BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 24

READT 039/19

IN THE MATTER OF	a charge laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 1903
AGAINST	RAYMOND PAUL SCHRODER Defendant
Hearing	8 June 2020, at Tauranga
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Mr N O'Connor Member
Appearances:	Ms A Davies, on behalf of the Committee Mr Schroder, Defendant
Date of Decision:	16 June 2020

DECISION OF THE TRIBUNAL
(Charge and Penalty)

Introduction

[1] On 5 November 2019, Complaints Assessment Committee 1903 charged Mr Schroder with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008, alleging that his conduct constituted a wilful or reckless contravention of r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

[2] In his response to the charge, dated 12 November 2019, Mr Schroder admitted the charge.

Facts

[3] An agreed Summary of Facts was filed on 31 January 2020.

[4] Mr Schroder was a licensed salesperson, engaged by Eves Realty Limited ("the Agency"). On 28 July 2018, he became the listing and selling salesperson for a property in Greerton, Tauranga.

[5] An agreement for sale and purchase of the property was entered into in early September 2018, for $590,000. A deposit of $59,000 was paid into the Agency's trust account, and Mr Schroder's share of the commission was paid to him when the contract became unconditional in early October. However, the purchaser defaulted on settlement and forfeited the deposit. The Agency agreed to forfeit the commission on the unsuccessful sale, but Mr Schroder was not required to refund his share of the commission.

[6] On 13 November 2018, another salesperson at the Agency presented an offer of $535,000 to the vendor. The vendor did not accept this offer.

[7] On 22 November, Mr Schroder presented an offer of $561,000 to the vendor, which was accepted. No further commission was disbursed to Mr Schroder, but he retained his share of the original commission.

[8] Mr Schroder then sent the following email to the vendor, from his personal email address:

> Hi [name]
>
> Today is a good day for you so congratulations on the successful conclusion to the final chapter.
>
> By my calculations with the default deposit you actually sold the property for a whopping $620,000 which is impressive. Not bad when you would have taken $565k.
>
> Also, you'll be pleased you waited a few days to nett an extra $26k so if you wanted to show your appreciation to my extra efforts I suggest we split the difference on the extra [achieved] for you between $535k and the $561k which works out at to $13k which will help offset some commission loss.
>
> This is extra to the commission which will be [deducted] from the deposit paid today but know I would be so appreciative so I'll leave it with you [name]. Congratulations again on the unconditional sale today. Know it was my pleasure to bring you such a great result. I'm sure this one will stick.
>
> Regards
>
> Ray

[9] Mr Schroder provided his personal bank account number.

[10] The vendor did not respond to Mr Schroder, but forwarded the email to the Agency. Mr Schroder's engagement with the Agency was terminated immediately. The Agency subsequently reported the matter to the Authority.

[11] Mr Schroder voluntarily surrendered his salesperson's licence, effective from 17 July 2019.

Determination of the charge

[12] Rule 6.3 of the Rules provides:

> A licensee must not engage in any conduct likely to bring the industry into disrepute.

[13] A licensee's conduct will be in breach of r 6.3 if it is conduct that, if known by the public generally, would lead them to think that licensees should not condone it or find it acceptable.[1]

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1 See *Jackman v Complaints Assessment Committee 10100* [2011] NZREADT 31, at [65].

[14] We accept Ms Davies' submission that Mr Schroder's conduct in seeking further payment from a vendor over and above the agreed commission is a clear breach of r 6.3. We agree that it is conduct that members of the public would not condone or find acceptable. Further, acceptance that such conduct is tolerable would tend to lower the standing and reputation of the real estate industry, and bring the industry into disrepute.

[15] Section 73(c) of the Act provides that a licensee is guilty of misconduct if the licensee's conduct:

> …
>
> (c) consists of a wilful or reckless contravention of–
>
> …
>
> (iii) regulations or rules made under this Act; …

[16] Ms Davies submitted that Mr Schroder's conduct in seeking a further commission payment was at least at the level of recklessness, in that he can be taken to have foreseen the possibility that his conduct would be viewed by members of the public as unacceptable, but proceeded to send the email to the vendor, regardless of that possibility.

