

Decision No: [2011] NZREADT 32

Reference No: READT 037/11 and  
044/11

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

**BETWEEN** **REAL ESTATE AGENTS  
AUTHORITY (CAC 10003)**

**AND** **DELAWER HOOSAIN KUMANDAN**

Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Ms K Davenport      Chairperson  
Mr J Gaukrodger      Member  
Ms J Robson          Member

**APPEARANCES**

Mr M Hodge for the Authority  
Mr D Kumandan in person

**PENALTY DECISION**

***Introduction***

[1] On the 5th day of April 2012 the Tribunal found Mr Kumandan guilty of misconduct. Submissions on penalty were received from the Complaints Assessment Committee and Mr Kumandan declined to make submissions on the basis that he had appealed the Tribunal's substantive decision.

[2] On 17 May 2012 the Tribunal advised Mr Kumandan that it considered that a Penalty Decision was needed to complete the case and asked for his submissions on penalty.

[3] Mr Kumandan has now provided those to the Tribunal, together with a copy of a Minute from Wylie J in the appeal in the Auckland High Court under CIV 2002-404-002194.

[4] The first issue to be determined by the Tribunal is whether or not the Tribunal should issue a stay on the Penalty Decision pending the outcome of the appeal.

[5] We consider that it is appropriate for us to consider and impose a penalty upon Mr Kumandan. Mr Kumandan can then apply for a stay of that decision from the High Court pending the outcome of his appeal. We consider that once we have a given a decision and it has been appealed then our role is *functus officio*. We consider that it is appropriate that the High Court has the benefit of dealing with the appeal on both

liability and penalty and it will determine whether it is appropriate to stay the imposition of this penalty pending the outcome of the appeal.

[6] As the High Court noted once a decision is given by the Tribunal, the Tribunal's role ends, which is why the Tribunal is not a Respondent in the appeal proceedings. The High Court will consider the Tribunal's decision and determine whether or not it has reached the correct decision on the basis of the facts and the application of those facts to the law.

[7] We note that Mr Kumandan has provided his submissions on penalty under protest.

[8] In reaching its decision on the two charges before it, the key findings of the Tribunal were that Mr Kumandan forged the signature of Mr Naidu on the settlement notice in respect of a transaction involving a property at 3207 Great North Road. The Tribunal dismissed the other charge relating to the complaint laid by Shiv Paul.

[9] Mr Kumandan's conduct was conduct which occurred before the Real Estate Agents Act came into force on 17 November 2009. The Tribunal has jurisdiction to consider charges before this date. There is a three-step process to be undertaken under s 172. The first question is whether or not the conduct could have been complained about or a charge laid under the Real Estate Agents Act 1976, if so, has the agent been guilty of misconduct or unsatisfactory conduct under the 2008 Act? If the answer to this question is "yes" then a penalty may be imposed under the 2008 Act provided that it may only be a penalty which could have been imposed under the 1976 Act.

[10] Under s 99 in the 1976 Act a salesperson found guilty of the equivalent of misconduct could have his or her certificate cancelled, or suspended and could face a fine of not exceeding \$750. Under this Act the Board could only cancel or suspend if they were satisfied that the agent was of such character that it was in the public interest to do so. In *Dodd* [2011] NZREADT 01 at [90] the Tribunal held that a finding of this is not a necessary step for the Tribunal. We agree. The purpose of the Act is in part to promote the public confidence in the real estate industry. An interpretation of s 172 that assists this purpose must be used by the Tribunal. We find that the words of s 172 which provide that the "tribunal may not make ... any order in the nature of a penalty that could not have been made when the conduct occurred" mean that only **orders** which could have been made under the 1976 Act can be imposed. An order for suspension or cancellation could have been made – but the 1976 act imposed another inquiry (as to character) on the Board **before** it could impose the penalties. The Tribunal find that this additional inquiry is not required under s 172.

### ***Principles of Sentencing***

[11] 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*<sup>1</sup> and *Dentice v The Valuers Registration Board*<sup>2</sup>.

(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*<sup>3</sup> and Lang J in *Patel v Complaints Assessment Committee*<sup>4</sup>.

(d) Where appropriate, rehabilitation of the agent must be considered – see *B v B*<sup>5</sup>.

