

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 31

Reference No: READT 025/2022

IN THE MATTER OF

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

BROUGHT BY

**COMPLAINTS ASSESSMENT
COMMITTEE 2102**

AGAINST

NICHOLAS HOOGWERF
Defendant

Tribunal:

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

Appearances:

Counsel for the Committee:
The Defendant:

S Farnell
No appearance

DECISION (PENALTY)
Dated 2 November 2023

INTRODUCTION

[1] In a decision issued on 25 September 2023, the Tribunal found Mr Hoogwerf had forged a valuation report for a property he contracted to buy and was therefore 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 narrative, as found by the Tribunal, is set out in its earlier decision and summarised below.

[4] Nicholas Hoogwerf, also known as Nicholas Pieter Miers-Hoogwerf, the defendant, was at the relevant time a licensed salesperson under the Act. He was engaged by City Realty Ltd, trading as Ray White Parnell (the agency).

[5] At an auction on 26 October 2021 of a property listed by a colleague, Mr Hoogwerf was the highest bidder. He paid a deposit. As a licensed salesperson buying a property, he was required to provide the vendors with a valuation from an independent registered valuer. He sent a valuation report (dated 8 November 2021) to his colleague on 9 November 2021. It was in the name of a reputable valuation company. Due to errors in the report, he sent revisions of the report to his colleague three times.

[6] The valuation company advised the agency that the report was forged. The vendors therefore cancelled the sale and purchase agreement with Mr Hoogwerf on 3 December 2021. They re-sold the property to another person.

THE TRIBUNAL'S DECISION

[7] Mr Hoogwerf, who did not attend the hearing to defend the charge, had admitted the facts underpinning the charge in his explanation to the Real Estate Agents Authority (the Authority) on 18 May 2022. The Tribunal found the forgery of the report to be dishonest. It was disgraceful and was misconduct under s 73(a) of the Act.

¹ *Complaints Assessment Committee 2102 v Hoogwerf* [2023] NZREADT 25.

PENALTY

Jurisdiction and principles

[8] The Tribunal's jurisdiction to impose penalty orders is set out in s 110(1) and (2) of 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).
- (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.

...

[9] The Committee may 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.

[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.

...

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.

[12] 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

[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;

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

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].

- (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] There are submissions (6 October 2023) from Ms Farnell, on behalf of the Committee.

[16] Counsel submits that the penalties for misconduct should reflect the need to maintain a high standard of conduct in the industry, the need for consumer protection and to promote confidence in the industry, as well as the need for deterrence.

[17] Mr Hoogwerf was first licensed in April 2021 and his misconduct occurred seven months later in November 2021. It was early in his career. While he has not been subject to any previous disciplinary findings, that is of marginal weight given the short time in which he was licensed. This is not, however, the first time he appears to have produced a false document as the Tenancy Tribunal found he filed a false invoice in support of a claim against his landlord.⁶

[18] It is submitted that dishonesty of any nature runs contrary to the principles of registration under the Act and its associated privileges. It is important that it is met with consequences which uphold the standards of the profession and ensure the public retain confidence in the integrity of all agents.

[19] The Committee contends that Mr Hoogwerf's conduct, being dishonesty, is at the higher end of misconduct. The extent and deliberateness of his conduct should be reflected in the penalty imposed. Its repeated nature is concerning. He supplied four versions of the report, as he continually attempted to deceive the listing agent. When queried, he did not admit his conduct but instead attributed the errors to the valuation

⁶ *Oliver v Miers and Hoogwerf* [2023] NZTT 4371662, 4366660.

company. While the Tribunal found Mr Hoogwerf would not have received a financial benefit had the transaction proceeded, he produced the report in order to proceed with the purchase. He therefore dishonestly produced the false valuation for his personal benefit.

[20] The Committee seeks the following penalties:

1. Censure.
2. An order under s 110(2)(e) of the Act that any current employment of Mr Hoogwerf by a licensee be terminated and that no agent engage him.
3. Payment of \$14,496.44, being 50 per cent of the Committee's external costs (incl GST).

[21] The Committee submits censure would be appropriate to mark the seriousness of Mr Hoogwerf's conduct.

[22] Mr Hoogwerf is not currently licensed. Had he been, the Committee would have sought an order for cancellation. In the alternative, it seeks an order that no agent engage him, for a period of five years. It is warranted in light of the gravity of the offending and the risk he poses to the public and the integrity of the profession. It is submitted it would be appropriate for the Tribunal to record that the term of five years is not an indication he would be a fit and proper person to be licensed at the expiry of that term. In cases where such an order is sought, the Committee does not seek a fine.

[23] The Tribunal has the power to award costs. The starting point is 50 per cent of the Committee's reasonable costs. Its external costs were \$28,992.88, so \$14,496.44 are sought. It is relevant to note that Mr Hoogwerf failed to engage with the Committee's investigation or the Tribunal until the very last moment. Despite admitting to the Authority (on 18 May 2022) the preparation of false valuations, he did not respond to the charges against him which required the Committee to proceed to a formal proof hearing. Furthermore, in making the admission, he sought to blame COVID-19 and the listing agent. A schedule of the Committee's costs is attached to the submissions.

