

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 15

READT 065/12

IN THE MATTER OF an appeal under s.112 of the Real Estate Agents Act 2008

BETWEEN **MR G**
Applicant

AND **REGISTRAR OF THE REAL ESTATE AGENTS AUTHORITY**
Respondent

MEMBERS OF TRIBUNAL

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

HEARD AT QUEENSTOWN 25 January 2013

DATE OF THIS DECISION: 19 February 2013

APPEARANCES

Mr P McDonald and Ms K McHugh for the applicant
Mr L J Clancy counsel for the respondent

DECISION OF THE TRIBUNAL

Introduction

[1] The Registrar of the Real Estate Agents Authority has refused to grant a salesperson's licence to Mr G. Mr G seeks a review of that decision. The issue for the Tribunal today is whether in the circumstances of this case Mr G should be granted a licence. The Real Estate Agents Authority declined the application because Mr G received a conviction for Indecent Assault in 2008. Mr G was 21 at

the time of the offence. He was sentenced to five months' home detention. The Registrar considered that Mr G was not a fit and proper person to be a salesperson. A letter of explanation dated 19 September 2012 says:

"A Police check shows in 2008 you had a conviction for Indecent Assault. A copy of the Police report is enclosed. Given that consumers provide real estate agents with access to their homes it's important that those holding licenses have the highest levels of honesty and integrity and that consumers are able to trust them. You have been convicted of a serious offence and the nature of that offending as described in the sentencing notes provided by you does not reflect well on you. Whilst you express remorse for your past offending, you have explained how you have changed your life and have provided character references testifying to your general good character I am not satisfied that you are a fit and proper person to hold a licence."

[2] Mr McDonald for Mr G takes issue with this conclusion by the Real Estate Agents Authority. He urges the Tribunal to find that Mr G is a fit and proper person to have a licence. He has filed 12 affidavits in support of Mr G including one from Mr G and his current employer Mr D. Evidence was given at the hearing from Mr G and Mr D. Mr D is the owner and manager of X Realty, trading as XXX. Other relevant affidavit evidence was evidence from Ms A Fea, a Clinical Psychologist who has seen Mr G.

[3] There have been a number of previous cases which address the matters which the Tribunal must consider when determining whether or not a person ought to be granted a licence. In *Yang Shi v Real Estate Agents Authority*, [2013] NZREADT002 the Tribunal had this to say about the relevant law:

The issue for us is whether the applicant satisfied the Registrar that she was a fit and proper person to hold a licence; Revill v Registrar of the Real Estate Agents Authority [2011] NZREADT 41 at [11].

We have a different body of information before us than did the Registrar. Each such case is fact specific. We must determine whether the applicant has satisfied the onus of showing she is a fit and proper person to hold a salesperson's licence with reference to any additional material: Revill at [41].

The onus is on the applicant to satisfy us that she is a fit and proper person to hold a licence. This is clear from the language of s.36(2) of the Act which provides:

"36 Entitlement to licence

...

- (2) *An individual may be licensed as a salesperson if the individual satisfies the Registrar that he or she –*
- (a) *Has attained the age of 18 years; and*
 - (b) *Is not prohibited from holding a licence under section 37; and*
 - (c) *Is a fit and proper person to hold a licence; and*
 - (d) *Has the prescribed qualifications."*

Only s.36(2)(c) is in issue for the applicant.

*The standard of proof is the ordinary civil standard of the balance of probabilities. However, sufficient and adequate information must be provided to meet this standard; the Supreme Court made that point in *Westfield (New Zealand) Limited & Anor v North Shore Council & Anor* [2005] 2 NZLR 597.*

Section 37 prohibits people with certain conviction types from being licensed as salespersons and relevantly provides:

"37 Persons prohibited from being licensed

- (1) *The following persons are not eligible to hold a licence:*

- (a) *a person who has been convicted, whether in New Zealand or another country, of a crime involving dishonesty (or of a crime that, if committed in New Zealand, would be a crime involving dishonesty) within the 10 years preceding the application for a licence. ...” ...*

As we noted in *Revill v Registrar of the Real Estate Agents Authority*, the “fit and proper person” test is wider than the absolute prohibition in s.37 and we put it:

“[9] *The “fit and proper person” criterion applies in addition to the prohibitions which apply under s.37. In other words, a person may not be prohibited from holding a licence under s.37 but may nevertheless not satisfy the Registrar that he or she is a fit and proper person.*”

In Marie-Ann Nixon v Real Estate Licensing Board of New Zealand [1999] 1 NZLR 467 at 474, the High Court held that the starting point in any determination is that good character is presumed unless a real question mark is raised by the evidence. If a question mark has been raised then, as was held in L v Canterbury District Law Society HC AK 222/93, 23 August 1984 at 21:

“... the [applicant] must establish affirmatively that he is a person of unquestionable integrity, probity and trustworthiness and that since the [offending] he has “so far amended his ways and character that he is now a fit and proper person to practice on his own account.”

