

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 27

Reference No: READT 049/2019

IN THE MATTER OF

Appeals under s 111 of the Real Estate
Agents Act 2008

BETWEEN

VISHAL and MONISHA SHARMA
Appellants

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 1901)**
First Respondent

AND

**JULIE ANNE BRAKE and SUCCESS
REALTY LTD t/a BAYLEYS ROTORUA**
Second Respondents

Tribunal:

D J Plunkett (Chair)
C A Sandelin (Deputy Chairperson)
G J Denley (Member)

Appearances:

The appellants:	Self-represented
Counsel for the first respondent:	E Mok
Counsel for the second respondents:	J Waymouth

DECISION
Dated 03 October 2023

INTRODUCTION

[1] The appellants, Vishal and Monisha Sharma, were the purchasers of a property (the purchasers). One of the second respondents, Julie Anne Brake, was an owner of the property. She is also a licensed real estate salesperson under the Real Estate Agents Act 2008 (the Act). Ms Brake was one of the agents who dealt with the purchasers.

[2] The complaint of the purchasers is essentially that the property is unsafe and Ms Brake failed to disclose previous burglaries. The complaint was made to the Real Estate Agents Authority (the Authority) and was upheld by Complaints Assessment Committee 1901 (the Committee). It found Ms Brake guilty of unsatisfactory conduct on the basis of breaches of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules).

[3] In the penalty decision, Ms Brake was censured, fined \$2,000 and ordered to pay the purchasers' legal costs of \$1,395. The purchasers appeal against the penalty decision.

BACKGROUND

[4] Ms Brake was engaged at the relevant time by Success Realty Ltd, trading as Bayleys Rotorua (the agency), also a second respondent.

[5] The relevant property was owned by Ms Brake and her husband. There had been two burglaries at the property in August 2018. A few months later, it was placed on the market through the agency. Ms Brake was not a listing agent.

[6] The purchasers viewed the property on 19 January 2019. They signed a conditional sale and purchase agreement on 25 January 2019 for \$540,000. There was a second viewing on 6 February 2019. The transaction became unconditional on 12 or 18 February 2019 and settlement occurred on 29 March 2019.

[7] There was an attempted break-in of the house on 12 May 2019 while one of the purchasers and their son were present. The intruder fled when he saw the occupants. There was some damage to the house.

Complaint to the Authority

[8] On about 14 May 2019, the purchasers made a complaint against Ms Brake to the Authority. They alleged that, on viewing the property, the wife asked Ms Brake

whether the house was safe. They were concerned about safety as their son had special needs and would be left alone at times. Ms Brake replied that it was safe and she and her husband had never had any issues.

[9] Ms Brake denied saying the property was safe. She said the purchasers asked her whether the area was good and she replied that her family loved it because of the local amenities. There was no question about safety.

[10] On 2 December 2019, the Committee issued its decision partially upholding the complaint.¹ It decided to take no further action in respect of the other licensee (one of the listing agents) and the agency. As for Ms Brake, it found unsatisfactory conduct in two respects:

1. Failing to disclose the two burglaries, in breach of r 6.4 of the Rules. Ms Brake had been put on notice by the purchasers of their concerns due to their child's special needs.
2. Failing to disclose ownership of the property in writing, in breach of s 136 of the Act. The purchasers were though aware of it.

[11] On 19 March 2020, the Committee issued its decision on the penalty orders.² It described the two breaches as at the lower end of unsatisfactory conduct. The Committee recorded that Ms Brake had made an apology through counsel. The penalties were:³

1. Censure.
2. A fine of \$2,000 (\$1,000 for each breach).
3. Payment of the purchasers' legal costs of \$1,395.

[12] In the penalty decision, the Committee dealt with the purchasers' application for \$40,000 as relief from the consequences of Ms Brake's error.⁴ The Committee found the costs did not flow directly from Ms Brake's unsatisfactory conduct. It noted that the new statutory compensation provision did not apply to conduct prior to 30 October 2019.

[13] Since the Committee's decisions, there has, as aptly described by Ms Mok, been a protracted procedural history.

¹ Complaint No: C31379 (2 December 2019).

² Complaint No: C31379 (19 March 2020).

³ At [4.6]–[4.7].

⁴ Real Estate Agents Act 2008, s 93(1)(f).

APPEAL

[14] The purchasers were dissatisfied with the Committee's penalty decision, so appealed to the Tribunal (the Tribunal's file reference is READT 49/2019). The Tribunal treated this as an appeal against both the liability and penalty decisions, as it was apparent from the purchasers' arguments that both were contested. Ms Brake also appealed to the Tribunal against both decisions (READT 01/2020), though we record she has recently withdrawn her appeal.

