlords of various properties in [Redacted], Wellington, all of which were owned by a Trust with the sole trustee being HH. Ms Lieven had a beneficial interest in the Trust but was not a trustee.

[5] One of the properties (the property) was tenanted by SC (the complainant) and three other tenants (the tenants). The tenancy agreement for the property was dated 12 February 2018.

[6] On 25 July 2019, HH signed a real estate agency agreement with the agency appointing the agency as selling agent. The agency agreement named the selling client as HH and Ms Lieven.

[7] On 26 July 2019, Ms Lieven emailed the tenants from the agency's email address informing them that the property was being put on the market, as required by s 47 of the Residential Tenancies Act 1986 (the RTA).

[8] On or about 28 July 2019, Ms Lieven advised the tenants that she had been engaged as the selling agent for the property and asked them "to co-operate with the agents viewing hours of Monday – Friday 10-5 pm (excluding public holidays)".

[9] The complainant responded to Ms Lieven, requesting 48 hours' notice of any visitors or works being carried out on the property. However, Ms Lieven refused and sent emails stating [sic]:

You have been provided notice effective immediately with times and days. That's notice.

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<sup>1</sup> *Complaints Assessment Committee 2013 v Lieven* [2023] NZREADT 11.

...

Read the email

That constitutes notice.

...

Just to be clear

We don't need your permission

The property is for sale. You are required under the residential tenancies Act to comply. You have received notice and buyers will be through from tomorrow.

[10] The complainant responded stating that the tenants would consent to buyers being shown throughout the house subject to the following conditions:

That [the tenants be] given at least 24 hours' notice whenever a potential buyer is planning to look at the house;

That [the tenants be] told the day and approximate time you are planning to show each visitor; and

That viewings are only carried out during work hours, with weekends agreed to on a case by case basis with [the tenants] in advance.

[11] Ms Lieven responded as follows:

You have had notice

This week [redacted] are viewing the property along with their purchase delegation, their security staff, their Ambassador and diplomatic security squad.

You have been given notice.

[12] The complainant repeated his request for conditions and Ms Lieven responded:

I am a licensed real estate agent having given you notice that the property is for sale

Such notice is valid and binding.

There will be no further communication on that.

You have been advised of the days & times the property is required for viewing & will be those until further notice.

Tanya Lieven

Sell NZ Real Estate Ltd

Wellington

[13] After further emails from the complainant, Ms Lieven continued to state that she had provided adequate notice. She stated that she was not acting as a landlord but as a real estate agent.

[14] The complainant sent further emails setting out the law and requesting more information about when buyers would be viewing the house. He said he had security concerns about the house being viewed in his absence due to the nature of his employment. The complainant also stated that he was happy to work with Ms Lieven to come up with a solution.

[15] After further emails were exchanged, with Ms Lieven continuing to state that the tenants' consent was not required, the complainant issued Ms Lieven with a trespass notice, warning her to stay out of the house until they could come to an agreement. He noted that if she wished to show potential buyers through the property, conditions could be discussed through the Tenancy Services' mediation service or the Tenancy Tribunal (the TT).

[16] Ms Lieven responded as follows:

Then I'll sue you for each & every loss

The purchase price is \$8m

[17] The complainant sent two further emails to Ms Lieven asking if she would accept mediation and asking her to confirm that she would not be accessing the house. Ms Lieven did not respond and did not enter the property.

[18] The complainant made a complaint about Ms Lieven to the TT. The TT found that:

- (a) Ms Lieven had confused the landlord's requirement to give written notice to the tenants of the property that the property had been put on the market (s 47 of the RTA) with the landlord's requirement to obtain the tenants' consent before entering the premises to show the premises to prospective purchasers or a real estate agent (s 48(3)(b) and (d) of the RTA).
- (b) Ms Lieven had not breached s 48(3)(b) of the RTA as no viewings of the property had taken place.
- (c) Ms Lieven's conduct breached s 38(2) of the RTA in that she interfered with the tenants' reasonable peace, comfort or privacy.