[17] However, Ms Davies submitted that the Tribunal could find that Mr Schroder's breach of r 6.3 was wilful, and he can be found to have known that his conduct would be seen as unacceptable. She submitted that this is evident from the tone of the email, in particular his statements that:

[a] the payment would be to "show your appreciation to my extra efforts", and that he would be "so appreciative" if the vendor would "split the difference" of $26,000 between the offers made on 16 and 22 November; and

[b] he would "leave it with you".

[18] Ms Davis submitted that these statements show that Mr Schroder knew that he was requesting an extra or additional payment to the commission to which he was entitled, and knew that the vendor was not obliged to make the payment. She

submitted that Mr Schroder was aware that he was crossing a line by making the request and that by leaving the possibility of payment in the hands of the vendor, he was attempting to absolve himself of responsibility as to whether the payment was made or not.

[19] Mr Schroder accepted that his conduct in emailing the vendor was reckless, unprofessional, and irrational. He submitted that it was completely out of character, brought about by what he said was a "collision of personal emotional circumstances at the time". He submitted that he had felt that he had negotiated the purchaser's offer up to a figure that was acceptable to the vendor, and which resulted in the vendor obtaining a very good price for the property when the forfeited deposited was taken into account, but did not really expect the vendor to agree to making an additional payment to him.

[20] We do not agree that Mr Schroder should be found guilty of a wilful breach of r 6.3. We are not persuaded that he intentionally set out to bring the industry into disrepute. We find him guilty of misconduct on the basis of a reckless breach of r 6.3.

Penalty

Submissions

[21] Ms Davies submitted that Mr Schroder's conduct was at the low to moderate level of misconduct.

[22] She submitted that Mr Schroder's actions were motivated by personal commercial gain, and that the actions were discovered only because the vendor forwarded his email to the agency. She submitted that if Mr Schroder had been successful in his attempt to obtain extra payment, the conduct would likely not have been discovered at all. She submitted that it was not Mr Schroder's candour that led to the Committee's investigation of the matter, but rather the vendor's knowledge that this conduct was not acceptable.

[23] She further submitted that consumers and other interested parties must be able to trust real estate licensees to act with honesty and candour in transactions related to real estate. In the real estate industry, licensees receive a commission for their work, which must be agreed in an agency agreement.[2] There is no entitlement to further payment for that work.

[24] Ms Davies submitted that the Committee is not aware of any aggravating factors personal to Mr Schroder, and accepted that he will be entitled to some credit for his lack of previous disciplinary history and his guilty plea to the charge. She accepted that he had signalled a guilty plea at the earliest available opportunity.

[25] Ms Davies acknowledged that Mr Schroder has voluntarily surrendered his salesperson's licence, pursuant to s 61 of the Act. She noted that under s 61(5), the voluntary surrender does not affect a licensee's liability for any act done before the suspension took effect.

[26] She submitted that the appropriate penalty would be orders for censure and a fine of $3,000 to $4,000.

[27] Mr Schroder submitted that the Tribunal should take into account the fact that at the relevant time he was a relatively new and inexperienced licensee, having been first licensed in 2016. He considered that he had not been well supervised or managed at the time. He also referred to a letter he had sent to the vendor in December 2018, in which he apologised and expressed his regret and remorse.

[28] Mr Schroder told the Tribunal he had been hoping to have a long career in the industry, but his actions had led to his dismissal. He said that as a result, his income had been significantly reduced. Recently, his income has been affected by the Covid-19 pandemic.

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2 Pursuant to s 126 of the Act.

