

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 2

READT 063/12

IN THE MATTER OF

an application to review a Registrar's decision pursuant to s.112 of the Real Estate Agents Act 2008

BETWEEN

YANG SHI

Applicant

AND

REGISTRAR OF THE REAL ESTATE AGENTS AUTHORITY

Respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD at AUCKLAND on 5 December 2012

DATE OF DECISION 15 January 2013

APPEARANCES

The applicant on her own behalf
Mr M J Hodge, counsel for the respondent

RESERVED DECISION OF THE TRIBUNAL

The Issue

[1] Should the applicant be granted a salesperson's licence under the Real Estate Agents Act 2008 ("the Act")?

[2] On 28 August 2012 the Registrar of the Real Estate Agents Authority declined Yang Shi's application for a salesperson's licence. The applicant seeks the Tribunal's review of the Registrar's decision pursuant to s.112 of the Act.

[3] The Authority submits that the Registrar was correct to decline to grant the applicant a salesperson's licence on the basis that she is not a fit and proper person by reason of her criminal conviction for kidnapping. The Registrar considered that the applicant committed serious criminal offending for the purpose of financial gain and that such conduct is incompatible with the standards expected of a salesperson under this consumer-focused Act and, more specifically, its licensing regime which requires successful applicants to be "*fit and proper*" people to hold a licence.

Relevant Law

[4] 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].

[5] 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].

[6] 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.”*

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

[8] 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.

[9] 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. ...”*

[10] A conviction for kidnapping under s.209 of the Crimes Act 1961 does not fall within the s.37 prohibition as kidnapping is not within the definition of “*crime involving dishonesty*” under the Act. However, without suggesting that s.37 applies, the applicant's crime involved dishonesty as it involved the extortion of money.

[11] 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.”*

[12] 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.”

[13] 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.”

[14] 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.

[15] 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.

[16] 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).

[17] 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.

[18] 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 ..."

[19] 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)

[20] 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).

The Application and Decision to Decline

[21] The 29 year old applicant applied for a salesperson's licence by application dated 3 August 2012. In July 2012 she had attained a National Certificate in real estate (salesperson) level 4.

[22] The applicant disclosed her kidnapping conviction under the head "*... other circumstance that would or might make me not a fit and proper person to hold a licence*". She attached a letter explaining her version of the kidnapping offending, a letter dated 27 November 2007 from the Hon Shane Jones MP granting a special direction to enable her to have a one year open work permit – despite her conviction for kidnapping, and other relevant/standard documents.

[23] The applicant's letter relevantly recorded in relation to the offending:

- [a] Her friends borrowed her cellphone on the way back from town after a night out in March 2004;
- [b] The applicant later discovered it had been used to contact the kidnapping victim;
- [c] The applicant felt scared as she thought there may be a feud between her friends and the victim and there could be a fight;
- [d] She left the car and caught a taxi home;

[e] Police questioned and interviewed her a few days later.

[24] However, the applicant's explanation is at odds with what His Honour Judge Wilson QC found when sentencing her and we specify below.

[25] The Registrar's decision to decline the applicant was based on her conviction for kidnapping, which the Registrar termed a "*serious offence*". This meant that the applicant was not a fit and proper person to be licensed as a salesperson under s.36(2)(c) of the Act. The 28 August 2012 letter to the applicant from the Authority's Senior Licensing Administrator stated that the applicant had "*sought to minimise [her] role in that offence. However, the enclosed police summary of facts and newspaper report do not support that attempt at minimisation.*" In declining the applicant's application, the letter went on to record:

"Consumers are entitled to assume that only those who observe the high societal standards will be admitted to the industry and also should be able to have confidence that those who hold licences are trustworthy. The Registrar considers your kidnapping conviction means that you do not have the requisite level of trustworthiness or adhere to the high societal standard necessary for entry into the industry. The Registrar has concluded, therefore, that you are not a fit and proper person to hold a licence."

The Kidnapping Offence – Relevant Details and Sentencing Notes of His Honour Judge Wilson QC

[26] On 8 June 2006 the applicant was found guilty of kidnapping pursuant to s.209 of the Crimes Act 1961 following a trial by jury which lasted almost six weeks. It was put to us that she did not accept or acknowledge her role in the offending by pleading guilty.