- (d) The tenants had acted reasonably to seek basic conditions for entry under s 48(3A) of the RTA.
- (e) Ms Lieven's response to the tenants after the complainant issued a trespass notice – "Then I'll sue you for each & every loss. The purchase price is \$8m" was intended to harass the tenants and was a direct threat.

[19] The TT ordered the landlords, being Ms Lieven and HH, to pay the tenants \$1,520.44. This consisted of \$500 compensation, \$1,000 in exemplary damages, and a filing fee.

[20] Ms Lieven and HH appealed the TT decision to the [court] which dismissed the appeal and found that:<sup>2</sup>

- (a) the Tenancy Adjudicator was correct to find that Ms Lieven breached her obligations under s 38(1) of the RTA by not giving notice of specific times of any viewings and that the tenants acted reasonably in seeking 24 hours' notice of viewings; and
- (b) the Adjudicator was entitled to find on the evidence that Ms Lieven engaged in intentional harassment of the tenants.

[21] On 19 March 2020, the complainant submitted a complaint to the Real Estate Agents Authority (the Authority) about various aspects of Ms Lieven's conduct.

[22] The Committee inquired into the allegations, investigated and determined to lay the charges against Ms Lieven in accordance with s 91 of the Act.

### **TRIBUNAL'S SUBSTANTIVE DECISION**

[23] The charges laid by the Committee against Ms Lieven were as follows:

- (a) Charge 1: misconduct under s 73(a) and/or s 73(c)(iii) of the Act, namely conduct that
  - (i) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; and/or

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<sup>2</sup> [Redacted].

- (ii) consists of a wilful or reckless contravention of r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules).
- (b) Charge 2 (as an alternative to charge 1): unsatisfactory conduct under s 72(a) and/or s 72(b) and/or s 72(d) of the Act, namely conduct that:
  - (i) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; and/or
  - (ii) contravenes r 6.3 of the Rules; and/or
  - (iii) would reasonably be regarded by agents of good standing as being unacceptable.
- (c) Charge 3: misconduct under s 73(b) of the Act, namely conduct that constitutes seriously incompetent or seriously negligent real estate agency work.
- (d) Charge 4 (as an alternative to charge 3): unsatisfactory conduct under s 72(a) and/or s 72(b) of the Act, namely conduct that:
  - (i) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; and/or
  - (ii) contravenes r 5.2 of the Rules; and/or
  - (iii) contravenes r 9.1 of the Rules.

## **CHARGES 1 AND 2**

[24] The Tribunal found that Ms Lieven's conduct in harassing the tenants in the manner that she did and threatening to sue the tenants, was a breach of r 6.3 of the Rules.

[25] However, the Tribunal was not persuaded that Ms Lieven in her communications with the tenants foresaw that her conduct would be a breach of r 6.3 and proceeded regardless in a reckless manner. To be guilty of misconduct under s 73(c)(iii), a "wilful or reckless" contravention required that Ms Lieven intended to contravene r 6.3, or that she knew that her conduct may have the effect of bringing the industry into disrepute, but proceeded with that conduct regardless of the risk. The Tribunal found that there had been no direct evidence of that, or any evidence that would allow the Tribunal to

make an inference to that effect. Accordingly, the Tribunal was not persuaded on the balance of probabilities that Ms Lieven's conduct amounted to a breach of s 73(c)(iii).

[26] Under the alternative charge 2, the Tribunal found that Ms Lieven's conduct in harassing the tenants in the manner that she did and threatening to sue the tenants met the requirements for a finding of unsatisfactory conduct pursuant to ss 72(a), 72(b) and 72(d) of the Act.

### **CHARGES 3 AND 4**

[27] The Tribunal found that Ms Lieven, when giving evidence before the Tribunal, demonstrated an unsound knowledge of the RTA, and attempted to gloss over the correct interpretation of the legislation. However, the Tribunal was not satisfied on the balance of probabilities that Ms Lieven's conduct amounted to seriously incompetent or seriously negligent real estate agency work pursuant to s 73(b) of the Act.