In Re Gazley HC WLG CIV-2011-485-1776 26 October 2011, the High Court remarked:

“[9] *... the focus of the Court’s inquiry is necessarily forward looking and the function of the Court is not to punish the applicant for past conduct. Due recognition should be given to the circumstances of youth where the conduct in question occurred when the candidate was immature and the entire circumstances and wider facts concerning the application must be considered, not just the previous misconduct. The onus is on the candidate to show that he or she is a fit and proper person.*”

In Re T [2005] NZLR 544, at 547, the High Court highlighted four features relevant to the required assessment under the Law Practitioners Act 1982, namely:

- [a] *The focus is necessarily forward looking. The function of the Court is not to punish the applicant for past conduct. Rather, the issue is “worthiness and reliability for the future”.*
- [b] *The onus on a person who has erred in a professional sense following admission to the profession, is heavier than that upon a candidate for admission.*
- [c] *Due recognition must be given to the circumstances of youth where errors of conduct occurred when an applicant was immature.*
- [d] *It is important to look at the facts of the case in the round, and not just have regard to the fact of a previous conviction or convictions.*

It is a significant step to deprive a person of a licence or status. However, the primary consideration is as emphasised in *Re Owen [2005] 2 NZLR 536*: the Court must be satisfied objectively that the candidate is a fit and proper person; the judgment of the Court is made in the interests of the community, having regard for the profession.

This principle is equally applicable to licensing decisions under the Act. The purpose of the consumer-focussed 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.”* (refer s.3 of the Act).

For consumers, real estate transactions are often the largest and most important they will enter into in their lives. It is essential that consumers are able to rely on the honesty and integrity of licensees who act in such transactions. It is for this reason that the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 impose minimum standards requiring licensees to comply with their fiduciary obligations to their clients, to act in good faith and deal fairly with all parties to a transaction, and to not engage in conduct likely to bring the industry into disrepute.

In *Revill* we noted the trust reposed in sales people who typically operate in an individual's home:

"[22] ... Real estate salespersons typically operate in the privacy of their clients' homes. Indeed they are required to, for example in providing appraisals. This requires consumers to place a high degree of trust in licensees and could leave consumers in a vulnerable position ..."

The scheme of the licensing regime, as found in Part 3 of the Act, highlights the importance that licensees are 'fit and proper' people. For example, there is a requirement that an applicant advertise his or her application (s.39) and there can be objections to the issuing of a licence (s.40) which is discretionary, as is seen in the words of s.36(2): 'An individual may be licensed as a salesperson if the individual satisfies the Registrar that he or she ...' (emphasis added)

Licences last for one year (s.46) and must be renewed (s.52). The requirements for renewal of a licence substantially overlap with those for first applications and there is a further requirement for any prescribed continuing education (s.52(3)). Lastly, the details of licensees are recorded on the public Registrar of licensees (s.63). The details which must be recorded are fairly comprehensive (see s.66).

[4] This Tribunal agrees with those comments and adopts them. It is for us now to review the facts of this case and determine whether we consider that Mr G has established that he is of good character and that since his offending he has amended his ways and character. Adopting the test in *Re T*, [2005] NZLR 544 at 547 we note:

1. The focus is necessarily forward looking. The function of the Court is not to punish the applicant for past conduct.
2. The onus is heavier for a person who has erred following admission rather than the one applying for admission.
3. Recognition must be given to youth and it is important to look at the facts of the case in the round.

[5] The facts of this case are sad for all parties concerned. Mr G was a promising badminton player. In 2006 he was in a party of other young badminton players who travelled to Auckland to play badminton. They were accompanied by a number of adults including Mr G's mother. During an afternoon in the course of the championships the team began playing a game known as a Court Game which involved the young members of the team having to pay 'fines' for misdemeanours that had happened during the course of the year. The fine involved the young members having to down shots of liquor as punishment. The young woman complainant was also part of the team. During the afternoon she became very drunk and was taken to her room and put to bed. She was extremely intoxicated. Mr G sometime later went to her room where he was found by another member of the team kissing her and in a state of undress with his underwear off and with an erect penis. He was removed from the room. Approximately six weeks later a complaint was made to the Police. A jury trial was subsequently held and he was convicted of indecent assault. He ran the defence, as best the Tribunal can tell, of consent, and/or his belief that she consented. This defence was not perfectly clear from the materials.

[6] Mr G gave evidence and said he'd made a real effort to turn his life around since the conviction. He had acknowledged his wrongdoing to the complainant but had very little recollection of the event at all. He told the Tribunal that he did not believe that he had an alcohol problem but he had tried very hard now to monitor his

drinking. He also had counselling from the Psychologist who gave evidence to the Tribunal, (Ms A Fea). He told the Tribunal he had time to reflect on the situation and felt great remorse. As he cannot contact the victim, (who he thinks about at least once a day) he says that the only way that he can make it up to her is to live up to his potential and do the best with his life as he can. He said he really wanted to make 'a go' of being a real estate agent. He had worked hard in the other jobs he had had since completing his degree. However now he felt that Real Estate was the occupation he wanted to pursue. He told the Tribunal that he now deals with stress by making sure that he stayed very fit and that he simply wanted to be given a chance to move on with his life in a career which he felt would suit him. He had disclosed his conviction to Mr D shortly after meeting him.

