

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2012] NZREADT 70

READT 050/10

**IN THE MATTER OF**

a penalty under s.172 of the Real Estate Agents Act 2008

**BETWEEN**

**REAL ESTATE AGENTS  
AUTHORITY (CAC10007)**

Applicant

**AND**

**JANINE ANN WALLACE**

Defendant

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Ms J Robson - Member  
Mr G Denley - Member

**HEARING ON PENALTY HEARD** at AUCKLAND on 24 October 2012

**DATE OF SUBSTANTIVE DECISION**

18 June 2012 [2012] NZREADT 34

**DATE OF THIS PENALTY DECISION**

21 November 2012

**APPEARANCES**

Mr L J Clancy, counsel for prosecution  
The defendant on her own behalf

**DECISION OF THE TRIBUNAL ON PENALTY**

***Introduction***

*The Issue*

[1] Janine Wallace (the defendant) has been found guilty of three charges of misconduct under s.73 of the Real Estate Agents Act 2008. What is the appropriate penalty?

[2] Given that the conduct pre-dates the 2008 Act, the penalty available in this case is limited to those that were available under the Real Estate Agents Act 1976.

### ***Factual Background***

[3] In our substantive decision in this case issued on 18 June 2012 under No. [2012] NZREADT 34, we covered the evidence and our findings of fact in quite some. Accordingly, for present purposes, we refer to the three proven charges as follows.

[4] First the, defendant sold Mr and Mrs Burt a car park which she did not own, and/or in circumstances where her ownership of the car park was disputed. Also, she failed to return the deposit paid to her by the Burts in relation to that car park. We found, inter alia, that it is misconduct on the part of a licensed real estate agent to fail to tell purchasers that the title to the car park which they were purchasing from that agent was disputed; and, at times material to that transaction, the defendant was not only a licensed real estate agent but the vendor of the car park.

[5] Second, we found that at a time when she was unlicensed, the vendor acted as a real estate agent on the sale of two apartments to the said Mr and Mrs Burt. Inter alia we considered that it is misconduct for a person to hold herself out as a licensed agent when she was not licensed at certain material times and also in endeavouring to obtain a commission split, or a fee of some type, for facilitating a property transaction when not so licensed.

[6] The third charge had been that the defendant was seriously incompetent or negligent in entering into a written contract of agency with, and placing undue pressure on, the vendors of a vineyard property and winery/restaurant business. We were not prepared to find misconduct on the part of the defendant regarding that charge until the point where she claimed commission (on 30 March 2009 by statutory demand). We considered that it must be misconduct on the part of a real estate agent to claim commission when the conditions basic to the transaction proceeding had not been fulfilled and the transaction collapsed. In our said 18 June 2012 decision, we also noted *“to so pursue an unjustifiable claim for commission against the would-be vendors of that transaction (as described above) caused them much stress and financial cost and seemed to virtually amount to harassment of them by the defendant”*.

[7] We found all the charges to have been proved and the defendant to be guilty of misconduct with regard to each and all of them, and we sought to address the issue of penalty but for various reasons beyond our control that did not happen until 24 October 2012. We then understood that the defendant has not been operating as a real estate agent since about May of this year, apparently, because she has been overseas much of the time since then. We observed that she is very distressed by these charges having been proved and does not seem to accept guilt. Indeed, she maintains that she always acted in good faith one way or another and that she was always giving of her very best efforts to the customers involved in each charge and (she put it) often at quite some personal inconvenience to herself.

[8] Mr Clancy emphasised the seriousness of the charges and such further aspects that the \$25,000 deposit paid by Mr and Mrs Burt for the car park does not seem to have ever been returned to them or recovered by them, and that they have spent at least \$65,000 in litigation with the defendant arising out of the facts of these charges.

[9] With regard to the first charge, we found the defendant guilty of misconduct on the basis that she failed to tell the purchasers of an apartment property, Mr and Mrs Burt, that the title to a car park which they were also purchasing from her, was

disputed. At all material times Ms Wallace was not only acting as a licensed agent but the vendor of the car park. We also found Ms Wallace guilty of misconduct in holding herself as a licensed agent when she was not.

[10] With regard to the second charge, we found Ms Wallace guilty of misconduct in claiming commission when the conditions basic to the transaction had not been fulfilled.

