

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2023] NZREADT 9

Reference No: READT 026/2022

**IN THE MATTER OF**

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

**BROUGHT BY**

**COMPLAINTS ASSESSMENT  
COMMITTEE 2108**

**AGAINST**

**MATTHEW MICHAEL O'BRIEN**  
First Defendant

**AND**

**AMY JOAN WILDMAN**  
Second Defendant

Tribunal:

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

Appearances:

Counsel for the Committee:  
The Defendants:

E Mok  
Self-represented

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**DECISION (ON CHARGES AND PENALTY)**  
**Dated 28 April 2023**

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## **INTRODUCTION**

[1] The defendant licensees, Matthew Michael O'Brien and Amy Joan Wildman, have pleaded guilty to charges of misconduct under ss 73(b) and/or (c) of the Real Estate Agents Act 2008 (the Act). The Tribunal will now determine the penalty.

## **BACKGROUND**

[2] At the material time, Mr O'Brien was a licensed salesperson under the Act. He was an employee of Bayleys Real Estate Ltd, trading as Bayleys Real Estate, at its Ponsonby branch (Bayleys). Ms Wildman was a licensed agent. She was a director of Jervois & Co Real Estate Ltd, another real estate agency (Jervois).

[3] Mr O'Brien and Ms Wildman were in a relationship.

[4] In about September 2020, Ms Wildman told Mr O'Brien she was working with buyers who were looking for a property in Ponsonby. He suggested a particular property (the property). He introduced the vendors to Ms Wildman and they agreed to list the property with Jervois.

[5] Mr O'Brien then showed a couple around the property on two occasions.<sup>1</sup> He answered their questions about property defects, obtained a LIM report for them and presented their offer to the vendors.

[6] The couple made an offer by signing a sale and purchase agreement on 20 September 2020. Ms Wildman was recorded as the agent and salesperson. This offer was presented to the vendors prior to them signing Jervois' agency agreement.

[7] Later on the same day, 20 September 2020, the vendors signed an agency agreement with Jervois. We assume the vendors accepted the offer by signing the sale and purchase agreement at the same time.

[8] Jervois received the commission. On an unknown date, Ms Wildman transferred the full commission to Mr O'Brien.

## **COMPLAINT**

[9] On 11 February 2021, the Real Estate Agents Authority (the Authority) received a complaint from Bayleys. It was referred to Complaints Assessment Committee 2108 (the Committee). The Committee decided on 18 November 2022 to lay charges:

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<sup>1</sup> It is not known whether the couple were the buyers already known to Ms Wildman.

Mr O'Brien

1. Misconduct under ss 73(b) and/or (c) of the Act, in that he engaged in seriously negligent or incompetent real estate agency work and/or wilfully or recklessly contravened any or all of rr 5.1, 5.2, 6.2, 6.3, 6.4 and/or 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules).
2. In the alternative, he engaged in unsatisfactory conduct.

*Particulars*

1. By offering and/or marketing the property for sale without an agency agreement, in breach of r 9.6.
2. By failing to ensure a conjunctional sale agreement was in place, in breach of r 5.1 and/or r 5.2.
3. By failing to explain to one or both of the parties that he was assisting Ms Wildman at a different agency, in breach of r 6.2 and/or r 6.4.
4. By engaging in conduct likely to bring the industry into disrepute, in breach of r 6.3, namely:
  - (i) Depriving Bayleys, the agency employing him, of commission.
  - (ii) Failing to inform Bayleys about the transaction and therefore carrying out real estate work without supervision.
  - (iii) Initially misleading Bayleys by stating he received only 20 per cent of the commission, when he was paid the full commission.
  - (iv) Failing to inform Bayleys of issues which the purchasers raised post-settlement, which had the potential to result in a complaint.

Ms Wildman

1. Misconduct under ss 73(b) and/or (c), in that she engaged in seriously negligent or incompetent real estate agency work and/or wilfully or recklessly contravened any or all of rr 5.1, 5.2 and/or 6.3 of the Rules.
2. In the alternative, she engaged in unsatisfactory conduct.

