

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 23

READT 090/12

IN THE MATTER OF a charge laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN **REAL ESTATE AGENTS**
AUTHORITY (CAC 20006)

Prosecutor

AND **MR D (LICENSED**
SALESPERSON)

Defendant

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF DECISION ON PENALTY 14 March 2013

REPRESENTATION

Ms J MacGibbon, counsel for prosecution
Defendant on his own behalf

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] On 16 November 2012 the defendant was charged with misconduct under s.73(a) of the Real Estate Agents Act 2008 ("the Act") on the basis that his conduct would reasonably be regarded by agents of good standing or a reasonable member of the public as disgraceful. Essentially, this case concerns his accessing a drawer of female underwear after an 'open home'. We cover the basic facts below.

[2] On 30 January 2013 the defendant accepted the charge and entered a guilty plea. We then ordered a timetable for written submissions on the basis that, by consent, we deal with penalty on the papers.

[3] In September 2012 the defendant had surrendered his licence under s.61 of the Act which means that his licence has been cancelled at about that time. It is put that the Orders available to us are limited because s.110 of the Act stipulates the available penalties as for those who are licensed. Nevertheless, the Authority seeks that we make a penalty decision as to the gravity of the defendant's conduct so that can be taken into account should the defendant reapply for a licence. However,

s.61(5)(c) provides that the surrender of the licence does not affect the surrendering licensee's liability, inter alia, *"for any act done or default made before the date on which the licence ceased to have effect"*.

Factual Background

[4] It is put that on 16 September 2012, while conducting an open home at X X Crescent, X X, and without the authority of the vendor, the appellant looked through a drawer containing lingerie while in the vendor's bedroom, and took out and held in his hands her underwear and a bra. He then left the vendor's bedroom to talk to customers who were attending the open home. Afterwards, he returned to the vendor's bedroom and again took lingerie out of the drawer and held it in his hands.

[5] In terms of the precise facts, the defendant maintains that he did not leave the bedroom to talk to customers as the open home time had terminated and there were no customers left at the property, but he left the room because he thought he heard a noise. He also states that he did not open the drawer in the bedroom of the client vendor but had found it open at the close of the open home. He has also stated to us: *"I looked in the drawer more out of curiosity and intrigue than out of malicious intent. It was a foolish thing to do and I regret it. The consequences of leaving things as I had found them may have been worse"*.

Case Law on Penalty Determinations

[6] It is well established that decisions of disciplinary Tribunals should emphasise the maintenance of high standards and the protection of the public through specific and general deterrence. While this may result in orders having a punitive effect, this is not their purpose.

[7] To this effect, McGrath J held for the majority of the Supreme Court in *Z v CAC* [2009] 1 NZLR 1 at [97]:

"... 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 maintainable in the occupation concerned."

[8] As we said in *CAC v Walker* [2011] NZREADT 4:

"[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 discipline 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 [1990] 2 ALL ER 263 and in disciplinary proceedings involving valuers: Dentice v the Valuers Registration Board [1992] 1 NZLR 720. 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 HC AK CIV 2007-404-1818* 13 August 2007, 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.”

[9] In other professional disciplinary jurisdictions it has been noted that public interest is the predominant purpose of a penalty order. In *Daniels v Complaints Committee 2 of the Wellington District Law Society* (HC Wellington, CIV 2011-485-0002227, 8 August 2011) the Court noted:

[8] “It is well known that the Disciplinary Tribunal’s penalty function does not have as its primary purpose punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which include “protection of the public”), to maintain professional standards, to impose sanctions on a practitioner for a breach of his/her duties, and to provide a scope for rehabilitation in appropriate cases.”

[9] “A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific to the practitioner, and in general for all practitioners. It is to ensure that only those fit, in the wider sense, to practise are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession.”

Discussion

[10] The prosecution submits that the appropriate penalty for the defendant is one of licence cancellation because he engaged in a serious breach of his duties to his client and, furthermore, a serious invasion of his clients’ privacy. We agree that there was a serious breach of his duties to the vendor and a serious invasion of her privacy.

[11] We noted in the case of *Revill v Registrar of the Real Estate Agents Authority* [2011] NZREADT 41 that the obligations which a real estate agent has to clients are important. That case involved an appeal/review against the decision of the Registrar to decline a licence application on the grounds that Mr Revill was not a fit and proper person. As it happens, we allowed the review for reasons there set out but at paragraph [22] we said: “Real estate salespersons typically operate in the privacy of their clients’ homes. Indeed they are required to, for example in providing appraisals. This requires the consumer to place a high degree of trust in licensees and could leave consumers in a vulnerable position.”

[12] In the present case, the defendant went into his client’s bedroom, reached into an open drawer and handled her underwear. This is a gross breach of privacy and destroys any possible trust which clients could have in allowing the defendant into their homes.

[13] The defendant referred to facts of the above case authorities and to some other disciplinary decisions, and to the above case law principles.

[14] We now set out part of the submissions from the defendant, namely:

“5. **PENALTY:** *I voluntarily surrendered my licence at the suggestion of my former employer and also the CAC investigator, Mr Chris Delaney and of my own free will, because I thought it appropriate, having just previous to that sought a temporary suspension. That was back in September 2012, close to six months ago.*

It is my belief, taking into account the gravity of the matter; my stupidity at the time; the fact that the public involved were not anxious to pursue the matter; rather the need for the licensed Company by whom I was engaged, correctly to report the matter; that I will have done my time once your decision is reached. Is cancellation at this moment in time the real only alternative or should my voluntary suspension period be taken into account? I simply request that this be given your consideration.”

Our Conclusions

[15] We find that the defendant’s conduct is a severe breach of his fiduciary relationship with his clients.

[16] It is put that although there are mitigating features personal to the defendant, the question is whether these outweigh the breach or not, because there has been a gross invasion of privacy which betrays trust of clients in their licensee agent. The mitigating factors seem to be an early plea, strong remorse and regret (including voluntary surrender of licence), and a good previous record. Normally, we would consider that the said type of conduct shows a need for some education of the licensee on professional ethics. In view of the senior age and experience of this defendant we think such an order to be inappropriate in this particular case. We understand that the defendant comes before us with an otherwise blameless record and he has certainly been contrite and cooperative.

[17] The aggravating factor is breach of trust.

[18] In the public interest there is a need for deterrence, denunciation, and accountability. We record that the privilege of holding a real estate salesperson’s licence requires adherence to high professional standards.

[19] The final submission of Ms MacGibbon is that there is a need for public protection from such conduct which makes cancellation of licence the appropriate penalty. Although the defendant has already had his licence cancelled, the prosecution seeks from us a penalty decision which acknowledges the gravity of the defendant’s conduct and what the appropriate penalty would have been.

[20] In our view a fair sentencing package on the defendant in this situation is suspension of his licence for six months, a fine of \$1,500, and costs of \$1,000. We consider it just that the suspension run from 30 September 2012 so that aspect has become rather academic due to the defendant having voluntarily surrendered his licence about then.

[21] We formally Order that:

[a] The defendant’s licence is cancelled for calendar six months from 30 September 2012; and

- [b] The defendant is fined \$1,500 to be paid to the Registrar of the Authority within one calendar month; and
- [c] The defendant is to pay \$1,000 to the Tribunals Unit, Ministry of Justice, Wellington within one calendar month as a contribution to the costs of this Tribunal.

[22] We reserve leave to apply for 15 working days on the issue of name suppression of the defendant.

[23] 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