[28] The Tribunal found that, in her capacity as a real estate agent selling a tenanted property, Ms Lieven should have ensured that her knowledge was such that her dealings with the tenants complied with the RTA. Overall, the Tribunal found that Ms Lieven's knowledge fell short of her obligations under r 5.2 and that she was guilty of unsatisfactory conduct under charge 4, for breaches of s 72(a) and s 72(b) of the Act.

[29] The Tribunal did not consider that the element of the charge relating to r 9.1 of the Rules added anything to the overall assessment of Ms Lieven's conduct, and therefore did not consider it further.

### **JURISDICTION AND PRINCIPLES**

[30] The Tribunal's jurisdiction to impose penalty orders if unsatisfactory conduct 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, although not guilty of misconduct, he or she has engaged in unsatisfactory conduct, it may do either or both of the following:
  - (a) make any of the orders that a Complaints Assessment Committee may make under section 93 (except under section 93(1)(ha));
  - (b) if it appears to the Tribunal that any person has suffered loss by reason of the licensee's unsatisfactory conduct, make an order that the licensee pay to that person a sum not exceeding \$100,000 by way of compensation, but only if—

- (i) the unsatisfactory conduct is more than a minor or technical contravention of this Act or of any regulations or rules made under this Act; and
- (ii) the order is one that a court of competent jurisdiction could make in relation to a similar claim in accordance with principles of law.

[31] 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.

[32] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>3</sup>

...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.

...

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.

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

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<sup>3</sup> *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.<sup>4</sup>

[34] 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.<sup>5</sup>

[35] The most appropriate penalty is that which:<sup>6</sup>

- (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 for the Committee*

[36] Ms Nizam submitted that the appropriate penalty orders are a censure, a fine and an order to complete further training. She submitted that Ms Lieven's conduct is at a moderate level of seriousness.

[37] Ms Nizam submitted that deterrence, both personal and general, is an appropriate consideration. She submitted that Ms Lieven does not appear to have shown any insight into her conduct and the seriousness of it, despite the TT and [court] findings

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<sup>4</sup> *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 3, at [151].

<sup>5</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

<sup>6</sup> *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].

that Ms Lieven had breached her requirements as to notice. She submitted that the appropriate penalty is one that ensures that Ms Lieven does not repeat this conduct in the future, whilst sending a message to the industry that this sort of conduct is unacceptable.

[38] Ms Nizam referred to *Real Estate Agents Authority (CAC 10054) v Subritzky*<sup>7</sup> and *Li Wang*<sup>8</sup> as being of a similar seriousness to the conduct of Ms Lieven. She submitted that the threats in all three cases occurred over a number of occasions and whilst the substance of the threats was different in all three cases, the nature of the behaviour was similar.

[39] It was submitted by Ms Nizam that as Ms Lieven has continued to demonstrate an unsound knowledge of the RTA despite the conduct occurring in 2019, a training order is necessary. She referred to *Re Rankin* where the Committee found that the licensee breached r 5.2 of the Rules in relation to the termination of a tenancy, as his behaviour demonstrated that he did not have the required knowledge of the RTA, which was a clearly relevant piece of legislation.<sup>9</sup> The licensee was found guilty of unsatisfactory conduct on several charges and ordered to undergo training or education and to pay a fine of \$4000.<sup>10</sup>

[40] Ms Nizam submits that a fine in the amount of \$4,000 is appropriate.

#### *Submissions for Ms Lieven*

[41] Mr Hayes submitted that in *Subritzky* and *Li Wang* the threats were more serious than in the case of Ms Lieven and that a fine of \$1000 was appropriate.

[42] Mr Hayes submitted that as the offence was committed nearly four years ago without further incident, and there has been public opprobrium by the publication of the TT findings, a censure is a step too far. He submitted that there was no indication of a criminal offence being committed by the threat to sue, and no deliberate ignoring of her obligations under the RTA. Mr Hayes submitted that publication of the Tribunal's substantive decision is sufficient notice to the profession of Ms Lieven's behaviour and the conduct and circumstances do not warrant a censure.