*Particulars*

1. By allowing Mr O'Brien to facilitate the transaction without implementing a conjunctural agreement between Jervois and Bayleys, in breach of r 5.1 and/or r 5.2.
2. By engaging in conduct likely to bring the industry into disrepute, in breach of r 6.3, namely facilitating payment of the full commission to Mr O'Brien personally rather than to Bayleys, depriving both Jervois and Bayleys of a share of the commission.

**CHARGES FILED IN THE TRIBUNAL**

[10] On about 18 November 2022, the charges were filed in the Tribunal.

[11] Mr O'Brien and Ms Wildman both filed Response to Charge forms (dated 21 and 26 November 2022 respectively) admitting the charge of misconduct and all the particulars.

[12] Following a telephone conference, the Tribunal issued Minute 1 with procedural directions on 20 December 2022. No party sought an oral hearing. A hearing on the papers for the penalty orders was accordingly directed.

*Submissions from the Committee*

[13] The Tribunal received submissions from the Committee (31 January 2023). Ms Mok submits that the key purpose of the penalty orders in this case will be to ensure that other practitioners are deterred from similar conduct, as well as providing for individual deterrence of the licensees. The licensees engaged in conduct that, at the very least, recklessly breached their professional obligations.

[14] Ms Mok relies on three earlier decisions of the Tribunal: *Chaudhary, Brady and Wong*.<sup>2</sup>

[15] It is submitted that Mr O'Brien's conduct was moderately serious, having regard to:

1. The breach of six rules. It was not an isolated error, but a sustained failure to meet his professional obligations.

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<sup>2</sup> *Chaudhary v Real Estate Agents Authority* [2019] NZREADT 24, *Complaints Assessment Committee 1905 v Brady* [2021] NZREADT 35, *Complaints Assessment Committee 409 v Wong* [2018] NZREADT 16.

2. The Court of Appeal has highlighted the importance of an agency agreement.<sup>3</sup>
3. He breached his obligation to the parties (marketing the property without an agency agreement) and acted unprofessionally towards his employer.
4. By failing to inform his employer of the transaction, Bayleys was not in a position to supervise him.
5. While it is not suggested Mr O'Brien set out with a deliberate and dishonest intention to deprive Bayleys of the commission, he was reckless as to his professional obligations.

[16] It is submitted Ms Wildman's conduct was low-moderate in terms of seriousness, having regard to:

1. The breach of three rules, being a more limited involvement in the transaction.
2. As the agent responsible for the transaction and a director of Jervois, she ought to have been cognisant of the implications of not entering into a conjunctural sale arrangement and of paying the commission to Mr O'Brien personally. Given her experience in the industry, she should have taken greater care.
3. Ms Wildman intentionally paid Mr O'Brien the full commission. While not dishonestly depriving Bayleys of the commission, the consequence of her conduct was that Bayleys and her own agency were deprived of the commission.

[17] Ms Mok acknowledges the following personal mitigating factors:

1. Both Mr O'Brien and Ms Wildman pleaded guilty and accepted responsibility at an early stage.
2. Both have co-operated in the course of the disciplinary process.
3. Neither has a disciplinary history.
4. Mr O'Brien expressed regret and remorse for his actions, attributing it to a lapse in judgement. He has unreservedly apologised to the parties and

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<sup>3</sup> *Soft Technology JR Ltd v Jones Lang Lasalle Ltd* [2022] NZCA 353.

Bayleys. He has indicated a wish to pay the commission to Bayleys, but it is not known whether this has occurred.

5. Ms Wildman has shown insight into her conduct and remorse. She acknowledges in her response to the charges that the personal and professional lines were blurred. She is highly apologetic to the industry and Bayleys. She did not benefit financially from the transaction. She says it will never happen again.

[18] Ms Mok contends that the appropriate penalty orders would be:

1. Both Mr O'Brien and Ms Wildman are censured.
2. Mr O'Brien to pay a fine in the vicinity of \$8,000 to \$10,000.
3. Ms Wildman to pay a fine in the vicinity of \$3,000 to \$4,000.

*Submissions from the defendants*

[19] There are brief submissions from the licensees commenting on their misconduct.

[20] Mr O'Brien told the Tribunal at the procedural teleconference that there was no pre-planning involved. He repeated this in an email to the Tribunal on 17 February 2023. He said he never intentionally set out to break the Rules, having never done so in his nine years in real estate. He regrets his actions hugely.