[12] The Supreme Court in *Z v CAC*<sup>6</sup> (Blanchard, Tipping and McGrath JJ) held<sup>7</sup>:

*... 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 appropriate standards of conduct are maintained in the occupation concerned.*

[13] In *CAC v Walker*<sup>8</sup> 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 Council<sup>9</sup> and in disciplinary proceedings involving valuers: Dentice v The Valuers Registration Board<sup>10</sup> This is reinforced by the reference in the purpose provision to the Act (s 3) to raising industry standards and the*

<sup>1</sup> [1990] 2 All ER 263

<sup>2</sup> [1992] 1 NZLR 720

<sup>3</sup> (1960) 104 CLR 186 at 201-202

<sup>4</sup> HC Auckland CIV 2007-404-1818; Lang J; 13/8/07

<sup>5</sup> HC Auckland, HC 4/92 6/4/93; [1993] BCL 1093

<sup>6</sup> [2009]1 NZLR 1

<sup>7</sup> At [97]

<sup>8</sup> [2011] NZREADT 4, Tab 3

<sup>9</sup> [1990] 2 ALL ER 263

<sup>10</sup> [1992] 1 NZLR 720

*promotion of public confidence in the performance of real estate agency work.*

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

[14] Cases must also be proportional and reflect other decisions of the Tribunal. 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.

[15] In applying any penalty, the Tribunal must have regard to the law, the previous decisions of the Tribunal (to ensure consistency) and most importantly the facts of each case and the circumstances of the agent. Applying the law to the facts of this case we consider that a finding of forgery is a serious matter for an agent and that honesty is a prerequisite for any real estate salesperson. This is clearly an offence at the highest end of the scale. The CAC urged the Tribunal to cancel Mr Kumandan’s salesperson’s licence to reflect the gravity of the misconduct. In the alternative they submit that a suspension at the upper end of the scale (three years) should be imposed upon the defendant.

[16] Mr Kumandan rejects the call to cancel his licence and says that the cancellation of his licence by the Tribunal is *“merely an establishment of a predetermined guilty the evidence of which has been presented to the Tribunal in an unjust and wrongful manner”*. He submitted that the two cases (*Dodd* and *Khan*) presented by the CAC were not factually similar to the case before this Tribunal and submitted that the Tribunal ought to take into account the fact that:

*“... the system left the defendant out to dry. No legal representation. Being barraged with tons of paperwork. Being subjected to administrative injustices hence the entire process has itself been an ordeal over the passed three years”*.

[17] He submitted that nobody had been prejudiced and no losses had been incurred as a result of the charge. He referred to the fact that he was a new immigrant to New Zealand and entered the real estate industry, had no other job experience in New Zealand and needs his licence for his work. He submitted that he would not be able to survive in New Zealand should his licence be cancelled as he was not entitled to any support in New Zealand, WINZ or otherwise, should he be unemployed. Mr Kumandan told the Tribunal that he is the sole breadwinner. He submits that an appropriate penalty would be a caution or a nominal penalty.

## **Discussion**

[18] The High Court in other disciplinary cases (such as *Patel* - see above) has said that a regulatory Tribunal must impose the least serious penalty on a defendant which takes into account the need to maintain standards, maintain public confidence and yet

---

<sup>11</sup> High Court, Auckland, CIV 2007-404-1818, 13 August 2007

also to rehabilitate Mr Kumandan. We have carefully weighed all these matters. We have considered the previous cases of the Tribunal and the purpose of the Act.

[19] It does weigh heavily with us that Mr Kumandan is the only breadwinner for his family. Nonetheless it is our job to maintain our public standards in the real estate industry and we cannot help but conclude that the only remedy which appropriately reflects and maintains standards is to cancel Mr Kumandan's registration as a salesperson. Forging documents for the purposes of showing that a sale has taken place when it has not, is a serious matter. In other professions such as law and medicine it would almost inevitably be met with cancellation of the practitioner's registration. We think that similar concerns will be found in the real estate industry. Those who are dishonest have no place to be acting as agents in transactions involving large sums of money.


[20] We have seen no evidence to suggest that there is any conspiracy against Mr Kumandan which is racist or that the process before the CAC was not fair. We acknowledge that it is difficult for a self-represented person to appear before the Tribunal but Mr Kumandan, trained as a lawyer in South Africa, did an excellent job of defending himself.


[21] We have determined therefore to cancel Mr Kumandan's salesperson's licence. However, this order will not come into effect for a period of 28 days from the date of this decision in order to give Mr Kumandan time to apply to the High Court for an order staying this decision pending the outcome of his appeal.

**DATED** at AUCKLAND this 12<sup>th</sup> day of June 2012

  
 Ms K Davenport  
 Chairperson



  
 Mr J Gaukrodger  
 Member

  
 Ms J Robson  
 Member