[43] With regard to further training, Mr Hayes queried what training would assist. He submitted that as an appeal has been filed, the High Court will supply sufficient training

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<sup>7</sup> *Real Estate Agents Authority (CAC 10054) v Subritzky* [2012] NZREADT 20.

<sup>8</sup> *Re Complaint No C26114* (6 June 2019).

<sup>9</sup> *Re Complaint No C20552* (2 May 2018).

<sup>10</sup> *Re Complaint No C20552* (31 August 2018).

when it supplies the correct interpretation of the RTA. He submitted that the Committee's finding as to the threat to sue by Ms Lieven is sufficient to mark any disapproval and alert the profession to the boundaries of their conduct.

## DISCUSSION

[44] We agree with Ms Nizam that Ms Lieven's conduct was at a moderate level. However, we do not consider the threats made by Ms Lieven to be as serious as those made in either *Subritzky* or *Li Wang*. We consider that an appropriate fine is \$3000.

[45] We see no reason not to censure Ms Lieven. Whilst Mr Hayes submitted that Ms Lieven's conduct did not warrant a censure, we find that Ms Lieven's conduct in harassing the tenants in the manner that she did and in threatening to sue the tenants was inappropriate and fell short of the standard that a reasonable member of the public should expect from a competent licensee. Furthermore, Ms Lieven has failed to accept responsibility for her conduct. In the circumstances, we find that a censure is appropriate.

[46] We consider that Ms Lieven would benefit from undergoing training by completing Unit Standard 23141 (Demonstrate understanding of legal matters affecting real estate licensees).

## COSTS

[47] The Committee seeks a contribution to its costs.

[48] 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 High Court has identified the relevant considerations relating to the award of costs in professional disciplinary cases:<sup>11</sup>

- (a) Professional groups should not be expected to bear all the costs of the disciplinary regime.
- (b) Members who appeared on charges should make a proper contribution towards costs.
- (c) Costs are not punitive.
- (d) The practitioner's means, if known, are to be considered.

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<sup>11</sup> *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].

- (e) A practitioner's defence should not be deterred by the risks of a costs order.
- (f) 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.

[49] Ms Nizam submitted that 20% of the total costs incurred by the Committee is appropriate. In the recent case of *Complaints Assessment Committee 1904 v Bright*, the Tribunal ordered the licensee to pay 20% of the Committee's costs.<sup>12</sup> This was because the most serious charge was not upheld, and the dispute at the hearing was limited to whether the conduct was unprofessional (rather than whether the conduct occurred). Similarly, in the present case, Ms Lieven was found not guilty on the two most serious charges and an agreed statement of facts was filed.

[50] On 14 August, the Committee filed a schedule detailing their costs totalling \$15,742.80, 20% of which is \$3,148.56.

[51] Counsel for Ms Lieven has agreed that a contribution of 20% of the Committee's costs is appropriate.

## ORDERS

[52] Ms Lieven is:

- (a) Censured.
- (b) Ordered to pay a fine of \$3,000 to the Authority within 20 working days of this decision.
- (c) Ordered to undergo training by completing the Authority's Unit Standard 23141 "Demonstrate understanding of legal matters affecting real estate licensees", within 3 months from the date of this decision.
- (d) Ordered to pay 20% of the Committee's costs to the Authority, amounting to \$3,148.56 within 20 working days of this decision.

[53] 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.

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<sup>12</sup> *Complaints Assessment Committee 1904 v Bright* [2023] NZREADT 1 at [46]–[48].

**PUBLICATION**

[54] 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.<sup>13</sup>

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C A Sandelin  
Deputy Chairperson

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P N O'Connor  
Member

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F J Mathieson  
Member

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<sup>13</sup> Real Estate Agents Act, s 108.