

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2020] NZREADT 18**

**READT 056/18**

IN THE MATTER OF charges laid under s 91 of the Real Estate Agents Act  
2008

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 412

AGAINST DAVID HILLIAM  
Defendant

On the papers

Tribunal: Hon P J Andrews, Chairperson  
Mr G Denley, Member  
Ms C Sandelin, Member

Submissions received from: Mr M Mortimer, on behalf of the Committee  
Mr T Rea, on behalf of Mr Hilliam

Date of Decision: 20 April 2020  
Recalled and reissued: 16 June 2020

---

**DECISION OF THE TRIBUNAL**  
**(Charge and penalty)**

---

## **Introduction**

[1] Complaints Assessment Committee 412 (“the Committee”) has charged Mr Hilliam with:

- [a] Charge 1: a charge of misconduct under s 73(c) of the Real Estate Agents Act 2008 (“the Act”) (wilful or reckless contravention of the Act and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”)), or in the alternative, misconduct under s 73(b) of the Act (seriously incompetent or seriously negligent real estate agency work); and
- [b] Charge 2: a charge of misconduct under s 73(b) of the Act, or in the alternative, unsatisfactory conduct under s 72 of the Act.

[2] Mr Hilliam has pleaded guilty to each of the alternative charges. That is, he has admitted that the conduct alleged in Charge 1 constituted seriously incompetent or seriously negligent real estate agency work, and that the conduct alleged in Charge 2 constituted unsatisfactory conduct.

[3] The Tribunal is required to satisfy itself that Mr Hilliam’s conduct was seriously incompetent or seriously negligent real estate agency work, and unsatisfactory conduct, as alleged, and to determine the appropriate penalty.

[4] The parties have agreed to the Tribunal determining this matter on the papers.

## **Facts**

[5] The parties filed a detailed Agreed Summary of Facts. As directly relevant to the charges, we summarise this below.

[6] Mr Hilliam is a licensed salesperson with 34 years’ experience in the industry. Up until approximately mid-April 2017, he was employed by Zest for Realty Limited (trading as RE/MAX Zest). After that he was employed by SureCapital Real Estate

Limited. Mr Hilliam follows certain Asian religious beliefs and practices and incorporates aspects of these, in particular numerology,<sup>1</sup> into his real estate work.

[7] The complainant in this matter was Ms Herbst, who had separated from her partner, Mr Holmes.<sup>2</sup> They owned a property at Waiuku, near Auckland, and agreed that Mr Hilliam would sell it for them. Mr Hilliam discussed with them how he would incorporate numerological practices into the sale, including contacting his jyotishee<sup>3</sup> for information as to auspicious days and times to carry out certain steps in the marketing and sale process.

[8] Having consulted his jyotishee, Mr Hilliam emailed the complainants an agency listing agreement (“the listing agreement”) on 22 August 2016, on the front of which he had noted that the “time to sign” was “25<sup>th</sup> Aug 11am–1.35”, and “Sell 22 Nov 9.50 to 2.30”. In the body of the email, Mr Hilliam wrote [sic]:

Copy of listing to be signed 25<sup>th</sup> August between 11am and 3-30 and if you can both email back individual or together over the next few days would be great.

The selling date is 22 November (Tuesday) 9-50 am to 1-35 pm so it gives us some time to decide weather to auction or tender and plenty of time to catch up and discuss the procedure.

It’s very important to sign during this period. It starts the energy flow for great things at sale time.

Thank you for being open minded to neumorology. **YOU WILL BE REWARDED.**

Let’s have a meeting over the next couple of weeks and firm up the direction.

[9] Mr Hilliam did not recommend that the complainants take legal advice before signing the listing agreement, and he did not provide a comparative market appraisal, or set out in writing the estimated cost of commission payable by the complainants, based on an appraisal. The listing agreement recorded that the property was “very hard

---

<sup>1</sup> The Agreed Summary of Facts defines numerology as “belief in divine or mystical relationship between a number or one or more coinciding events”.