[15] Following a hearing on the papers, a decision was issued by the Tribunal on 12 February 2021 on both the purchasers' and Ms Brake's appeals.⁵ In respect of the purchasers' appeal against the liability decision, the Tribunal upheld the Committee's finding of unsatisfactory conduct on the basis of both breaches. However, the Tribunal also found that there was credible evidence on which misconduct could have been charged in respect of the failure to disclose the burglaries. Accordingly, it referred the proceedings back to the Committee to consider whether misconduct charges should be laid in the Tribunal.

[16] In respect of the purchasers' appeal against the penalty decision, there were two matters before the Tribunal:

1. The Committee had not ordered in their favour the expenses of securing the property. The Tribunal considered the purchasers may have suffered relevant claimable loss, but they had not produced evidence proving this.
2. The purchasers contended that if misconduct was ultimately found, more serious penalties should be ordered. This was something the Tribunal could not then deal with.

[17] The Tribunal accordingly deferred finalisation of the penalty for the unsatisfactory conduct it had upheld, pending the outcome of possible misconduct charges.⁶ It sought submissions from the parties on this approach.

[18] In a Ruling issued on 1 June 2021 and a decision on 13 July 2021, the Tribunal declined to revisit its earlier decision to refer possible misconduct charges back to the Committee.⁷ In a Minute issued on 3 August 2021, the Tribunal confirmed that the possible misconduct charges should be disposed of before the penalty appeals were decided.⁸ It therefore adjourned those appeals. In a further Minute on 21 September

⁵ *Sharma v Real Estate Agents Authority* [2021] NZREADT 7.

⁶ At [77] and [82].

⁷ *Sharma v Real Estate Agents Authority* [2021] NZREADT 25 and 31.

⁸ *Sharma v Real Estate Agents Authority* READT 049/19 and 01/20 Minute (3 August 2021).

2021, the Tribunal expressed the view that a new panel of the Tribunal should hear the misconduct charges.⁹

[19] The possibility of misconduct charges was considered by the Committee and it referred such charges to the Tribunal on 26 August 2021 (Tribunal reference READT 21/2021). A Minute was issued by the new panel of the Tribunal on 30 September 2021 as to the progress of the fresh charges.¹⁰

[20] The misconduct charges were heard by the new panel on 22 June 2023 and a decision dismissing the charges was issued by the Tribunal [redacted].¹¹

[21] The Tribunal then issued a Minute on 4 July 2023 stating that the outstanding appeal of the purchasers against the penalty decision of 19 March 2020 would be heard on the papers by the new panel and setting a timetable for submissions.¹² The parties were asked to expressly identify any earlier submissions filed on which they still relied, otherwise the earlier submissions would not be considered. That timetable has subsequently been revised a number of times, commencing with a Minute on 6 July 2023 followed by emailed directions.¹³

Submissions of the purchasers

[22] In their submissions (30 August 2023), the purchasers say they have been tirelessly seeking justice for four years, without the financial means to afford legal representation. The focus during the Tribunal's hearing was disproportionately placed on scrutinising their conversations with Ms Brake, instead of holding her accountable with equal intensity. This was unjust.

[23] The true toll of the safety concerns lies in the emotional trauma endured by the entire family, notably their son. They have made significant investments in security measures, installing cameras and fences, and getting a dog. The Tribunal has failed to recognise the depth of their commitment. They implore the Tribunal to take a comprehensive view of their circumstances, recognising the profound impact it had on their lives. They aim for compassionate consideration, highlighting the financial hardship they have faced in pursuing the case.

[24] On 27 September 2023, the purchasers sent two quotes to the Tribunal for remedial work (to the shower and the roof).

⁹ *Sharma v Real Estate Agents Authority* READT 049/19 Minute 4 (21 September 2021).

¹⁰ [Redacted].

¹¹ [Redacted].

¹² *Sharma v Real Estate Agents Authority* READT 049/19 and 01/20 Minute 5 (4 July 2023).

¹³ *Sharma v Real Estate Agents Authority* READT 049/19 and 01/20 Minute 6 (6 July 2023).

Submissions of the Authority

[25] Ms Mok, in her submissions (8 September 2023), notes that the sole issue for the Tribunal is to determine whether the Committee's penalty orders for Ms Brake's unsatisfactory conduct were appropriate. The Authority's position is that the orders were appropriate and a proportionate response to the unsatisfactory conduct. The orders decision should therefore be upheld.

[26] An appeal against penalty orders is one against the exercise of a discretion rather than a general appeal. The grounds of appeal are therefore limited.