[27] On 1 September 2006 His Honour Judge Wilson QC sentenced the applicant to 18 months' imprisonment with leave to apply for home detention. The sentence was deferred for one month due to circumstances surrounding her child and family. His Honour imposed standard release conditions on her and directed that the \$1,600 found in her apartment be treated as reparation for the emotional harm done to the kidnap victim; *R v Pengfei Huang and Ors* DC AK CRI 2004-090-2874 1 September 2006 at [29]. Judge Wilson relevantly noted the following matters in sentencing the applicant:

- [a] The four accused "*acted together*";
- [b] The applicant shared the intention of detaining an innocent man for ransom. Her role in the crime was "*critical*" and it was "*inconceivable that the victim would have gone to meet men on the side of a dark road in a part of Auckland city that he did not know*";
- [c] There was a series of phone calls from the applicant to the victim which "*made him think that the earlier contact he had had on the internet with Red Bean Ice was with a woman*";
- [d] The applicant approached the victim's car and opened the door;

- [e] The male prisoners then began the detention;
- [f] The detention showed “*significant signs and planning*”;
- [g] The detention involved “*binding, gagging, the use of a gun and a knife, punching and confinement over a period of two days – both in the boot of his car and then subsequently in a motel where he was for a good deal of the time kept in a small cupboard in a motel bedroom*”. The victim was bound and forced to reveal his PIN number and mother’s whereabouts. \$700 was taken from the victim during the detention;
- [h] \$60,000 was to be extorted;
- [i] Victim impact included significant psychological effects on the victim, and the person operating the money exchange lost the money handed over to the kidnapers and suffered some business harm;
- [j] With respect to the applicant’s culpability as compared to that of her three male co-offenders, Judge Wilson found:

“[12] Yang Shi, you knew that the other offenders were planning a robbery or a theft and as I have mentioned, you were in effect the lure to get the victim to the roadside where the further offending (that you knew was going to take place) would occur. There is no doubt though that you immediately left the scene. You took no physical part in the detention, there is no evidence that you were at the motel and I deal with you on that basis.”

- [k] His Honour went on to note her lesser role in the kidnapping, her withdrawal from the scene, and that she was not involved in the detention. Judge Wilson also noted that the applicant was caring for a child.

[28] Judge Wilson’s sentencing notes do not appear to have been before the Registrar when she made her decision.

[29] The applicant wrote a further letter to the Tribunal which was included with her Application to Review. That letter, again, states that the applicant was unaware of the plan to kidnap the victim and purports to depict the applicant as an immature 20 year old at the time of the offending. The applicant says she has changed her life and also emphasises her cooperation with Police.

Respondent’s Submissions on Application of “fit and proper” Person Test to Applicant

[30] The respondent submits that the applicant is not a fit and proper person to hold a salesperson’s licence.

[31] It is put that the applicant engaged in premeditated and highly risky criminal behaviour for financial gain; she did not acknowledge her role in the offending by pleading guilty; she maintains a position contrary to that on which she was sentenced by stating, in letters to the Registrar and to us that, for example, she was unaware of what was planned by her co-offenders.

[32] The respondent submits that the applicant's contention that she has changed her life since the offending is unsupported by sufficient and adequate information; that issuing the applicant a salesperson's licence runs counter to the purpose of the consumer-focussed Act and its high expectations for licences as seen, for example, in the requirements of the licensing regime; and that the Registrar's decision was correct and that we cannot be satisfied that the applicant is a fit and proper person to hold a salesperson's licence.

The Stance of the Applicant

[33] The applicant has a different approach to the above offending than did His Honour Judge Wilson QC. Part of her initial submissions to us read:

"In 2004 march I was involved in a kidnapping offence. My involvement was I was with the 3 other offenders before they kidnapped the victim. I was in their car when they drove to meet the victim, I did not know what they were planning to do when I was picked up by them, when the victim showed up and I felt they were going to do a robbery or fighting I got scared and run to the service station and got a taxi home. I have actually never met the victim.

After days later the police contacted me and I learned there was a kidnapping happened later on that night (my cell phone was used by the offenders during their detention of the victim), I was in complete shock, I went to the police station straight away and tried to assist them as much as I could to find the victim and identify the 'boys' I was with that night. I made a video and told police who I was with that night, where they have drove around and I knew it was important information and I was involved in a serious offence.