[21] Given the relationship at the time between the two of them, Mr O'Brien says the lines were blurred. The Authority has stated what he did wrong and he wholeheartedly acknowledges his wrongdoing. He understands the need for consequences and is prepared to take the penalty the Tribunal sees fit for his actions.

[22] The Tribunal sought further information from Mr O'Brien concerning whether he had paid part or all of the commission to Bayleys. He informed the Tribunal on 28 March 2023 that the full commission was \$42,500, of which Bayleys should have received \$3,825. He then informed the Tribunal on 14 April 2023 that he had attempted to pay Bayleys \$3,825, but it had declined to accept payment. He was therefore willing to pay \$5,000 to Starship Children's Hospital, by way of \$1,000 monthly instalments. The previous three years had been very emotional and financially challenging for him. Mr O'Brien produced to the Tribunal a receipt from Starship (14 April 2023) showing a donation of \$1,000.

[23] In her Response to Charge (26 November 2022), Ms Wildman says she is highly apologetic to the industry and to Bayleys for causing undue stress. She has been living in a state of high anxiety for the last 18 months which she knows is of her own doing. She did not benefit financially from the transaction. It was a result of personal and professional lines being blurred. It will never happen again. Ms Wildman says she is a solo mother with two children and real estate is her livelihood. She made a really bad judgement call, is highly embarrassed and hopes her apology can be accepted.

[24] Ms Wildman sent an email to the Tribunal on 17 February 2023. She concurs with Mr O'Brien's submission. Both of them are deeply regretful and apologetic to all parties concerned. She will accept the penalty as the Tribunal sees fit.

## **PENALTY**

### *Jurisdiction and principles*

[25] 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).
- (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.

...

[26] 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.

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

[28] 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.

[29] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>4</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.

[30] 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>4</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

good, but also to protect the collective reputation and public confidence in the profession itself.<sup>5</sup>

[31] 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>6</sup>

[32] The most appropriate penalty is that which:<sup>7</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.

## DISCUSSION

[33] The defendants have admitted breaching the following professional rules:

### **5 Standards of professional competence**

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
- 5.2 A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules), and other legislation relevant to real estate agency work.

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<sup>5</sup> *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 v Dental Complaints Assessment Committee*, above n 4, at [151].

<sup>6</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

<sup>7</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].

## **6 Standards of professional conduct**

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- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
- 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.
- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

## **9 Client and customer care**

### *General*

...

- 9.6 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.

...

[34] We agree with Ms Mok's characterisation of the conduct of both Mr O'Brien and Ms Wildman as reckless, rather than wilful. The evidence does not establish that they intentionally planned to circumvent the Rules and deprive Bayleys of their share of the commission (we ignore whether Jervois should have received any commission, as Ms Wildman may be entitled to waive its right to commission). Nor does it show that they intentionally misled the parties as to their respective roles in the transaction. There is no finding of dishonesty.

[35] We also accept counsel's classification of the gravity of the wrongdoing, being moderate for Mr O'Brien and the lower end of moderate for Ms Wildman. Mr O'Brien's misconduct is more serious as he was the person dealing directly with the parties on the transaction and whose conduct would have misled them as to his true role (merely assisting Ms Wildman who had the agency agreement). He was also the person who was primarily responsible for failing to ensure an agency agreement was in place before he undertook marketing. He is the person responsible for failing to notify Bayleys. They both bear responsibility for the lack of a conjunctural agreement and depriving Bayleys of the commission to which it was entitled.

[36] Neither Mr O'Brien nor Ms Wildman have any previous disciplinary history. Both have shown insight into their wrongdoing and expressed sincere remorse. They did so at an early stage. They have both apologised. The personal and professional lines were

blurred because of their relationship. A repeat of the misconduct by either of them is considered unlikely by the Tribunal.

[37] The sincerity of Mr O'Brien's remorse is shown by his donation to charity of the commission to which Bayleys would have been entitled (and slightly more). He has made the first donation of \$1,000 and will ultimately donate \$5,000. Ms Wildman, we appreciate, received no financial benefit from the transaction.