Penalty principles

[29] 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.[3] The Act achieves these purposes by regulating agents, branch managers, and salespersons, by raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.[4]

[30] In order to meet the purposes of the Act, penalties for misconduct and unsatisfactory conduct are determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, the maintenance of confidence in the industry, and the need for deterrence.

[31] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistence 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.[5]

[32] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case, the Tribunal may:

[a] make any of the orders that a Complaints Assessment Committee may make under s 93 of the Act (following a finding of unsatisfactory conduct); and

[b] order an individual licensee to pay a fine of up to $15,000.

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3 Section 3(1) of the Act.
4 Section 3(2).
5 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, [200p] 1 NZLR 1, at [97].

Discussion

[33] Ms Davies referred us to the Tribunal's decisions in *Complaints Assessment Committee 521 v Wright*,[6] and *Complaints Assessment Committee 1902 v Hanford*,[7] and *Canterbury-Westland Standards Committee No.3 v Hemi,* a decision under the Lawyers and Conveyancers Act 2006.[8]

[34] The circumstances in each of *Wright* and *Hemi* were more serious than in the present case, in that in those cases the defendant obtained (or retained) payments to which he was not entitled (albeit, in Mr Hemi's case, a considerably lower sum than that requested by Mr Schroder). However, each is an example of a defendant who used his position in order to gain funds in the course of his work.

[35] Mr Wright was ordered to pay compensation to the victims of his offending, totalling $14,890. The Tribunal recorded that it would have ordered cancellation of his licence, were it not for the fact that he had voluntarily surrendered it. Mr Hemi was suspended from practice for 18 months.

[36] Mr Hanford admitted a charge of a reckless breach of r 6.3. He had prepared a spreadsheet of details of a large number of properties, which was of commercial confidential value to the agency he had been engaged at, and had purported to (but not in fact) send it to a third party. He was censured and ordered to pay a fine of $2,500. The Tribunal took into account that he had entered an early guilty plea to the charge (having admitted it earlier to the agency), had no previous disciplinary history, and had deleted all the information from his computer. He had also voluntarily undertaken educational training through the Real Estate Institute of New Zealand and the Authority.

[37] We accept Ms Davies' submission that Mr Schroder's offending was at a low to moderate level of seriousness.

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6 *Complaints Assessment Committee 521 v Wright* [2019] NZREADT 49.
7 *Complaints Assessment Committee 1902 v Hanford* [2020] NZREADT 21.
8 *Canterbury-Westland Standards Committee No.3 v Hemi* [2013] NZLCDT 23.

[38] We accept that Mr Schroder's conduct in attempting to obtain an additional payment from his vendor client must not be taken lightly. However, we take into account his relative inexperience as a licensee, and lack of any previous disciplinary history, his immediate acknowledgement to his employer and early guilty plea to the charge, and the fact that his conduct resulted in his immediate dismissal and significant financial hardship. We also accept that Mr Schroder has demonstrated remorse by voluntarily surrendering his salesperson's licence and by his letter of apology to his vendor client.

[39] We have recorded Mr Schroder's submission as to his supervision and management, but in the absence of further evidence, cannot take it into account. We have also recorded Mr Schroder's submission that the offending occurred at a time when his personal circumstances were particularly difficult. On this point, we accept Ms Davies submission that while those circumstances may explain the offending, it cannot excuse it.

[40] Taking the above matters into account, we have concluded that the appropriate penalty orders are for censure and a fine of $2,000.

Committee's application for costs

Jurisdiction to order payment of costs

[41] Section 110A of the Act has provided as follows:[9]

> **110A Costs**
>
> (1) In any proceeding under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
>
> (2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether and to what extent, any party to the proceedings–
>
> (a) has participated in good faith in the proceedings:

[9] Section 110A was inserted by section 244 of the Tribunals Powers and Procedures Legislation Act 2018.

(b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:

(c) has acted in a manner that facilitated the resolution of issues that were the subject of the proceedings.