<sup>2</sup> The Agreed Summary of Facts notes that although Ms Herbst was the person who filed the complaint, for convenience Ms Herbst and Mr Holmes are referred to as the complainants.

<sup>3</sup> The Agreed Summary of Facts defines “Jyotisha” as a “traditional form of Hindu astrology for tracking and predicting movements of astronomical bodies to keep time, maintain calendar and predict auspicious times for Vedic rituals”, and “Jyotishee” as a “follower, practitioner of Jyotisha”

to price as may have subdivision potential. We must check with Council as to subdivisibility. Really one large home but almost 2 houses with studio”.

[10] Ms Herbst signed the listing agreement on 25 August 2016. Mr Holmes did not sign it, although both Mr Hilliam and Ms Herbst made attempts to have him do so. Mr Hilliam did not feel he could begin a marketing campaign without a listing agreement signed by both clients.

[11] On 11 October 2016, Mr Hilliam suggested to the complainants that he show the property to developers on his database, as a way to potentially get an offer. The complainants agreed.

[12] Mr Hilliam then introduced a property developer, Mr Dumasia. He did not disclose to the complainants that he had a pre-existing relationship with Mr Dumasia, in that they both attended the same jiyotishee, he had previously acted as a real estate agent for Mr Dumasia’s property developments, he had previously provided large sums of money to Mr Dumasia for his property developments (leading to his being engaged to act as selling agent for developments),<sup>4</sup> and he was at the time of the listing agreement financially involved in two other development projects led by Mr Dumasia.

[13] Mr Dumasia was interested in purchasing the property in order to subdivide and develop it. The complainants were aware of this intention. Mr Dumasia required resource consent from Council before he could subdivide the property.

[14] Mr Hilliam drafted an agreement for sale and purchase of the property, between the complainants and Mr Dumasia’s company, Franklin Wiz Ltd (“the sale agreement”). The sale agreement provided for Mr Dumasia to pay a deposit of \$30,000, and was conditional “for 50 days upon the purchaser satisfying himself he can subdivide the land to his plan and specs” (“the subdivision condition”). The settlement date was to be “30 working days from resource consent”. The sale agreement did not provide for what would happen if Mr Dumasia never applied for resource consent, or if an application for resource consent were delayed or not granted.

---

<sup>4</sup> The Agreed Summary of Facts gave an example of an agreement dated 3 August 2015, in which Mr Hilliam agreed to loan Mr Dumasia up to \$1.1 m for a development at Whangaparaoa.

The subdivision condition was included on Mr Dumasia's instructions, to ensure that he did not pay for land that he could not later subdivide, and then only when the development could go ahead. Mr Hilliam later described the sale agreement as being "structured to suit [Mr Dumasia]".

[15] Mr Dumasia initially offered \$750,000 for the property. Following a counter-offer from the complainants, a sale price of \$850,00 was agreed. Mr Dumasia and the complainants signed the sale agreement on 21 November 2016.

[16] Mr Hilliam did not submit the listing agreement to the agency he worked for until he submitted both it and the sale agreement on or about 22 November 2016. The effect was that the property was never exposed to other salespersons, or the market. This was on the instructions of Mr Holmes, who informed Mr Hilliam that he would not allow any exposure of the property.

[17] Mr Dumasia required funding in order to apply for a resource consent. Mr Hilliam loaned him \$40,000. The loan was formalised in a written agreement between Mr Hilliam and Mr Dumasia, dated 21 January 2017, in which Mr Hilliam was given the right to purchase one of the to-be-subdivided lots on the property. Mr Hilliam did not tell the complainants about the loan to Mr Dumasia, and did not obtain their consent to his obtaining an interest in the property.

