

Decision no: [2012] NZREADT 31

Reference no: READT 041/11

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

BETWEEN **REAL ESTATE AGENTS AUTHORITY (CAC 10043)**

AND **EILEEN MARY JOSEPHINE BROOKER**

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

Appearances:

Mr M Hodge for the Authority
Ms B Allen for the defendant

PENALTY DECISION

Background

[1] In its decision [2012] NZREADT 23 the Tribunal found Ms Brooker guilty of misconduct following a complaint by Mr Baird and his partner Gay Grigg. The complaint related to a property which had been purchased by Mr Baird and Ms Grigg in Invercargill sight unseen. Ms Brooker was the agent who acted on the sale. The issue was whether or not Ms Brooker had told Mr Baird and Ms Grigg that she also had not been inside the property and was not able to assess its suitability for rental.

[2] The Tribunal found Ms Brooker guilty of misconduct. The Tribunal now must determine the appropriate penalty to impose upon her.

Principles of Sentencing

[3] The Supreme Court in *Z v CAC*¹ (Blanchard, Tipping and McGrath JJ) held²:

... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it

¹ [2009]1 NZLR 1

² At [97]

may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned.

[4] A penalty must fulfil the following functions in a disciplinary case. They are:

(a) Protecting the public

Section 3 of the Real Estate Agents Act sets out the purposes of the legislation. 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”.

(b) Maintenance of appropriate standards

This was emphasised in *Taylor v The General Medical Council*³ and *Dentice v The Valuers Registration Board*⁴.

(c) Punishment

While most cases stress that a penalty in a professional discipline case is about the maintenance of standards and protection of the public there is also an element of punishment – such as in the imposition of a fine or censure. See for example the discussion by Dowsett J in *Clyne v NSW Bar Association*⁵ and Lang J in *Patel v Complaints Assessment Committee*⁶.

(d) Where appropriate, rehabilitation of the agent must be considered – see *B v B*⁷.

[5] In *CAC v Walker*⁸ the Tribunal reiterated what has been set out above and said as follows:

“[17] Section 3(1) of the Act sets out the purpose of legislation. 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.’ One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (s 3(2)).

[18] This function has been recognised in professional disciplinary proceedings involving other professions for example, in medical disciplinary proceedings: Taylor v The General Medical Council⁹ and in disciplinary proceedings involving valuers: Dentice v The Valuers

³ [1990] 2 All ER 263

⁴ [1992] 1 NZLR 720

⁵ (1960) 104 CLR 186 at 201-202

⁶ HC Auckland CIV 2007-404-1818; Lang J; 13/8/07

⁷ HC Auckland, HC 4/92 6/4/93; [1993] BCL 1093

⁸ [2011] NZREADT 4, Tab 3

⁹ [1990] 2 ALL ER 263

*Registration Board*¹⁰ This is reinforced by the reference in the purpose provision to the Act (s 3) to raising industry standards and the promotion of public confidence in the performance of real estate agency work.

[19] In *Patel v Dentists Disciplinary Tribunal*¹¹ Lang J held that disciplinary proceedings inevitably involve issues of deterrence and penalties and are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.”

[6] Penalties must also be proportional and reflect other decisions of the Tribunal. In this respect the CAC referred to the decision of the Tribunal in *Khan* where Mrs Khan’s licence was cancelled when she was found to have acted dishonestly on a transaction. The CAC also referred to the decision of *Dodd*, in which a dishonest agent was suspended.

[7] Because this matter arises before the coming into force of the Real Estate Agents Act 2008 the Tribunal must consider the impact of s 172 of the Act. This section enables the Tribunal to deal with conduct which arose before the Act but in fairness to the agent provides that the Tribunal cannot impose a penalty on the agent which could not have been imposed upon the agent under the 1976 Act.

[8] Section 172 sets out a three-step process:

1. Could the defendant have been complained about or charged under the 1976 Act in respect of that conduct?

Answer: Yes, as a salesperson Ms Brooker could have been complained about under the 1976 Real Estate Agents Act.

2. Does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act.

Answer: Yes, the Tribunal has already found Ms Brooker guilty of misconduct.

3. If so, what penalty is appropriate?

Answer: only orders available under the 1976 Act may be imposed by the Tribunal.

[9] It is common ground that under the 1976 Act the only penalties available under s 99 against a salesperson were to have their certificate of approval cancelled or suspended or impose a monetary penalty of up to \$750.

[10] The difference between the 1976 Act and the 2008 Act is that the 1976 Act also required the Board, as it was then, to satisfy itself that before a salesperson’s certificate could be cancelled or suspended, that the licensee is of such character that it is in the interests of the public that his/her licence be cancelled or suspended.

¹⁰ [1992] 1 NZLR 720

¹¹ High Court, Auckland, CIV 2007-404-1818, 13 August 2007

[11] In the decision of *CAC10026 v Dodd* [2011] NZREADT 1, this Tribunal found that s 172 did not require the Tribunal to make a finding as to character as had been required under the old Act. Rather, the order is imposed under the 2008 Act as suspension (in the *Dodd* case) was available under the 1976 Act.

[12] Ms Brooker's counsel urges the Tribunal to reject the finding in *Dodd*, submitting that this cannot be right and that the Tribunal may only impose the **actual** orders that could have been imposed under the 1976 Act. She submits that the Tribunal must satisfy itself that the agent was of such character that it was in the interests of the public that the licence be cancelled and/or suspended. Ms Allen referred to the decision of the High Court in *Niall v REINZ* [HC AK 9 July 2009 Allan J] in this case found that the Licensing Board had to consider the good character test under s 99.

Discussion

[13] We have no doubt that the High Court in *Niall* reached the correct decision because it was applying s 99 Real Estate Agents Act 1976. What this Tribunal must do is consider the implications of s 172 Real Estate Agents Act 2008. The purpose of s 172 is to enable the principles of the new Real Estate Agents Act 2008, the purpose of which is to improve and strengthen public confidence in real estate agents notwithstanding that the conduct occurred before the passing of the Act. It is important to note that retrospective legislation does not usually impose a higher penalty on the wrongdoer than existed at the time the offence was committed.

[14] In *Dodd* the Tribunal found that the Tribunal could not impose a penalty which was not available under the 1976 Act but in fact that the good character/public interest test did not need to be implied as a limitation on the Tribunal's powers. This must be correct. The **penalty** is suspension or cancellation. The good character test is necessary before the Board could decide to impose a penalty. It was not part of the penalty itself. Section 172 makes it clear that the Tribunal cannot impose any penalty not available under the 1976 Act.

[15] Having said all this, each case must be decided on its own facts. In this case we consider that neither suspension nor cancellation of Ms Brooker's licence is required. There has been a lengthy delay in prosecuting this matter caused partly by the delay in making a complaint by Mr Baird and Ms Grigg. The events themselves took place in 2006. Certainly the tragic death of Mr Baird added significantly to the delay. We have considered carefully the submissions of counsel for Ms Brooker and consider that in this case, taking into account all her personal circumstances and the need to maintain public confidence, we consider that the imposition of a fine would be the appropriate penalty for Ms Brooker. We consider that this matter is serious but not the most serious case of misconduct that the Tribunal has heard and consider that a fine of \$500 would be the appropriate penalty for Ms Brooker. We order, therefore, that she pay the sum of \$500 by way of a fine.

[16] We draw the parties' attention to s 116 of the Real Estate Agents Act which provides for the right of appeal to the High Court.

DATED at AUCKLAND this 11th day of June 2012

K Davenport

Ms K Davenport
Chairperson



G Denley

Mr G Denley
Member

J Gaukrodger

Mr J Gaukrodger
Member