(3) [Not relevant to this proceeding]

(4) A person to whom costs are awarded under this section, but who has not been paid in full, may file a copy of the order in the District Court, where it may be enforced for so much of the amount as is still owing as if it were a judgment of the District Court.

[42] The Tribunal is given a discretion as to orders for costs. That discretion is to be exercised in accordance with the Act, on the particular circumstances of the case before the Tribunal.[10] In his judgment in *TSM v A Professional Conduct Committee*, his Honour Justice Palmer set out established principles as to orders for costs in professional disciplinary proceedings, as follows:[11]

(a) professional groups should not be expected to bear all the costs of the disciplinary regime;

(b) members who appeared on charges should make a "proper contribution" towards costs;

(c) costs are not punitive;

(d) the practitioner's means, if known, are to be considered;

(e) a practitioner's defence should not be deterred by the risks of a costs order; and

(f) in a general way 50 percent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

Submissions

[43] Ms Davies submitted that in proceedings involving charges successfully brought by a Complaints Assessment Committee under the Act, an award of costs should generally (although not invariably) be made in favour of the relevant Committee. That is, a licensee found guilty of charges should generally expect to pay at least some of the Committee's costs. Ms Davies submitted that this reflects the purposes of the Act,

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10 See *Complaints Assessment Committee v Wright* [2019] NZREADT 56, at [12].

11 *TSM v A Professional Conduct Committee* [2015] NZHC 3063, at [21], citing *Vatsayann V Professional Conduct Committee Of The New Zealand Medical Council* [2012] NZHC 1138, at [34], per Priestley J.

and recognises that the costs associated with charges matters are borne by members of the industry.

[44] Ms Davies provided details of the costs charged to the Committee by its counsel, totalling $7,341.00 (exclusive of GST and disbursements).

[45] Ms Davies accepted that the Tribunal could consider a reduction from the general starting point of around 50 percent of actual costs, to take into account Mr Schroder's co-operation during the course of the proceedings, and his acceptance of his conduct. However, she submitted that the fact that the charges did not proceed to a defended hearing necessarily means that the Committee's costs will be less (and as a consequence, the order for costs will be lower) than would otherwise have been the case.

[46] Mr Schroder submitted that the Committee's costs appeared to be excessive, given his early guilty plea. He further submitted that he has a very limited ability to meet an order for costs. As recorded earlier, he was dismissed from his position as a salesperson, and has since then been self-employed outside the real estate industry. His ability to work has been severely impacted by the Covid-19 pandemic. He told the Tribunal that he has been using savings and a recent government subsidy to "get by". In addition, relationship property matters are still unresolved.

Discussion

[47] We accept that it is appropriate that Mr Schroder be ordered to make a contribution towards the Committee's costs. We note that Mr Wright was ordered to pay approximately 50 percent of the Committee's costs. The Tribunal noted, in particular, that he had not co-operated with the relevant Committee's inquiry and had failed to respond appropriately to the disciplinary proceeding. [12] In Mr Hanford's case, the Tribunal accepted that a reduction should be made from the general guide of 50 percent to acknowledge his acceptance of wrongdoing, his co-operation with the Committee's inquiry, and limited financial means. He was ordered to pay $2,000, which was approximately 29 percent of the Committee's actual costs.

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[12] See *Wright*, above fn 10, at [13]–[17].

[48] In the present case, Mr Schroder's ability to pay costs is more limited that Mr Hanford's was, as Mr Hanford remained working in the industry. In the light of that additional factor, we have concluded that the appropriate contribution to the Committee costs is $1,500.

Orders

[49] We find Mr Schroder guilty of misconduct under s 73(c)(iii) of the Act, and order that he be censured and that he pay a fine of $2,000, which is to be paid to the Authority within 40 working days of the date of this decision.

[50] Pursuant to s 110A of the Act, we order Mr Schroder to pay $1,500 towards the Committee's costs. This sum is to be paid to the Authority within 40 working days of the date of this decision.

[51] 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.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Mr N O'Connor
Member