

Decision No: [2012] NZ READT 18

Reference No: READT 036/11

IN THE MATTER OF

of a charge laid under s 91 of the Real Estate Agents Act 2008s

BETWEEN

**REAL ESTATE AGENTS
AUTHORITY (CAC 10058)**

Appellant

AND

MS N

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Mr G Denley - Member
Ms J Robson - Member

APPEARANCES

M J Hodge, counsel for the Authority
No appearance for the defendant

[1] The defendant faced one charge of misconduct under s 73(a) of the Real Estate Agents Act on the grounds that she misappropriated money from the rental trust account and trading account of X and X Real Estate Limited. The charge is dated 22 March 2011.

[2] Ms N and the Complaints Assessment Committee agreed on a Summary of Facts and this is set out below:-

1. Since 17 November 2009, Ms N (**the defendant**) held an agent's licence under the Real Estate Agents Act 2008 (**Act**). Prior to 17 November 2009, the defendant held an agent's licence under the Real Estate Agents Act 1976.

Charge

The defendant faces one charge of misconduct contrary to s 73(a) of the Act.

Particulars

2. Between 8 July 2009 and 6 July 2010, the defendant was a director and 50% shareholder of X & X Real Estate Limited trading as XX Real Estate. XX carried on business as a real estate and residential property management agency.
3. At all relevant times, the defendant had a duty to pay all money received by her in respect of any transaction in her capacity as a real estate agent to the person lawfully entitled to the money or in accordance with that person's directions. Subject to a legal lien over such monies, the defendant was not entitled to use such monies to pay her debts.
4. XX operated two business bank accounts, a residential property management trust account and a trading account.
5. During the period 8 July 2009 to 6 July 2010 the defendant made 20 monetary transactions totalling \$16,450.00 from XX's trading account to her personal bank accounts without authorisation.
6. During the period 30 September 2009 to 6 July 2010 the defendant made 41 monetary transactions totalling \$60,200.00 from XX's residential property management trust account to her personal bank accounts without authorisation.
7. On 7 September 2010 an investigator from the Real Estate Agents Authority (**the Authority**) interviewed Ms W, the co-director and other 50% shareholder of XX. Ms W provided a statement that the defendant had admitted taking the funds without authorisation.
8. The defendant has repaid the misappropriated funds to XX in full.
9. On 19 October 2010, during the investigation of the present charge, the defendant voluntarily surrendered her licence to the Authority. She advised the Authority that she will not apply to renew her licence. Accordingly, the Registrar cancelled the defendant's licence pursuant to s 61 of the Act.
10. The defendant's psychological and physical condition currently precludes her from participating in a hearing of the charges against her.

[3] Ms N did not appear at the hearing but through her counsel provided a comprehensive written submission. She pleaded guilty to the charge and she agreed that her conduct was misconduct contrary to s 73(a) of the Real Estate Agents Act.

Discussion

[4] The ultimate decision on whether the charge is established is a decision for the Tribunal. Having considered the agreed facts which show that Ms N misappropriated money from the trust account we find that the Complaints Assessment Committee have discharged the burden of proof and proved on the

balance of probabilities that Ms N did in fact take money from the trust account of X & X Real Estate Limited trading as XX Real Estate.

The charge is established under s 73(a).

Penalty

[5] This conduct continued from 2009 until July 2010. It was a continuing course of conduct and we therefore propose to penalise Ms N under the Real Estate Agents Act 2008. Under that Act the Tribunal have the power to cancel or suspend Ms N's licence. We have carefully considered the appropriate penalty for Ms N. The offence was a serious offence. We consider that the only appropriate remedy for a charge of misappropriating trust account monies must be an order cancelling the licence of Ms N under s 110(2)(b). We understand that Ms N is no longer practicing real estate agency work but nonetheless her licence must be formally cancelled. We make no other orders.

Name Suppression

[6] Normally a finding of serious misconduct such as this would lead to the agent being named. There is significant public interest in the name of a real estate agent who misappropriates money. In this case Ms N has repaid the money but nonetheless it still remains a very serious matter. However the Tribunal has received evidence concerning Ms N's significantly impaired mental health and the real risk that she might become suicidal again. In considering whether or not an order ought to be made under s 108 restricting publication of Ms N's name the Tribunal is required to take into account the interests of any person, the privacy of the complainant and the public interest.

[7] Clearly the public interest is in an open justice system with the name of the practitioner being published. However balanced against this must be the interests of Ms N. In this particular case we consider that the serious risk of self harm set out in the medical reports filed on behalf of Ms N mean that there should be an order preventing publication of Ms N's name and any information that might identify her, including the name of the real estate agency.

[8] Accordingly the Tribunal makes the following orders:


- (i) Cancelling Ms N's licence s 110(2)(b).
- (ii) An order under s 108 limiting publication of the reporting of this decision so that Ms N's name and the name of the real estate agency and any other feature which might identify her are not published.

[9] The Tribunal draw the parties' attention to s 116 of the Real Estate Agents Act which contains the right to appeal this decision to the High Court.


DATED at WELLINGTON this 24th day of April 2012



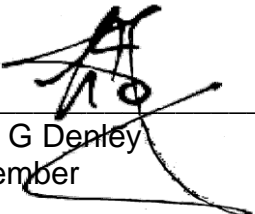
Ms K Davenport
Chairperson



The seal is circular with the text "REAL ESTATE AGENTS" at the top and "DISCIPLINARY TRIBUNAL" at the bottom. In the center is a coat of arms featuring a crown, a shield with a cross, and two figures holding a shield.



Ms J Robson
Member



Mr G Denley
Member