[18] The sale agreement became unconditional on 16 February 2017. Mr Dumasia paid the deposit on 17 February 2017 (using the money lent by Mr Hilliam). The deposit was retained by Mr Hilliam and his agency as commission.

[19] Mr Dumasia did not promptly apply for resource consent, but Mr Hilliam began introducing prospective purchasers of lots in January 2017. He did not have a listing agreement with Mr Dumasia at that time.

[20] Around March 2017, the complainants began to ask Mr Hilliam and Mr Dumasia why they had to wait for resource consent before the sale agreement could be settled, despite it being unconditional.

[21] Mr Dumasia did not lodge an application for resource consent until 5 May 2017.

[22] On 7 June 2017, Mr Hilliam and Mr Dumasia signed an agency listing agreement for Mr Hilliam to market the subdivided lots. This formalised the work that Mr Hilliam had been doing since January 2017. Mr Hilliam marketed the subdivided lots through his new agency as from June 2017.

[23] The complainants lodged a complaint with the Authority on 6 December 2017, at which time the sale agreement had still not settled. Auckland Council granted resource consent in April 2018. The sale agreement was not settled until 1 June 2018, 15 months after it became unconditional.

[24] Having entered into the sale agreement, the complainants were locked into the agreement with no means of cancelling it, dependent on, first, Mr Dumasia applying for resource consent and, secondly, resource consent being granted.

### **Charge 1: misconduct under s 73(b)**

#### *Submissions*

[25] Mr Mortimer submitted for the Committee that Mr Hilliam had breached provisions of the Act and Rules, as follows:

- [a] Rule 9.6, by offering the property to Mr Dumasia and undertaking real estate agency work without a listing agreement signed by Mr Holmes;
- [b] Rules 10.2 and 10.6(a), by failing to provide the complainants with a comparative market appraisal, a price estimate in advance, or an estimated cost of commission;
- [c] Rule 9.7, by failing to recommend that the complainants receive legal advice before signing the listing agreement;
- [d] Rules 6.1 and 6.4, by failing to disclose to the complainants that he had a long-standing business relationship with Mr Dumasia (including acting for

him as a real estate agent), that he had previously provided significant amounts of money to Mr Dumasia for property developments, that he had loaned money to Mr Dumasia so that he could proceed with the purchase of the complainant's property, that he had entered into an agreement to buy one of the to-be-subdivided lots before the sale agreement had settled, and that while acting for the complainants, and he had entered into an agency listing agreement with Mr Dumasia to on-sell the to-be-subdivided lots;

[e] Rules 5.1, 6.1, and 9.1, by structuring the sale agreement, to suit Mr Dumasia; and

[f] Section 134 of the Act, by entering into an agreement with Mr Dumasia to buy one of the to-be-subdivided lots (thereby acquiring an interest in the property) while acting for the complainants, but failing to obtain the complainants' consent.

[26] Through his counsel Mr Rea, Mr Hilliam accepted that there were fundamental failings in the real estate services he provided to the complainants, amounting to serious negligence.

### *Discussion*

[27] We are satisfied that Mr Hilliam must be found guilty of misconduct under s 73(b) of the Act, on the basis of his admitted breaches of the Act and Rules.

[28] The most serious breaches are those relating to Mr Hilliam's failure to disclose his long-standing business relationship with Mr Dumasia (in particular that he had previously provided significant amounts of money to Mr Dumasia for property developments, had loaned money to Mr Dumasia so that he could proceed with the purchase of the complainant's property, had entered into an agreement to buy one of the to-be-subdivided lots before the sale agreement had settled, and that while acting for the complainants, he had entered into an agency listing agreement with Mr Dumasia to on-sell the to-be-subdivided lots), and his failure to obtain the

complainants' consent to his entering into an agreement to buy one of the to-be-subdivided lots (thereby acquiring an interest in the property).