[11] The detail of the facts and our reasoning is set out in our decision [2012] NZREADT 34 issued on 18 June 2012.

### ***Victim Impact Statements***

[12] Since our decision, the Real Estate Agents Authority has contacted the victims and asked for their comments on the impact on them of the defendant's behaviour. Both victims replied by email and portions of those emails are set out below, but only relevant parts of their emails are included.

[13] The Burts stated:

*"We arrived in New Zealand and loved the friendliness of the country and its people, who were keen to help us and show us their country. She arrived and has single headedly tarnished for ever our feelings about NZ, and its business community, and ethical standpoint.*

*We travel the world a lot and meet lots of people in the course of my job, who ask me about my favourite place in the world where I would like to live. I struggle not to let her actions affect my answer.*

*The majority of the remainder of the people we have met in New Zealand have been friendly and professional, with a lovely old world way about them where morality is a high priority, not just the pursuit of money.*

*Through her actions, she has caused us considerable financial loss, and at times extreme personal sadness and stress, over some 5 years."*

[14] The Hoskins stated:

*"In terms of the impact this has had on our lives, the judgement describes it pretty well. As they say, well I might add, her continual pursuit of a commission amounted to harassment. Coming as this did at the same time as Mary's illness, Mary's recovery was made that much more difficult. The need to continually defend ourselves was not merely prohibitive in terms of cost (est 65k), but stressful to the extreme. Never knowing how the particular Court would decide, and wondering whether a Court might actually find in her favour, meant our future was always uncertain."*

### ***Three Step Process***

[15] The misconduct engaged in by Ms Wallace occurred prior to the 2008 Act coming into force on 17 November 2009. Section 172 of the 2008 Act therefore applies, which requires a three-step process to be followed. We have applied this

process in a number of cases; e.g. *CAC10026 v Dodd* [2011] NZREADT 1 and *CAC10012 v Khan* [2011] NZREADT 11.

[16] In terms of the first step, we find that the conduct could have been complained about or charged under the 1976 Act.

[17] The second step is to determine whether the defendant is guilty of misconduct (or unsatisfactory conduct). We did this in our 18 June 2012 decision.

[18] The third step is the imposition of a penalty under the 2008 Act, subject to the limitation that it may only be a penalty which could have been imposed under the 1976 Act.

[19] Under s.99 of the 1976 Act, having found a salesperson to be of such character that it was in the public interest that the salesperson's certificate of approval be cancelled or suspended, the Licensing Board could cancel the salesperson's certificates; suspend the salesperson for a period not exceeding three years; or impose a monetary penalty (payable to the Institute) not exceeding \$750.

[20] Section 99 of the 1976 Act applied to salespersons, and was the comparable provision to s.94 of the 1976 Act, considered in *Dodd*, which applied to agents. In the circumstances of this case there are no material differences between ss.94 and 99, so that the analysis in *Dodd* applies, other than to note that the maximum fine is one not exceeding \$750 rather than \$5,000.

[21] In *Dodd*, we canvassed two possible alternatives:

- [a] The Tribunal must make a finding in respect of the defendant's character, as required under ss.94 or 99 of the 1976 Act, before it can make any of the orders referred to.
- [b] No such finding as to character is required under s.172. Rather, an order under the 2008 Act is simply imposed as appropriate under the 2008 Act, provided the order is one that was available under the 1976 Act (i.e. cancellation, suspension, or a fine not exceeding (in this case) \$750).

[22] Without formally deciding the issue in *Dodd*, the Tribunal considered the second alternative is correct. That Tribunal went on to record that it did not make any difference, because the findings of the Tribunal in relation to the forgeries committed by Mr Dodd reflected on his character such that cancellation or suspension was in the public interest.

[23] We consider that the same position applies here. That is, even if the first alternative were to be preferred, the information before us, reflected in our findings, demonstrates that the defendant is of such character that cancellation or suspension is in the public interest. The question is, therefore, which of the said available orders are justified in this case?

### **General Principles**

[24] We consider that decisions of industry disciplinary Tribunals should emphasise the maintenance of high standards and the protection of the public (through both

specific and general deterrence). However, while this may mean that orders made in disciplinary proceedings have a punitive effect, this is not their purpose.