I was never held in custody like the other offenders, they police were happy for me to stay home on bail and they have wrote letter for me they happy for me to continue my study at Auckland university. I just needed to go to court to give evidence at court days. Around pre-deposition time they tried to pull me out of the situation and withdraw my charge. They contacted my lawyer and but unfortunately I had Christopher Harder as my lawyer, every time the policeman tried to arrange a meeting with him, he wouldn't show up, instead he rang the policeman that I would like to pled guilty, all he wanted was for me to go to trial. Soon after my case I read on the newspaper he was discharged as a lawyer. In the end the police forward a favorable letter to the judge of my help for the police and I have received 18 month home detention. (I remembered the other offenders have got around 7 years imprisonment each.)

I came from a well educated good family, before I came to New Zealand I hardly known anyone outside my school or family. I didn't have a social life at all. I could not possibly imagine at the time that the boys would plan something as horrible like kidnapping. I was 20 when the offence happened, compare to a kiwi girl I was too inexperienced and immature. When the offender said they wanted to use my computer I said yes, when they said they wanted to use my cell phone I said yes. I always believed I am a good person, it was not fair for me to be guilty of something the other boys have done, because I would never kidnap someone, the 'boys' have done it, not me. I was just unlucky that they 'picked' me that day. And sometimes I wish the kidnapping never happened after I left. In heart I cannot accept myself as one of the offenders, I couldn't even imagine the scene of the detention of the victim. I struggle every day trying

to understand during my home detention time why I am guilty of such a crime? I am not a bad person. And I finally understood is my stupidity made me to commit a crime. Sometimes it doesn't have to mean physically involved or if I could think of it myself or not, I should have thought of 'kidnapping' was possible to happen, should have left their car a lot earlier and report to the police station. Helping the wrong people that are just the same as if I wanted to hurt someone myself, if I can't differ the good and bad. It was very very hard for me to accept that, and grow and change myself from there.

It has been almost 9 years now, being through this case made me learned about myself and grow up the hard way, I believe I have become a very strong person that I otherwise would not have been. And I came from China as a overseas student at the time, I did not drive then and I had no idea where I was as, I think if I was in my own car, I would have left them straight away before it was too late when I felt uncomfortable. During this case I was honest with the police since the very beginning, I am a honest person, I took it very seriously and tried to help as much as I could, when I made the video which was the only evidence against me in court.

I hope you don't see me as trying to minimize my involvement or finding excuses. When the registrar declined my application I felt like I have got punished again and can never put the past behind. The reason I'm submitting this application is I want to fight for to have a .second chance. I am not that 20 year old immature girl from China anymore, I do think they were other factors affected me to commit the crime which are not here now. It has been 8 and half years since the offence and I have grown into a strong person with my own thoughts, I believe the person that I am now an honest fit and proper person to hold a salesperson licence.

I have done my study through Ray White Henderson (realestateoutwest) and got my national certificate of real estate salesperson from etito. My manager licensee agent David Sharma has given me lots of support during my studies in his office. I would like to work under his office and he is fully aware of my conviction and would like to continue to support me, also supervise me if needed.”

[34] In a letter to our Registrar the applicant noted that she had left her job as a cafe manager earlier this year and started studying a real estate course while working to some extent for Ray White, at Henderson; but she did not seem to be paid over a four month period. It seems that the applicant has a job with Ray White at Henderson but not as a salesperson.

[35] The applicant gave detailed evidence to us mingled with submissions and is clearly an intelligent person, and fluent in English.

[36] In evidence to us the applicant seemed to be saying that she knew her friends were going to rob and fight the victim referred to above, but she has been truthful to the Police at all times and wanted to run away from her friends when they started offending. She said that they later rang her for money. She said she was not involved in any planning for the offence and, initially, thought she was simply going out with her boyfriend and some of his friends.

[37] She admitted that she banked money taken from the victim into her account but said it had come to her from her boyfriend as repayment of a \$6,000 loan she had made to him prior to the offending.