### *Training*

[38] Ms Mok submits that it may be appropriate to order Mr O'Brien and Ms Wildman to undertake further training or professional development. Given the one-off nature of the wrongdoing here (in the sense of one transaction only) and the fulsome acknowledgement of it, we do not see the need to impose any training direction. We believe a repetition of the misconduct to be very unlikely.

### *Fine*

[39] The maximum fine available against an individual is \$15,000.

[40] Ms Mok contends that Mr O'Brien should be fined in the vicinity of \$8,000 to \$10,000 and Ms Wildman in the vicinity of \$3,000 to \$4,000.

[41] With respect, we derive little assistance from the three cases relied on by Ms Mok.

[42] *Chaudhary* concerns unsatisfactory conduct (not the more serious misconduct as here) and the agent refusing to honour an agreement with the vendors to discount the commission (failing to honour an agreement with a client is a different wrong from depriving another agency of commission). *Brady* concerned a conflict of interest (failure to follow the statutory requirements where the agent was effectively the purchaser), a different professional wrong. *Wong* was also a case of unsatisfactory conduct. It concerned an agent who abdicated oversight of another agent. The wrong we are dealing with included the defendants' failure to ensure Mr O'Brien was supervised by another agency, Bayleys. It did not concern any personal failure to supervise anyone. Furthermore, the charges upheld against Mr O'Brien and Ms Wildman are much wider.

[43] Instead, we agree with Ms Mok's submission that the case presents some unusual features which are not shared by previous decisions of the Tribunal.

[44] Noting the moderately serious nature of Mr O'Brien's misconduct, his breach of six rules, the isolated nature of the transaction (albeit sustained failings on that one transaction), the early guilty plea and remorse, the donation to charity (of part of the commission), together with his clean disciplinary record, the fine will be \$6,500.

[45] In respect of Ms Wildman's misconduct involving the breach of three rules, the one-off nature of the transaction, the lack of any financial benefit, the early guilty plea and remorse, together with her clean disciplinary record, the fine will be \$3,000.

### Costs

[46] 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>8</sup>

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.

[47] The Committee seeks a contribution towards the costs of the prosecution, as members should not be expected to bear all the costs in holding licensees to account. It is contended that a modest reduction from the general starting point of 50 per cent might be appropriate to reflect the licensees' early guilty pleas and cooperation. They should make an equal contribution. A schedule produced by Ms Mok shows the prosecution costs to be \$3,105 (excl. GST and disbursements).

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<sup>8</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]. Relied on by the Tribunal in numerous cases. See, for example, *Complaints Assessment Committee 2108 v Rankin* [2022] NZREADT 15 at [128].

[48] It seems to us that Ms Mok is being generous in inviting a discount from 50 per cent. The early guilty plea will be reflected in the modest costs to date. We will direct the defendants to cumulatively pay \$1,552.50 (being 50 per cent of \$3,105). We agree it should be split equally with Mr O'Brien and Ms Wildman each paying \$776.25.

## **OUTCOME**

[49] The Tribunal formally finds Mr O'Brien guilty of misconduct in that he engaged in seriously negligent real estate agency work and recklessly contravened rr 5.1, 5.2, 6.2, 6.3, 6.4 and 9.6 of the Rules.

[50] Mr O'Brien is:

1. Censured.
2. Ordered to pay a fine of \$6,500 to the Authority within one month of this decision.
3. Ordered to pay costs of \$776.25 to the Authority within one month of this decision.

[51] The Tribunal formally finds Ms Wildman guilty of misconduct in that she engaged in seriously negligent real estate agency work and recklessly contravened rr 5.1, 5.2 and 6.3 of the Rules.

[52] Ms Wildman is:

1. Censured.
2. Ordered to pay a fine of \$3,000 to the Authority within one month of this decision.
3. Ordered to pay costs of \$776.25 to the Authority within one month 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.

**PUBLICATION**

[54] Having regard to the interests of the public, it is appropriate to order publication of this decision.<sup>9</sup>

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D J Plunkett  
Chair

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G J Denley  
Member

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F J Mathieson  
Member

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<sup>9</sup> Real Estate Agents Act 2008, s 108.