### **Charge 2: unsatisfactory conduct under s 73(c)**

[29] This charge related to Mr Hilliam's representations to the complainants as to the consequences of following numerological practices in marketing the property, in particular, representing that it was "very important to sign" the listing agreement during a stated period, as it "starts the energy flow for great things at sale time", and that "YOU WILL BE REWARDED".

#### *Submissions*

[30] Mr Mortimer submitted that Mr Hilliam was (and is) free to incorporate his personal beliefs into his real estate practice, but a professional conduct issue arose when he made unsubstantiated representations about the effect of marketing the property in accordance with numerological practice, and represented that conforming with that practice would in fact result in positive results.

[31] Mr Rea submitted that Mr Hilliam accepts that his conduct was unsatisfactory, and understands that while he is entitled to his belief in the use of numerology, he must be cautious about any representations he may make regarding its effectiveness.

#### *Discussion*

[32] We are satisfied that Mr Hilliam breached r 5.1 of the Rules (by failing to exercise skill, care, competence, and diligence) and r 6.4 (by misleading the complainants) and must be found to have engaged in unsatisfactory conduct.

### **Finding**

[33] We find Mr Hilliam guilty of misconduct on Charge 1, and guilty of unsatisfactory conduct on Charge 2.

## Penalty submissions

[34] Mr Mortimer referred us to the Tribunal's penalty decisions in *Real Estate Agents Authority (CAC 10070) v Adams*,<sup>5</sup> *Complaints Assessment Committee 408 v Reed*,<sup>6</sup> and *Complaints Assessment Committee 414 v Goyal*.<sup>7</sup> He submitted that Mr Hilliam's conduct was more serious than that considered in *Reed*. He submitted that in the present case, the complainants did not know the extent of Mr Hilliam's relationship with Mr Dumasia, or that he had acquired an interest in the property, in contrast to the circumstances in *Reed*, where the vendors knew from the outset that the licensee was buying their property.

[35] Mr Mortimer also submitted that the present case is at least as serious as that considered in *Goyal*. He submitted that while in that case there were two properties involved, the present case also involved Mr Hilliam's structuring the sale agreement to suit Mr Dumasia, but leaving his clients, the complainants, in limbo as to completing settlement.

[36] Mr Mortimer further submitted that Mr Hilliam's conduct was similar to that considered in *Adams*, as both concerned an experienced licensee obtaining a financial interest in a client's property before settlement. However, he submitted that *Adams* did not involve that same extent of breaches of fundamental obligations throughout the transaction. He further submitted that in the present case, the complainants suffered the effects of the much-extended settlement period, with no way to extract themselves from it.

[37] Mr Mortimer submitted that the appropriate penalty is for Mr Hilliam to be censured, that his licence be suspended for a period of six to nine months, and for him to be ordered to pay a fine of \$6,000. He submitted that a fine of that level is necessary to reflect Mr Hilliam's extensive breaches of his professional obligations.

[38] Mr Rea submitted that the present case is quite different from *Goyal*. He submitted that Mr Goyal's breaches involved two properties and duties owed to the

---

<sup>5</sup> *Real Estate Agents Authority (CAC 10070) v Adams* [2012] NZREADT 5.

<sup>6</sup> *Complaints Assessment Committee 408 v Reed* [2017] NZREADT 34.

<sup>7</sup> *Complaints Assessment Committee 414 v Goyal* [2018] NZREADT 3.

vendors of those properties, and that as his company had taken an assignment of two agreements for sale and purchase from the purchaser (with whom he had a previous association), completed the developments by subdividing the properties himself, building houses on them then selling them for his own personal benefit, he had a much greater level of personal involvement in, and benefit from, the transactions than in the present case. He submitted that Mr Hilliam's involvement and benefit was much less than that of Mr Goyal.