[25] To this effect, McGrath J for the majority of the Supreme Court in *Z v CAC* [2009] 1 at [97] (Blanchard, Tipping and McGrath JJ) held:

*“... 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.”*

[26] Turning to the particular statutory scheme under the 2008 Act, the Tribunal correctly summarised the position in *CAC v Walker* [2011] NZREADT 4 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 and in disciplinary proceedings involving valuers: Dentice v The Valuers Registration Board. 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 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.”*

### **Previous Penalty Decisions**

[27] Previous penalty decisions have been made by the Tribunal in respect of conduct which pre-dates that of the 2008 Act. In *Dodd* the Tribunal found that forgery of initials on a loan document amounted to a serious departure from the standards of an agent of good standing or a reasonable member of the public. The defendant had signed and submitted loan documents on behalf of his Trust, without ascertaining the signatures of the trustees. The Tribunal considered the observations of Allan J in *Niall v REINZ* HC Auckland CIV 2009-404-000135, 9 July 2009:

*“The Board’s powers are extensive. It has jurisdiction to deprive those involved in the industry of their livelihood. It must exercise its jurisdiction in accordance with the principles of natural justice, among which is a requirement that a sanction imposed in a given case must bear some proper relationship to penalties imposed in past similar cases: Aitken v Real Estate Agents Licensing Board HC Christchurch AP 130/96, 6 September 1996 at 12.”*

[28] The Tribunal was satisfied that the conduct warrants consideration of cancellation or suspension of the defendant's licence, but took into account the context of the offending, namely a bitter and private matrimonial dispute. Further, the forgeries were not directly connected with his real estate work. The end sentence was one of suspension for 12 months.

[29] In *CAC 10003 v Kumandan* [2012] NZREADT 32, the Tribunal held that a finding of forgery is a serious matter for an agent. This was because honesty is a pre-requisite for any real estate salesperson. The Tribunal found that:

*"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 reflect and maintains standards is to cancel Mr Kumandan's registration as a salesperson ...*

*Those who are dishonest have no place acting as agents in transactions involving large sums of money."*

[30] The Tribunal made similar findings in *Khan*, Ms Khan was a licensed salesperson who was found to have deliberately created evidence of deposits and money in bank accounts to deceive the lender into believing that the purchaser had sufficient money for the deposit on her property. Again, her conduct was considered fraudulent and the Tribunal determined that the only appropriate penalty was to cancel Ms Khan's salesperson's licence and impose the maximum fine of \$750.

[31] In this instance, we find that the defendant's misconduct falls between that of the less serious offending in *Dodd* and of the more serious offending in *Khan* and *Kumandan*. Given that Ms Wallace was the vendor of the car park and knew that there was an ongoing dispute over its ownership, this is dishonest conduct which brings the profession into disrepute. Not only did she sell a property, knowing there was a dispute as to its ownership, but she further acted outside the restrictions of a salesperson's licence.

[32] Although Ms Wallace's actions directly contravened the purpose of the Act, it is accepted that her actions are not at the highest end of the scale.

### **Penalty**

[33] Counsel for the Committee submitted that an appropriate penalty is one of suspension of the defendant's licence for a period of 24 months. He noted that a fine is an available penalty and submitted it is appropriate on the basis that where there is a commercial benefit obtained by an agent acting contrary to their obligations, a monetary penalty is warranted. It was put that the maximum fine available is \$750. Counsel noted that a compensation order is not available under the 1976 Act.

[34] We understand that it can be argued that, in terms of the particular status of the defendant at material times, we may have jurisdiction to impose a fine of up to \$5,000 rather than with a ceiling of \$750. However, we are satisfied that the defendant's financial position makes any fine over \$750 unrealistic in terms of the Authority being able to recover it.

[35] It might be thought that the defendant should have her licence cancelled by us. However, we feel that when her conduct is compared with precedent cases such as those referred to by Mr Clancy above, a fair but perhaps slightly kind penalty is that the defendant's licence be suspended for 18 months from 18 June 2012 (because we had wished to sentence her then). Accordingly, she is suspended for 18 months on that basis and fined \$750 to be paid to the Authority within 21 days from the date of this decision.

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Judge P F Barber  
Chairperson

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Ms J Robson  
Member

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Mr G Denley  
Member