[27] The purchasers have highlighted their financial hardship and their feelings of betrayal and distress from Ms Brake's actions. These issues of costs and compensation were previously addressed in the decision of the Tribunal's original panel.

[28] It is submitted there is no demonstrable error in the Committee's penalty decision. It had regard to the nature and gravity of Ms Brake's conduct, including its significant impact on the purchasers, as well as the personal factors put forward by Ms Brake. The decision was not plainly wrong. Indeed, it was a proportionate response to the low-level breaches.

Submissions of Ms Brake and the agency

[29] In his submissions (12 September 2023), Mr Waymouth concurs with Ms Mok's submission that Ms Brake's breaches were at the low end of seriousness. He further concurs with her submission that there was no demonstrable error in the Committee's penalty decision. That decision was a proportionate response to the low-level breaches. The penalties of censure or reprimand, together with a fine of \$2,000, were appropriate.

[30] It is contended by counsel that the requirement to make a contribution of \$1,395 towards the purchasers' costs is now inappropriate, taking into account that subsequent to the order, the purchasers have been unsuccessful in their appeal. That appeal was clearly hopeless at the outset. Ms Brake has had to incur substantial legal fees in the appeal. The ability to seek costs against the purchasers is available to Ms Brake, but counsel has been instructed not to do so. Ms Brake continues to have sympathy for their financial position.

[31] It is, however, unfair, unjust, inequitable and inappropriate that Ms Brake pay \$1,395, given the unsuccessful and hopeless appeal. The purchasers should not benefit from the costs awarded to them by the Committee, having subjected Ms Brake to far more substantial costs.

Bundle of documents

[32] The new panel of the Tribunal confirms that it had available to it the Committee's bundle of documents produced for the appeals determined by the original panel on 12 February 2021 (the original bundle), in addition to the bundle produced for the appeal heard by the new panel (the new bundle).

JURISDICTION AND PRINCIPLES

[33] This is an appeal pursuant to s 111 of the Act.

[34] The appeal is by way of a rehearing.¹⁴ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.¹⁵ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.¹⁶ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.¹⁷

[35] A hearing may be in person or on the papers.¹⁸ A hearing in person may be conducted by telephone or audiovisual link.

[36] The appeal in relation to the penalty is an appeal against the Committee's exercise of a discretion. This requires an appellant to establish that the Committee made an error of law or principle, took into account irrelevant matters or failed to take into account relevant matters, or that the Committee's decision on penalty is plainly wrong.¹⁹

[37] The Tribunal's principles in relation to penalties are set out in *Sheldon*.²⁰

DISCUSSION

[38] The starting point for assessing penalty orders against Ms Brake is the wrongdoing found by the Committee and confirmed by both panels of the Tribunal. She was found guilty by the Committee of unsatisfactory conduct in two respects:

1. Failing to disclose two burglaries, in breach of r 6.4 of the Rules.
2. Failing to disclose ownership of the property in writing, in breach of s 136 of the Act.

¹⁴ Real Estate Agents Act, s 111(3).

¹⁵ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].

¹⁶ Real Estate Agents Act, s 111(4).

¹⁷ Section 111(5).

¹⁸ Sections 107 and 107A.

¹⁹ *WM v Real Estate Agents Authority (CAC 1906)* [2022] NZREADT 7 at [56].

²⁰ *Complaints Assessment Committee 2107 v Sheldon* [2023] NZREADT 20 at [9]–[14].

[39] In the Committee's penalty decision, it described both breaches as being at the lower end. The penalties were:

1. Censure.
2. A fine of \$2,000 (\$1,000 for each breach).
3. Payment of the purchasers' legal costs of \$1,395.

[40] The original panel of the Tribunal reached no conclusion concerning the penalty orders, pending the Committee's consideration of possible misconduct charges.

[41] This brings the new panel of the Tribunal to the purchasers' appeal against the Committee's penalty decision. They make no submission concerning the penalty orders, aside from seeking compensation. We will deal with compensation later.

[42] It is relevant to note Ms Brake made a written apology to the purchasers for any distress or inconvenience caused.²¹

Censure or reprimand

[43] The purchasers do not challenge the Committee's decision to censure Ms Brake.

Fine

[44] The purchasers do not challenge the fine of \$2,000 imposed on Ms Brake.

Relief from rectification or compensation

[45] The primary issue before the Tribunal is whether the Committee was wrong not to grant relief (by reimbursement of expenses) where rectification of Ms Brake's error was not practical, in accordance with the Committee's discretion under s 93(1)(f)(ii) of the Act. Plainly, there could have been no rectification of the omission to inform the purchasers of the burglaries after settlement (prior to settlement, rectification might arguably have involved cancellation of the sale and purchase agreement).