[39] Mr Rea further submitted that Mr Goyal had defended the charges against him, requiring a three-day hearing before the Tribunal. In contrast, Mr Hilliam admitted his misconduct and unsatisfactory conduct. He submitted that he had made efforts to ameliorate that situation for the complainants, in conjunction with Mr Dumasia. He submitted that Mr Hilliam had informed the vendors in April 2017 that Mr Dumasia had offered to release them from the sale agreement, and that Mr Hilliam had offered to pay compensation of \$10,000 to Ms Herbst for rental and legal fees incurred as a result of the delays in settling the sale agreement.

[40] A statement by Mr Hilliam has been provided to the Tribunal. Mr Hilliam attributes his conduct largely to dyslexia. He provided a diagnostic assessment by a registered psychologist, dated 13 August 2018. Mr Hilliam says that he has had difficulty understanding and retaining information as to legislation relevant to the real estate industry. Since receiving the diagnosis, Mr Hilliam has had weekly therapy sessions with a dyslexia specialist, and for the past 12 months, at his own cost, he has undertaken 18 one-on-one learning sessions with an experienced real estate trainer, covering various topics relevant to the charges.

[41] Mr Hilliam understands that signs of dyslexia are: being slower to process information and needing repeated exposures to retain learning, having difficulty with retrieval of information, and a large gap between oral and written capabilities. He considers that his dyslexia makes him not suited to learning in a classroom environment, and is committed to continuing his one-on-one training, to ensure that learning is done at his own pace, allowing him to better understand relevant content.

[42] Mr Rea acknowledged that the penalty imposed will include an order for censure and a fine, and is likely to include an order for suspension of Mr Hilliam's licence. He submitted that the level of fine and period of suspension should be less than that submitted for by the Committee.

[43] Mr Rea submitted that the circumstances of this case are unique, in that Mr Hilliam's conduct has been caused or contributed to by his dyslexia. He submitted that the focus should be on ensuring that Mr Hilliam continues with the one-on-one training, which he is committed to doing. He noted that Mr Hilliam has the full support of his employers, and has undertaken to provide an apology to the complainants and to pay compensation.

[44] In his submissions in reply, Mr Mortimer acknowledged the fact of Mr Hilliam's dyslexia, and the steps he has taken to address it. He submitted that those steps may provide a degree of assurance as to Mr Hilliam's future practice in real estate. However, he submitted that care is still required, to ensure that his dyslexia is not used as an explanation for conduct that the Committee submits must have been obvious to Mr Hilliam.

[45] Mr Mortimer submitted that nothing in the material provided by Mr Hilliam in his penalty submissions provides an evidential foundation for finding that Mr Hilliam did not understand the concepts of openness with clients, not acting for more than one party in a transaction, and not favouring a developer friend over clients. He submitted that these are fundamentals of real estate agency work, that underpin and inform competent real estate agency work, not technical, or text-heavy concepts. He submitted that while the Tribunal should take into account the effect of Mr Hilliam's dyslexia, it did not significantly mitigate his culpability for his conduct.

### **Penalty principles**

[46] The principal purpose of the 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."<sup>8</sup> The Act achieves these

---

<sup>8</sup> Section 3(1) of the Act.

purposes by regulating agents, branch managers, and salespersons, raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.<sup>9</sup>

[47] These purposes are best met by penalties for misconduct and unsatisfactory conduct being determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, and the maintenance of confidence in the industry, and the need for deterrence.

[48] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.<sup>10</sup>

[49] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As raised in the submissions on behalf of the Committee and Mr Hilliam in this case, the Tribunal may:

- [a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);
- [b] Order cancellation or suspension of the licensee's licence;
- [c] Impose a fine of up to \$15,000 (on a finding of misconduct);
- [d] Order Mr Hilliam to pay compensation for loss suffered by reason of his misconduct, in a sum not exceeding \$100,000

## **Discussion**

[50] As noted earlier, the conduct which we have found to be misconduct in Charge 1 falls into two groups: first, Mr Hilliam's failure to obtain a signed listing agreement,

---

<sup>9</sup> Section 3(2).