Submissions of the defendant

[24] There are no submissions from Mr Hoogwerf.

DISCUSSION

[25] Mr Hoogwerf has been found guilty of misconduct (disgraceful conduct) for the forgery of a valuation report, required for him to proceed with the purchase of a property he had bought at auction. He perpetuated the dishonesty by producing another three versions of the report as he corrected errors. He sought to blame the valuation company for the errors. When confronted by the listing agent, he acknowledged doing something wrong, but in his explanation to the Authority (18 May 2022) falsely blamed the COVID-19 lockdowns for the difficulty in obtaining a valuation and the listing agent who he claimed was pressuring him.

[26] Mr Hoogwerf forged the report to benefit himself, in the sense that he needed a report to proceed with the purchase, but there was no financial benefit to him (beyond owning the property) as there is no evidence he bought at an undervalue. In fact, the vendors ultimately sold the property for slightly less than Mr Hoogwerf had paid.

[27] We agree with Ms Farnell's submission that dishonesty is at the higher end of misconduct. The Tribunal has said before that honesty is essential to achieving the purpose of the Act, in particular to maintaining public confidence in the industry.⁷

[28] We decline to rely on the finding of the Tenancy Tribunal concerning a different matter. There is no evidence before us that Mr Hoogwerf's dishonesty in relation to the valuation report was not an isolated incident (albeit perpetuated a total of four times). While this is Mr Hoogwerf's first appearance before the Tribunal, as Ms Farnell states this is not a factor to be given much weight as his career as a licensee has been so short.

[29] An aggravating factor is Mr Hoogwerf's limited engagement with the Authority and the Tribunal. His communication with the Tribunal was merely to seek an adjournment at the last minute. It was refused, so he chose not to attend the hearing (at no time did he say he could not attend the hearing). He expressed remorse in his email to the Authority (on 18 May 2022), but the false reasons given to the Authority for his wrongdoing and his lack of engagement with the Tribunal show the expression of remorse is not sincere.

[30] There is no apology from Mr Hoogwerf and no explanation has been given by him to the Tribunal. He has not drawn to our attention any mitigating factors.

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

⁷ *Complaints Assessment Committee 409 v Ganesh* [2018] NZREADT 19 at [115].

Censure or reprimand

[32] Only a censure would reflect the gravity of Mr Hoogwerf's wrongdoing and our condemnation of it.

Not to be employed or engaged

[33] Ms Farnell urges the Tribunal to make an order that Mr Hoogwerf not be employed or engaged by another licensee, for a period of five years. Had he retained his licence, she says the Committee would have sought its cancellation. Counsel points out the High Court has recognised that dishonesty by a real estate agent is regarded as serious misconduct and that cancellation of their licence must be the starting point.⁸ We note that the High Court added that it was not the invariable outcome of dishonesty.

[34] The Tribunal in *Rankin* made an order prohibiting the licensee's engagement for five years, where he had forged the initials and/or signatures of vendors on six agency agreements, even though there was no loss to the vendors and conceivably no financial gain for Mr Rankin.⁹ There had also been a lack of substantive engagement with the Tribunal by Mr Rankin, so the Tribunal could not be confident that he did not remain a risk to the public.

[35] Mr Hoogwerf has not sought to oppose such an order. We have no confidence he has learned anything from this complaint and agree the order is necessary to protect the public from him. It is appropriate to prohibit his employment for five years rather than indefinitely, given this was an isolated incident and there was no financial benefit for Mr Hoogwerf. Such an order would align with the period which would have applied had we cancelled his licence.¹⁰

[36] It is also appropriate to signal our view that the effluxion of five years may not of itself be sufficient to establish that Mr Hoogwerf is a fit and proper person to hold a licence. That will be a matter for the Registrar to assess should he apply to be relicensed.

Fine

[37] In the event that a prohibition order is made, the Committee does not seek a fine. This reflects the Tribunal's usual practice, as the prohibition is a severe financial burden

⁸ *Prasad v Real Estate Agents Authority* [2020] NZHC 335 at [50]–[51].

⁹ *Complaints Assessment Committee 2108 v Rankin* [2022] NZREADT 15.

¹⁰ Real Estate Agents Act 2008, s 37(1).

on its own. We agree that censure, the employment prohibition and costs are an adequate penalty in this case.

Costs

[38] 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.

[39] 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.

[40] There is no reason in this case not to follow the practice of awarding the Committee 50 per cent of its costs. Such an award is not opposed by Mr Hoogwerf. The Committee's costs of \$28,992.88 are reasonable. The Committee will be awarded \$14,496.44.

¹¹ Section 110A(1).

¹² Section 110A(2).

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*, above n 9, at [128].

ORDERS

[41] Mr Hoogwerf is:

1. Censured.
2. Ordered to pay the sum of \$14,496.44 to the Authority within one month of this decision.

[42] The Tribunal further orders that any current employment or engagement of Mr Hoogwerf by a licensee be terminated and that no agent employ or engage him in connection with real estate agency work.

[43] 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

[44] 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.¹⁴

D J Plunkett
Chair

P N O'Connor
Member

F J Mathieson
Member

¹⁴ Real Estate Agents Act, s 108.