[46] The Committee found that it was not appropriate to make an order for relief as the costs incurred in securing the property did not flow directly from Ms Brake's unsatisfactory conduct.²² It noted that the new compensation provisions of the Act did

²¹ Apology addressed to the purchasers by Ms Brake (undated) attached to penalty submissions of 31 January 2020 made to the Committee by Mr Waymouth, at 317 of the original bundle.

²² Complaint No: C31379 (19 March 2020) at [4.4].

not apply because the unsatisfactory conduct was prior to 30 October 2019 when those provisions came into effect.

[47] While the original panel of the Tribunal said it would not deal with the penalty appeals (of both the purchasers and Ms Brake) pending consideration of possible misconduct charges, it did consider the question of compensation. Ms Mok is probably right when she says the original panel has determined the issue of compensation, but we will briefly deal with it, since it is the only issue raised by the purchasers.

[48] The new panel of the Tribunal agrees with the original panel that the new compensation provisions of the Act do not apply, as they came into effect after the unsatisfactory conduct here (which was in January and February 2019).

[49] The original panel therefore assessed whether the Committee should have granted relief under s 93(1)(f). It considered that the normal measure of a loss from a misrepresentation was whether what was acquired was worth less than the price and/or whether there had been wasted expenditure.²³ Adopting that approach, it found that the purchasers may have suffered a claimable loss, but they had not provided any evidence of such a loss.²⁴ They had put forward no evidence that the price paid for the property took account of it being in a location with an increased risk of burglary. There was no valuation evidence.

[50] We respectfully agree with the original panel's approach. The Committee cannot award broad compensation under the guise of relief from rectification.²⁵ As the original panel noted, the High Court in *Quin* considered that the principles underlying the Court of Appeal's decision in *Harvey* (which had concerned s 43 of the Fair Trading Act 1986) should be adopted to measuring the expense of relief where rectification was not available.²⁶ The tortious measure of damages was applicable, not expectation damages. The purchasers' claim for compensation (considered in terms of the expense of relief from rectification) failed because of a lack of valuation evidence. That remains the position.

[51] In addition, we think there is an even more compelling reason to dismiss the claim for the expense of securing the property and that is the reason given by the Committee. Even if these expenses were of a type that is potentially recoverable, they are not causally connected to Ms Brake's unsatisfactory conduct. They flow from the attempted

²³ *Sharma v Real Estate Agents Authority*, above n 5, at [69].

²⁴ At [70]–[71].

²⁵ *Quin v Real Estate Agents Authority* [2012] NZHC 3557 at [56] and [58].

²⁶ At [76], [78] and [83], citing *Harvey Corp Ltd v Barker* [2002] 2 NZLR 213 (CA).

burglary after the purchasers took possession, not from the omission to inform them of two burglaries six months prior to purchase.

Costs

[52] Ms Brake challenges the Committee's award of \$1,395 in costs in favour of the purchasers (or at least permitting its enforcement) on the basis that she has now been put to substantial costs by the purchasers' "hopeless" appeal. This challenge must fail for the following reasons:

1. Ms Brake has withdrawn her appeal against the Committee's penalty decision.
2. The purchasers' appeals against the liability and penalty decisions of the Committee were not hopeless. While they have been unsuccessful in obtaining any form of compensation, they did succeed in persuading the original panel that Ms Brake's wrongdoing might amount to misconduct. That led the Tribunal to refer the matter back to the Committee, which then referred misconduct charges to the Tribunal. Those charges ultimately failed in the Tribunal and Ms Brake's costs on those charges is being dealt with separately.
3. Mr Waymouth has not articulated any legal basis for the Tribunal to effectively stay the Committee's award of costs on the basis of conduct after the Committee's decision.

Conclusion on penalty

[53] The Committee's decision to censure Ms Brake, fine her \$2,000 and direct the payment of \$1,395 in costs, was reasonable and proportionate in the circumstances. In particular, the purchasers have not shown any error of law or principle or that the Committee took into account any irrelevant matter or that it failed to take into account a relevant matter or that the Committee's decision was plainly wrong.

OUTCOME

[54] The appeal is dismissed. The Committee's penalty decision is confirmed.

[55] 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

[56] Having regard to the interests of the public in the transparency of the Tribunal and knowing of wrongdoing by licensees, as well as the privacy of the people involved, it is appropriate to order publication of the decision.

D J Plunkett
Chair

C A Sandelin
Deputy Chairperson

G J Denley
Member