<sup>10</sup> See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128] and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

to give an appraisal, to provide commission information, and to recommend legal advice; and secondly, what can broadly be described as breaches of fiduciary duties: Mr Hilliam's failure to disclose his relationship with Mr Dumasia, failure to disclose his earlier loans to Mr Dumasia and his loan to Mr Dumasia during the course of marketing the property, structuring the sale agreement in Mr Dumasia's favour, and his failure to disclose that he had entered into an agreement to buy one of the lots.

[51] The matters in the second group constitute seriously incompetent or seriously negligent real estate agency work. Mr Hilliam clearly had a close business relationship with Mr Dumasia, not only as a real estate agent, but also as a lender and investor in Mr Dumasia's developments. He had a clear conflict of interest. Mr Hilliam's breaches of his obligations constitute a very serious departure from acceptable industry standards.

[52] We acknowledge that Mr Mortimer accepted that Mr Hilliam's conduct in relation to Charge 2 was not deliberately deceptive, as it was motivated by Mr Hilliam's sincere beliefs. We accept Mr Mortimer's submission that Mr Hilliam stepped across the line by making an unqualified statement as to the outcome of following his recommendations. However, we accept that Charge 2 does not require separate consideration in relation to penalty.

[53] The decisions in *Adams*, *Reed*, and *Goyal* were all concerned with breaches of licensees' fiduciary obligations, and their obligations of disclosure under rr 6.1 and 6.4 of the Rules, and s 134 of the Act. However, they are of limited assistance in determining the appropriate penalty in this case. While in each case the Tribunal stressed the seriousness with which such breaches are regarded, the circumstances in each case were different.

[54] In the present case, we accept that Mr Hilliam's understanding and appreciation of his professional obligations may have been limited as a result of his dyslexia. We also take into account that he has taken steps to address this issue by engaging in one-on-one training. We also take into account that Mr Hilliam has been open about his conduct from the time of the complaint, and co-operated with the prosecution of the charges, by agreeing a statement of facts and entering guilty pleas.

[55] However, we accept Mr Mortimer's submission that Mr Hilliam's breaches were of fundamental obligations, such as of openness with clients, and not being in a conflict of interest, that should be self-evident, and not dependent on reading the Act and Rules. His conduct involved an extended departure from the standards expected of real estate licensees.

[56] It is appropriate that Mr Hilliam is censured, and that he be ordered to pay a fine. The seriousness of his conduct must also be reflected in an order for suspension of his licence. In determining the quantum of the fine, and the period of suspension, we have taken into account the seriousness of Mr Hilliam's breaches, the penalty principles set out earlier, the submissions made on behalf of the Committee and Mr Hilliam, the steps Mr Hilliam has already taken and is committed to taking, and his response to the charges.

### **Orders**

[57] We make an order for censure of Mr Hilliam. We order that he pay a fine of \$4,000, which is to be paid to the Registrar of the Authority within 20 working days of the date of this decision. We further order that his licence is suspended for a period of six months.

[58] Further, as agreed by Mr Hilliam, we order as follows:

- [a] Mr Hilliam is to provide a written apology to the complainants, in a form approved by the Authority, within 20 working days of the date of this decision;
- [b] Mr Hilliam is to pay the sum of \$10,000 to the complainants, within 20 working days of the date of this decision. The payment is to be made to Ms Herbst and Mr Holmes in equal shares of \$5,000; and
- [c] Mr Hilliam is to undertake further education on a one-on-one basis, and is to provide evidence to the Authority of having satisfied the requirements of the appropriate Unit Standards, in particular as to agreements for sale

and purchase, misleading and deceptive conduct and misrepresentation, and principles of ethics. Such evidence is to be provided to the Authority within 12 months of the date of this decision.

[59] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

---

Hon P J Andrews  
Chairperson

---

Mr G Denley  
Member

---

Ms C Sandelin  
Member