[38] She emphasised that her involvement in the kidnapping offence was a long time ago – nine years and that since then she had been granted residency by the Ministry of Immigration, despite that offending, as she is really a good person. She accepts that the offending was serious but puts it that it was a long time ago and she is now a different person and would now never be involved in that type of offending.

[39] The applicant said that although she had sat real estate papers through Ray White at Henderson she had not at first mentioned her conviction to that firm “as I thought it irrelevant” but, in the course of her studies for real estate, she did mention it to her employer.

[40] She referred to the support she has had from her family from the time of offending and to how difficult it was to tell her parents of her offending and her sentence of home detention. She said the offending occurred at a time when she was very young and by herself in New Zealand as an overseas student. She became interested in real estate as a career when she observed her mother buy a house in New Zealand through Ray White and she felt that she would have an advantage as a salesperson in the Auckland area due to being Chinese. She referred to various prominent people being prepared to attest to her true character.

Our Conclusion

[41] We note that the Police “Summary of Facts” as at 16 April 2004 for sentencing read as follows:

“SUMMARY OF FACTS”

Between the 30th of March 2004 and the 1st of April 2004 the victim was kidnapped.

The defendant SHI was one of four people involved in the kidnapping of the victim.

A ransom of \$160,000 was sought from the victim’s family in China for his release.

On the 1st of April 2004 the offenders received confirmation that \$60,000.00 had been wired from China into an agents bank account.

On receipt of this confirmation the victim was released.

The offenders obtained the \$60,000.00 later that day.

On the 1st of April 2004 the defendant went to the New Market branch of the National Bank and deposited \$6000.00 into her bank account. Bank account number.

The \$6000.00 she deposited was profit from the kidnapping of the victim.

Between the 1st of April 2004 and the 7th of April 2004 the defendant has withdrawn \$5200.00 of the \$6000.00. She withdrew this in four \$800.00 amounts and one \$2000 amount.

When spoken to by Police the defendant was in possession of \$1600.00 of the \$6000.00.

In explanation she said that she had received the \$6000.00 from her boyfriend, who was also involved in the kidnapping. She said that the \$1600.00 was to pay for the rent of her room.

She said that approximately she spent approximately \$2800.00 on airline tickets for her and her boyfriend to return home to China. The tickets purchased were one way tickets.

She said that she spent approximately \$200.00 on miscellaneous items.

Approximately \$600.00 remains unaccounted for.

The defendant is a 20-year-old Chinese student. She has not previously appeared before the Court.”

[42] It may well be that the applicant has reformed and is being hindered by an offence of about nine years ago due to her having then kept rather bad company. It does seem that she was a young person in New Zealand without much family support at that time, vulnerable, and then easily led. We are conscious that we must allow for youth and immaturity and have a forward looking focus. We realise that the applicant came to New Zealand at the age of 16 to study medicine because her mother and grandfather teach Traditional Chinese Medicine in Germany; but she did not seem to have family support in New Zealand.

[43] It seems to us, as Mr Hodge also put it, that there is a degree of minimisation in the submission of the applicant about the very serious offending referred to above. Of course, she was then vulnerable and aged only about 20; but the situation was thoroughly analysed by a very experienced criminal Court Judge (His Honour Judge Wilson QC) and his comments have been referred to above. It is true that the applicant's culpability was less than her co-offenders but it was, nevertheless, serious; and, as Mr Hodge pointed out, would not seem to bode well for a career in real estate where integrity is paramount.

[44] Also, there seemed to be an element of financial gain to the appellant in the said criminal offending in that she obtained \$6,000 from the source of the victim and, when apprehended, had reduced that amount to \$1,600. To us, the applicant accepted that she was the lure to the offending against the victim which involved terrifying him with a knife and a gun.

[45] The real estate industry must pivot on the highest ethical standards and the public expect that to be fundamental as it must be. Despite all the circumstances about the crime outlined by the applicant from her point of view, we consider that her involvement was so serious that she cannot be confidently regarded as a fit and proper person for the purpose of holding a licence as a real estate salesperson. We must apply the standards and criteria set out in the Act and the applicant does not

meet those. We have endeavoured to stand back and absorb and consider the facts of this case in the round.

[46] Accordingly, her appeal is hereby dismissed.

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

Judge P F Barber
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member