

Decision No: [2012] NZREADT 47

Reference No: READT 024/11

IN THE MATTER OF

Charges laid under s 91 of the Real Estate Agents Act 2008

BETWEEN

**REAL ESTATE AGENTS AUTHORITY
(CAC 10031)**

AND

LEVANI DAULEVU CHARLIE LUM-ON

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

Mr L Clancy, Counsel for the Committee
The defendant in person

PENALTY DECISION

Introduction

[1] On the 1st of June 2012 the Tribunal found Mr Lum-on guilty of misconduct on three of four charges. Submissions on penalty were received from the Complaints Assessment Committee and Mr Lum-on with comments from the complainants.

[2] In reaching its decision on the three charges on which Mr Lum-on was found guilty the key findings of the Tribunal were concerned with the 'lay-by' sale arrangement promoted by Mr Lum-on as an agent where he was not licensed to do the work.

[3] Mr Lum-on'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 to be answered 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.

[4] 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 bad character is not a necessary step for the Tribunal. We agree. This was also discussed in READT decision

Kumandan [2012] NZREADT 32. 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 s 172 (which says that the “tribunal may not make ... any order in the nature of a penalty that could not have been made when the conduct occurred.”¹¹) means that no additional public inquiry needs to be undertaken by the Tribunal. An order for suspension or cancellation could have been made and can be imposed if appropriate.

Principles of Sentencing

[5] 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*¹ and *Dentice v The Valuers Registration Board*².

(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*³ and Lang J in *Patel v Complaints Assessment Committee*.

(d) Where appropriate, rehabilitation of the agent must be considered – see *B v B*⁴.

[6] The Supreme Court in *Z v CAC*⁵ (Blanchard, Tipping and McGrath JJ) held⁶:

... 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.

[7] In *CAC v Walker*⁷ 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

¹ [1990] 2 All ER 263

² [1992] 1 NZLR 720

³ (1960) 104 CLR 186 at 201-202

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

⁵ [2009]1 NZLR 1

⁶ At [97]

⁷ [2011] NZREADT 4, Tab 3

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 Council⁸ and in disciplinary proceedings involving valuers: Dentice v The Valuers Registration Board⁹ 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 Tribunal¹⁰ 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.”

[8] Penalties must also be proportional to the offence and reflect other decisions of the Tribunal. The CAC referred to the decision of the Tribunal in *Khan* [2011] NZREADT 11 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* [2011] NZREADT 1, in which a dishonest agent was suspended.

[9] 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 the facts of this case are serious. Mr Lum-on’s actions took advantage of the complainants and we found that he accepted a fee for the lay-by agreement without disclosing this and carried out this work without being licensed under s 16 of the Real Estate Agents Act 1976.

[10] The REAA have submitted that given the seriousness of the charges – in particular the breach of s 16 and the significant risk to the complainants (as they were liable to pay \$250 more per week from the market rent – with no ability to recover the additional sums paid if rent to buy did not proceed) that cancellation of Mr Lum-on’s licence is needed.

[11] The complainants themselves said that they had suffered financial loss – the deposit of \$1,500, the condition of the property when they took possession was poor and they had safety problems with the pool. They said:

“Our experience with this rent to buy option left us homeless and lost our business, therefore forcing us to leave the country and begin a new life”.

[12] Mr Lum-on submitted that he had suffered “*considerable financial and personal losses during this process*”. He said he had suspended his licence pending the CAC’s decision. He referred to his “*exceptional record*” and that he never had any disciplinary action. He

⁸ [1990] 2 ALL ER 263

⁹ [1992] 1 NZLR 720

¹⁰ High Court, Auckland, CIV 2007-404-1818, 13 August 2007

said he felt for Mr Nathan but *“maintain that we (the vendors and I) made every endeavour to assist the Nathan’s which resulted in the vendor suffering further losses in unpaid rent and damage to the property when they vacated”*.

Discussion

[13] The Tribunal have considered these submissions. They are concerned that Mr Lum-on does not seem to have appreciated the seriousness of the conduct and the impact upon the complainants. He seems more concerned with the vendors than the complainants.

[14] The High Court in other disciplinary cases (Patel- see above) has said that a regulatory Tribunal must impose the least serious penalty on the defendant which takes into account the need to maintain standards, maintain public confidence and yet also to rehabilitate Mr Lum-on. We have carefully weighed all these matters. We have considered the previous cases of the Tribunal and the purpose of the Act.

[15] We have considered our obligation to rehabilitate Mr Lum-on. This is difficult given Mr Lum-on’s comments and lack of information about any rehabilitation. We therefore consider that the appropriate penalty is a period of suspension for 12 months. We have no power to award compensation to the complainants.

[16] We have determined therefore to suspend Mr Lum-on’s licence for 12 months from two weeks after the date of this decision.

[17] We draw the parties’ attention to s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 13th day of August 2012

Ms K Davenport
Chairperson

Ms J Robson
Member

Mr G Denley
Member