[7] Mr D gave evidence and told the Tribunal that he was an experienced real estate agent who had mentored a number of young real estate agents when he was the manager of X in Queenstown. He said that he had been employing Mr G in the role of a PA/Office Administrator and Database Manager for many months. He said he had done an excellent job 'above and beyond the call of duty' and everyone on the staff liked him and believed in him. He said that he wanted to support Mr G to move on with his life and career and given the way the office was structured with only one other very experienced agent, he would have time to monitor and support Mr G full time. Mr D told the Tribunal that Mr G was an engaging person who was trustworthy and proactive and very motivated. He said he felt that Mr G was courageous as he had come back to the Southland area in which the trial had been played out in the media and had faced up to his issues.

[8] The Tribunal also considered the affidavits and the written material put before it.

Submissions of Counsel

[9] In conclusion Mr Clancy submitted that the concerns for the Registrar were that the Judge and the Jury had rejected the belief of Mr G that the complainant consented or that Mr G believed that she consented. He submitted that Mr G minimised the seriousness of these issues and his own culpability. Mr Clancy submitted that Mr G continued to describe the offending as an error of judgement when it was in fact serious criminal offending.

[10] Mr McDonald submitted that to the contrary Mr G had done everything appropriate to face up to his culpability for his offending and he has tried to take positive steps to put this behind him. He had made no attempt to hide his conviction. He submitted that there had been no suggestion by the Probation Service or anyone that alcohol was an ongoing issue for him and/or any issues about sexual conduct. Mr McDonald submitted that Mr G was a young man at the time of the offence. He further submitted that the Tribunal must be 'forward thinking' (as provided in *Re T*) and that the Tribunal were not here to further punish him for offences for which he had already been punished. He submitted that applying the tests in *Re T*. Mr G had not offended whilst he was a professional, he was young at the time of the offence and the facts of the case taken in the round support this application.

[11] He also sought permanent name suppression for Mr G. Mr Clancy opposed this application submitting that whilst the Tribunal could suppress details of this application they could not suppress details of Mr G's name, together with the conviction for which he had already found guilty and for which no name suppression existed.

Discussion

[12] The Tribunal have considered this matter carefully. On the one hand Mr G was convicted of a serious criminal offence which has rightly been condemned by all persons. Mr G was convicted and sentenced and has served his sentence for this crime. However as is inevitable, Mr G is not able to escape from the consequences of this crime because this conviction continues to follow him. We must determine whether the conviction and the facts of it are such that Mr G has demonstrated that notwithstanding this conviction he is now a fit and proper person to hold a salesperson's licence.

[13] Having considered all these factors the Tribunal has also considered the environment in which Mr G would practice if given a licence. He would be supervised by Mr D, an experienced and compassionate man who wishes to give this young man a chance to make a fresh start and to embark upon a career in an industry in which he hopes that he will be successful. It is essential that consumers are able to rely upon the personal integrity of the salesperson so that they feel safe when admitting a real estate agent into their home and having them deal with open homes and show others, potential purchasers, through the property. For this reason clearly a person who was a sexual predator or who committed any sexual offence where there might be a risk of re-occurrence would be most unsuitable to be a real estate agent and would not be a fit and proper person to hold a licence. We do not consider that Mr G is such a person. Adopting the test in *Re T* we consider that Mr G should be given a chance to hold a real estate agent's licence. We need to have a forward focus. Mr G from the evidence we have heard and all the affidavits filed seems to have made a significant and real effort to have dealt with the offending and the consequences. He has continued to try and do his best in his professional life, having graduated from university and having had a successful job as a sales broker in Wellington. The offence was committed when Mr G was 21. He was certainly an adult but a young adult and in circumstances where from the Judge's sentencing notes there seems to have been a distinct lack of appropriate supervision from those who were involved as the adults for the team.

[14] We have considered Mr Clancy's submission that Mr G still minimises the crime. There is some evidence to support this but there is also evidence to support this young man having made a real effort to face his conviction and to try to move on in a positive way with his life. We were further convinced by Mr D who shows a real willingness to assist and supervise Mr G.

[15] The Tribunal also consider that if the opportunity given to Mr G is to have any chance of succeeding then this application should be the subject of name suppression. We have considered carefully the submission of Mr Clancy, because there is much merit in the argument that if Mr G's name was not suppressed then there would be nothing to fear from secrecy. On the other hand both Ray White and Mr D, (as well as Mr G) seek name suppression. The Tribunal therefore consider that it is appropriate in this case for Mr G's name and the name of his employer to be suppressed. We consider that s 108(1)(c) does give us the authority to suppress the details of this case, including the fact of the conviction as it relates to the matter before this Tribunal. Mr G deserves to have a chance to make a go of the salesperson's licence without having this offence, the subject of much media comment, re-aired and his guilt retried. Accordingly the Tribunal allow the appeal and grant Mr G a salesperson's licence.

[16] Pursuant to s.113 of the Act, the Tribunal record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.



Ms K Davenport
Chairperson



Mr J Gaukrodger
Member



Mr G Denley
Member